NEW YORK STATE BAR ASSOCIATION

WORKSHOP O.

Moving Towards Civil Gideon

2014 Legal Assistance Partnership Conference

Hosted by:
The New York State Bar Association
and The Committee on Legal Aid

NYSBA

NEW YORK STATE BAR ASSOCIATION
2014 PARTNERSHIP CONFERENCE

O. LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS: ISSUES IN THE IDENTIFICATION OF THE UNIQUE OCCUPANCY AND EVICTION REQUIREMENTS OF THOSE DEVELOPMENTS AND STRATEGIES FOR REPRESENTING OCCUPANTS OF LIHTC HOUSING

AGENDA

September 11, 2014
5:15 p.m. – 6:15 p.m.

1.0 Transitional CLE Credits in Professional Practice.
Under New York's MCLE rule, this program has been approved for all attorneys, including newly admitted.

Panelists:
Natalie Ann Knott, Esq., Staff Attorney, Legal Assistance of Western New York
Robert R. Romaker, Esq., Managing Attorney, Legal Aid Society of Northeastern New York, Inc.

I. Basic Overview & History	**5:15 pm – 5:25 pm**
II. How To Identify a LIHTC Development	**5:25 pm – 5:35 pm**
III. How LIHTC Works: State Regulations, Federal Regulations and Tenant Selection	**5:35 pm – 5:55 pm**
IV. Practitioner Tips	**5:55 pm – 6:05 pm**
V. Question & Answer	**6:05 pm – 6:15 pm**

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Substantive Outline

O. LOW INCOME HOUSING TAX CREDIT DEVELOPMENTS: ISSUES IN THE IDENTIFICATION OF THE UNIQUE OCCUPANCY AND EVICTION REQUIREMENTS OF THOSE DEVELOPMENTS AND STRATEGIES FOR REPRESENTING OCCUPANTS OF LIHTC HOUSING

OUTLINE

Resources:
Tax Reform Act of 1986
21 NYCRR 2188.3
21 NYCRR 2188.4
21 NYCRR 2188.6
26 U.S.C.A. § 42(h)(6)(B)(iv) (West Supp. 2013)
26 C.F.R. § 1.42-5(c)(1)(xi)(2013)
24 C.F.R. §§ 5.500-5.528 (2012)
IRS Guide for Completing Form 8823, at chp. 13
26 U.S.C.A. § 42(i)(3)(D) (West 2011)
42 U.S.C.A. § 13661(C)
42 U.S.C.A. §§ 13664(a)(2)-(3) (West 2005)
15 U.S.C.A. § 1681(d) (West 2009)
26 C.F.R. § 1.42-10 (2013)
26 U.S.C. § 42(g) (West Supp. 2013)
26 C.F.R. § 1.42-5(b)(1)(vi) (2013)
26 C.F.R. § 1.42-5(c)(1)(iii) (2013)
26 U.S.C.A. § 42(g)(8)(B) (West 2011)
26 C.F.R. § 1.42-5(b)(1)(vii) (2013)
26 U.S.C. § 42(b)
26 U.S.C. § 42
IRS Guide for Completing Form 8823, at chp. 26

I. BASIC OVERVIEW

A. LIHTC housing (pronounced "light-C" or "lie tech") is the most prevalent type of "low income" housing in the United States. It stands for Low-Income Housing Tax Credit.

1. 90% of all "multi-family" low-income rental housing built since 1990 is LIHTC.

B. LIHTC is different from other types of low-income housing such as public housing in several ways:

1. It is not overseen by a PHA
2. Compliance with the tax credit regulations is monitored by the IRS
3. It is a tax credit program designed to spur private investment in the affordable housing market
4. Developers can sell tax credits to raise cash for construction and rehabilitation for LIHTC projects.

C. LIHTC housing is primarily constructed and managed by corporations who are best positioned to take financial advantage of the tax credit system.

D. LIHTC is not income-based.

II. HISTORY OF LIHTC

A. Tax Reform Act of 1986

1. Act drastically shifted the economic value of investing in owner-occupied housing instead of rental housing.
2. In an attempt to try to ameliorate the effect of the TRA86 on an already overburdened affordable housing market, LIHTC was created to spur private investment in affordable housing.
3. Tax credits are a way for developers to raise cash to build low-income housing projects from private investors through a process known as syndication.

B. What is a Tax Credit?

1. Tax Deduction- reduces income that is considered taxable
2. Tax Credit- an actual reduction in the amount of taxes owed
    a. In LIHTC world they are commonly called "Section 42 credits" after the section of the IRS code that regulates LIHTC eligibility.

III. HOW IS LIHTC ADMINISTERED AT THE STATE LEVEL?

A. Department of Treasury annually allocates Section 42 credits to each state based on population.

1. The equation is multiplying $1.75 by a state's population.

B. Credits left over from a previous year or unused in that calendar year are added to the total available credits.

C. States through their housing agency administer the housing tax credits and award tax credits to developers under a competitive bid proposal system in accordance with the priorities and preferences set forth in state's Qualified Allocation Plan (QAP). 21 NYCRR 2188.3

1. Two tax credits are available: one at 9% of depreciable basis and one at 4% of depreciable basis. Calculation of the credit is beyond the scope of this outline and this session.
    a. The 9% depreciable credit is for new construction and rehabilitation of new LIHTC housing.
        i. Questions about inefficiency of this allocation.
    b. The 4% depreciable credit is for acquisition of existing low-income housing.

D. There are guidelines for the QAP, though the enforcement of these guidelines is questionable. 21 NYCRR 2188.4

1. QAPs must target areas that are dealing with affordable housing concerns like areas with pockets of poverty or the inner-city.
2. The QAP must also give preference to properties serving the lowest-income households for the longest periods.
3. 10% of a state's credits must be allocated to properties where a nonprofit either owns an interest or significantly participates in the property's development and operation.

E. <u>NY program known as "SLIHC" and overseen by the Department for Housing and Community Renewal (DHCR) was signed into law in 2000, 14 years after the federal program was started. 21 NYCRR 2188.6</u>

1. In order to prioritize projects for selection SLIHC uses a scoring program:
    a. Community Impact/Revitalization 15pts
    b. Financial Leveraging 13pts
    c. Sponsor Characteristics 10pts
    d. Green Building 5pts
    e. At least 5% of units (rounded up) must be fully equipped for tenants with mobility impairments, including roll-in showers with seats. At least 2% of units (rounded up) must be fully equipped for tenants with vision or hearing impairments. 5pts
    f. Project Readiness 5pts
    g. Preference for Persons with Special Needs 5pts
    h. Marketing Plan/Public Assistance 5pts.
    i. Preference for Individuals with Children 5pts.
    j. Participation by Non-Profit Org 4pts.

F. <u>Rent for each low income resident in a LIHTC development will be registered with DHCR</u>

IV. FEDERAL REGULATIONS

A. Owners must lease either 20% of the units to tenants earning no more than 50% of AMI or at least 40% of units to tenants earning no more than 60% of AMI

B. Owners cannot refuse to rent to Section 8 Housing Choice Voucher holders based on their status as voucher holders. 26 U.S.C.A. § 42(h)(6)(B)(iv) (West Supp. 2013); 26 C.F.R. § 1.42-5(c)(1)(xi) (2013).

C. Again, rent is not income-based; that is, families pay rent that is calculated in accordance with federal law but not adjusted for each individual family by income.

D. Federal law also mandates an annual recertification of all tenants to determine continued financial eligibility.

V. TENANT SELECTION

A. <u>Owners set tenant selection policies and may screen for credit history, tenancy history, and criminal history.</u> IRS has not promulgated any regulations on tenant selection except with respect to voucher holders.

B. <u>Citizenship Requirements:</u> Congress has not imposed any limitations on leasing to undocumented persons under the LIHTC Program. The HUD regulations at 24 C.F.R. §§ 5.500 - 5.528 (2012) on proration of assistance for families with undocumented persons do not apply. Owners may set their own tenant selection policies. But if an owner screens for citizenship status, the owner must apply the policy uniformly to all applicants or will run afoul of the Fair Housing Act. *See* IRS Guide for Completing Form 8823, at chp. 13.

C. Student Eligibility. Special rules apply to students. *See* 26 U.S.C.A. § 42 (i)(3)(D) (West 2011). Students are eligible if they meet one of the following criteria:

1. Student receives assistance under Title IV of the Social Security Act, i.e., TANF; or
2. Student was previously under the care and placement responsibility of the State agency responsible for administering a plan under part B of part E of Title IV of the Social Security Act, or
3. Student is enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar Federal, State, or local laws; or
4. Students are single parents and such parents are not dependents of another individual and such children are not dependents of another individual other than a parent of such children; or
5. Students are married and file a joint return.

D. Criminal history look-back periods. With respect to Section 8 voucher holders, owners should set reasonable time periods on criminal history look-back periods. *See* 42 U.S.C.A. § 13661(c), § 13664(a)(2)-(3) (West 2005).

1. IRS has not published regulations mandating that tax credit owners establish reasonable criminal history look-back periods in screening voucher holders.

E. Sec. 8 Voucher Holders

F. Applicants who believe the owner is discriminating in its selection policies in violation of the Fair Housing Act may always file a Fair Housing Act complaint with HUD or file a lawsuit.

VI. LEASES

A. Basics

1. Tax Credit Owners may use their own leases.
    a. There are no federal requirements for lease terms. The IRS has not mandated or prohibited any specific lease terms.
    b. In New York City there is a lease rider that must be included along with LIHTC housing leases
        i. Rider includes several city-specific provisions

B. Renewal Requirements

1. Applicants are not entitled to written notice of the grounds for denial unless the owner relies on information provided by a tenant-tracking or consumer-reporting service. In such cases, the Fair Credit Reporting Act requires that the owner notify the applicant of the basis for the denial and the right to obtain a copy of the report. *See* 15 U.S.C.A. § 1681(d) (West 2009).
2. Applicants denied admission are not entitled to any administrative appeal procedure, a stark difference from the public housing and project-based section 8 program in which applicants are entitled to written notice and an opportunity for an appeal meeting.

C. Rent Calculation

1. Rents are not income-based. Rents are flat rents based on adjusted median income. Tenant rents do not change as family income changes. If the family has a section 8 housing voucher, the tenant's share will change as adjusted by the local public housing authority in accordance with the voucher regulations.
2. Maximum gross rents cannot exceed 30% of 50% of adjusted median family income or 30% of 60% of adjusted median family income. This includes the allowance for utilities.
3. Meaning that the estimated amount a tenant will pay in utilities must be counted into the 30% figure and reduced accordingly. 26 C.F.R. § 1.42-10 (2013).

D. <u>Owners must use one of six methods set forth in 26 C.F.R. § 1.42-10 (2013)</u>

1. The local public housing Section 8 utility allowance;
2. A written estimate from a local utility provider;
3. The HUD Utility Schedule Model;
4. An energy consumption model;
5. An allowance based upon an average of the actual use of similarly constructed and sized unit in the building using actual utility usage date and rates
6. For newly constructed apartment complexes, consumption data for units of similar size and construction in the geographic area.
7. Calculation of Maximum Rent a Tax Credit Complex May Charge:
    a. Maximum Rents (26 U.S.C. § 42(g) (West Supp. 2013)):

E. <u>Rents set based on Adjusted Median Income</u>

1. Set at 30% of 50% of adjusted median income with assumed family size of 1.5 persons per bedroom, or
2. Set at 30% of 60% of adjusted median income with assumed family size of 1.5 persons per bedroom
3. Must adjust for utility allowance
4. Calculation of Maximum Rent Example: Assume the following facts:
    a. Complex is leasing to individuals whose income is 60% or less of area median family income
    b. 60 % of AMI is as follows:
        i. 2-person Household -- $34,140
        ii. 3-person Household -- $38,400
    c. Regardless of the size of the family -- whether 1-person or 4-persons -- the maximum gross rent that the landlord may charge is 30% of the MFI for 3 persons. (The landlord must set the rent on the 2-bedroom unit based on imputed number of persons of 3 – 1.5 persons per bedroom.)
    d. That calculates to $960 maximum rent per month ($38,400 ÷ 12 = $3,200 x.30 = $960) if the family is paying no utilities.
    e. If the family is paying utilities, then the maximum rent that the landlord can charge must be reduced by the amount of the utility allowance. So, if utility allowance is $100, then the maximum rent the tax credit landlord can charge is $860.

5. Tenants are not entitled to rent reductions when they suffer a reduction in income

VII. RECERTIFICATION

A. Annual recertification reviews are required. *See* 26 C.F.R. § 1.42-5(b) (1) (vi) (2013), § 1.42-5(c) (1) (iii) (2013).

B. But IRS may waive the annual recertification requirement for an owner of a LIHTC apartment complex in which 100% of the apartments are occupied by low-income tenants. 26 U.S.C.A. § 42(g) (8) (B) (West 2011).

C. The owner must document each tenant's income certification with a copy of the tenant's federal income tax return, W-2 Form, or third-party verification from an employer or government agency. 26 C.F.R. § 1.42-5(b) (1) (vii) (2013).

D. In determining tenant income, income is calculated under the regulations for the Section 8 Housing Choice Voucher Program.

E. If the tenant has a voucher, the owner may satisfy the documentation requirement if the local public housing authority provides a statement to the owner declaring that the tenant's income does not exceed the applicable income limits under 26 U.S.C. § 42(b). Id.

F. An owner of a complex with less than 100% LIHTC apartments timely complies with the annual recertification obligation if the owner completes the recertification within 120 days before the anniversary of the effective date of the original tenant income certification. IRS Guide for Completing Form 8823, chp. 26.

1. An owner who does not timely complete the recertification can self-correct the noncompliance without penalty by IRS. *See id.* Thus, a tenant facing eviction for failing to timely recertify can argue that the violation was not material, i.e., good cause, since the owner can correct it.

VIII. EVICTIONS PRACTICE TIPS

A. How to Tell if a Development is LIHTC?

1. Check the HUD LIHTC database: http://lihtc.huduser.org/
    a. All LIHTC developments are listed there and it is easily searchable.
    b. Can also pick up clues from discussing housing with client. Questions to ask:
        i. Has your rent been adjusted when your income changed?
        ii. When you re-certify do you do so with your property management office or with the local housing authority?

B. Tenants in LIHTC housing have "Good Cause" protection from eviction and refusals to renew leases. 26 U.S.C.A. § 42

1. Good cause is not defined in the tax policy and is adjudicated on a case-by-case basis.
2. It does not need to be in the lease but it will need to be proven in court if challenged.
3. The notice of termination or lease renewal refusal must include a list of specific good cause reasons for the action.
4. "Lack of good cause" can be raised as a defense by tenants if a landlord fails to follow these steps.

C. <u>Strategy for enforcing the good cause requirement is to appeal to the transaction attorney for the development.</u>

1. Eviction or refusal to renew a lease without good cause can jeopardize a developments tax credit status.
2. The transactional attorney will have more knowledge about the regulations related to maintaining good standing in the tax credit program and may be more willing to resolve the eviction/lease non-renewal if the property manager has not met the good cause requirements.

Introduction to LIHTC Housing

INTRODUCTION TO LIHTC HOUSING

Robert Romaker, Managing Attorney
Legal Aid Society of Northeastern New York

AND

Natalie Knott, Staff Attorney, Legal Assistance of Western New York

OVERVIEW 1/4

- **LIHTC** = Low Income Housing Tax Credit
- What is a tax credit?
  - Tax Deduction: reduces taxable income
  - Tax Credit: reduction in the amount of taxes owed.
- Most LIHTC construction is a partnership between large incorporated investors and developers.
  - This process is called "syndication."

OVERVIEW 2/4

- 90 % of all multi-family, low income rental housing constructed since 1990 is LIHTC.
- LIHTC housing was legally created by **the Tax Reform Act of 1986.**
- LIHTC credits are allocated to the states by the IRS and allocated within New York state by HCR.
- On-going compliance with the tax credit regulations is enforced but NOT monitored by the IRS.

OVERVIEW 3/4

- Ways LIHTC is different from traditional HUD "public housing"
  - Not monitored or managed by a **PHA**
  - Managed by corporations (for-profit and non-profit).
  - Rent is NOT income-based.
    - Prospective tenants must make under a certain amount to qualify for LIHTC housing, but rent will not be adjusted below a designated floor if a tenant's income decreases.
      - LIHTC often called a "shallow subsidy"

OVERVIEW 4/4

- Things to keep in mind:
  - LIHTC is part of a Reagan-era shift to privatizing federal social programs.
  - LIHTC projects are not monitored by any federal or state agency to enforce tenants' rights.
  - LIHTC regulations use the HUD standard for calculating income requirements.
  - "Good Cause" standard is required to terminate tenancy or refuse lease renewal.

FEDERAL REGULATIONS 1/4

- LIHTC properties are typically mixed-income developments.
  - The majority of the units in a development will be leased for market-rate rent.

FEDERAL REGULATIONS 2/4

- LIHTC properties **must**:
  - Lease either 20% of units to tenants earning no more than 50% of AMI

  OR
  - At least 40% of unite to tenants earning no more than 60% AMI
  - Annually recertify all tenants to determine ongoing financial eligibility.
    - This process is handled by the corporation that manages the property.

FEDERAL REGULATIONS 3/4

- LIHTC properties must maintain their tax credit status for a minimum of 30 years to remain eligible for the credits.
  - Initial period is 15 years known as "compliance period" with a mandatory 15 year "extended use" period.
  - An owner is prohibited from evicting or terminating or increasing the gross rent on any low-income tenancies (except for "good cause") within 3 years of the expiration of a commitment period.
    - Nordbye v. Ellington, 246 Or.App. 209 (2011).

FEDERAL REGULATIONS 4/4

- LIHTC properties CANNOT refuse to rent to Section 8 HCV holders based on their status as voucher holders.

TAX CREDIT ALLOCATION 1/3

- LIHTC credits are annually allocated to states based on population.
- State housing finance agencies (DCR in New York) award LIHTC credits under a competitive bid process in accordance with the states submitted QAP
  - Two tax credits are available
    - 9%- New Construction
    - 4%- Acquisition of existing low-income housing properties

TAX CREDIT ALLOCATION 2/3

- State QAPs
  - Provides guidelines for allocation:
    - Must target areas dealing with affordable housing concerns.
    - Must also give priority to properties planning to serve the lowest-income households for the longest periods.
    - 10% of credits must be allocated to properties where a **non-profit** owns an interest or significantly participates in the development and operation of the property.

TAX CREDIT ALLOCATION 3/3

- In 2000, NYS Low Income Housing Tax Credit Program (SLIHC) was established.
- Set scoring program to rank projects to receive credits.
  - Community Impact
  - Financial Leveraging
  - Sponsor Characteristics
  - "Green" Building
  - Number of units equipped for mobility impairments
  - Project readiness
  - Preference for persons with special needs
  - Preference for families with children
  - Participation by non-profits organizations.

TENANT SELECTION 1/4

- IRS has not promulgated any regulations on tenant screening. Criteria, other than maximum income, set by each managing corporation.

TENANT SELECTION 2/4

- **Citizenship Requirements**- HUD regulations on undocumented persons **DO NOT** apply. **No federal limitations have been imposed on leasing to undocumented persons.** Managing corporations may set their own policy.

TENANT SELECTION 3/4

- Student Eligibility
  - Eligibility governed by special statute: 26 U.S.C § (i)(3)(D).
    - Student receives TANF.
    - Student was a ward of the state.
    - Student is enrolled in a job training program receiving assistance under the Job Training Partnership Act or other similar federal or state program.
    - Students are single parents and children are not dependents of another individual.
    - Students are married and file a joint return.

TENANT SELECTION 4/4

- Criminal History Look-Back Periods
  - For Sec. 8 Voucher holders HUD regulations apply.
    - Managing corporation can deny the application of any applicant who, within a reasonable period of time preceding their application, engaged in violent or drug-related activity that would **adversely affect the health, safety, or right to peaceful enjoyment** of the premises by other residents.
  - IRS has not promulgated regulations defining a reasonable look-back periods for screening voucher holders.

LIHTC LEASES 1/5

- Basics:
  - Managing corporations may use their own leases.
  - NO federal requirements for lease terms mandated by the IRS.
  - In **New York City** there is a LIHTC rider that incorporates city-specific provisions.
  - Denied applicants are not entitled to an administrative appeal.

LIHTC LEASES 2/5

- Renewals
  - Refusal must list "good cause" reasons for denial.

LIHTC LEASES 3/5

- Rent Calculation
  - **Rents are NOT income-based.**
  - Maximum gross rents cannot exceed 30% of 50% of AMI or 30% of 60% of AMI. This includes the utility allowance.

LIHTC LEASES 4/5

- Calculating Utility Allowances:
  - Managing Corporation must use 1 of 6 methods to calculate utility allowance:
    - Local Sec. 8 public housing utility allowance
    - Written estimate from a local utility provider
    - The HUD Utility Schedule Model
    - An energy consumption model
    - An allowance based upon an **average** of the **actual use** of a similarly constructed and sized unit in the building. MUST use actual usage dates and rates.
      - For newly constructed complexes, consumption data for unites of similar size and construction in the sam geographic area.

LIHTC LEASES 5/5

- Recertification
  - Annual recertification reviews are required.
  - Income is calculated according to the regulations of the Section 8 Housing Choice Voucher Program.
  - Tenant must provide one of the following documents to support their recertification:
    - Federal Income Tax return
    - W-2 Form
    - Third-party verification from employer or government agency.

PRACTITIONER TIPS 1/4

How do I know if a specific development is LIHTC?

- http://lihtc.huduser.org/
- Intake Questions:
  - Has your rent adjusted when you reported income changes?
  - Who processes your recertification?

PRACTITIONER TIPS 2/4

"Good Cause" Protection in Eviction

- Not defined in tax policy.
- Adjudicated on case-by-case basis.
- "Good Cause" language not required in lease. But will be the standard if challenged in court.
- Notice of termination MUST include "good cause" reasons.

PRACTITIONER TIPS 3/4

- "Lack of good cause" can be raised as a defense.
  - Example: Macon St. Assoc. v. Sealy,32 Misc.3d 52 (2011).

PRACTITIONER TIPS 4/4

- Alternative strategy for enforcing "good cause" requirement:
  - Eviction or refusal to renew lease can jeopardize tax credit status.
  - Bypass the attorney handling the eviction and work with the transactional attorney.
    - May be more willing to resolve issue to maintain good standing in the tax credit program.

CONTACT INFORMATION

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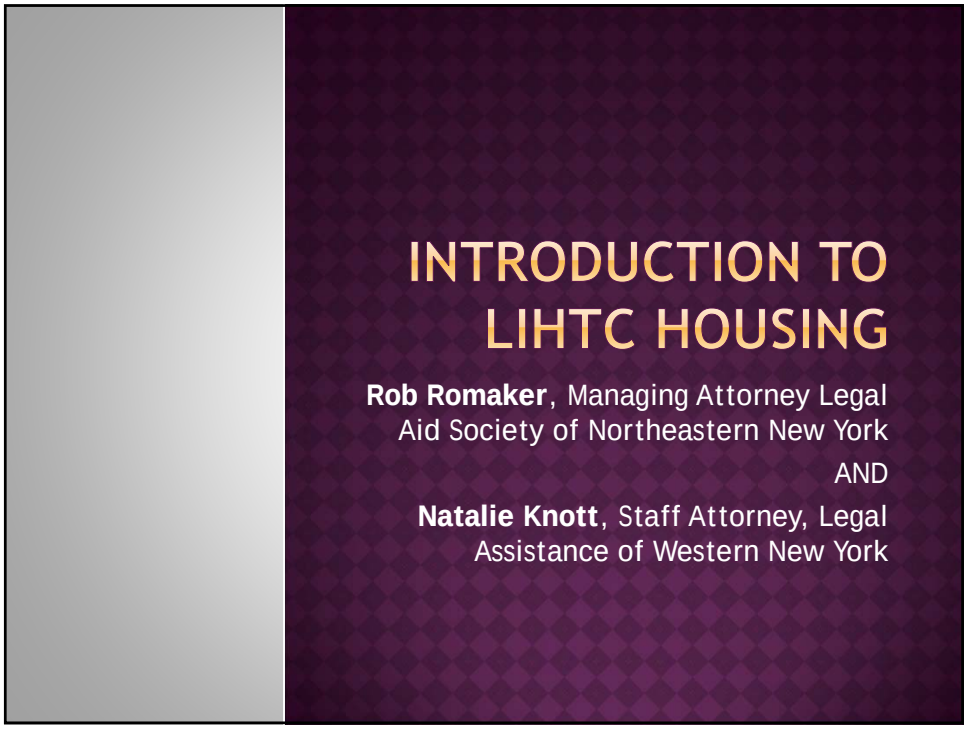
INTRODUCTION TO LIHTC HOUSING
Rob Romaker, Managing Attorney Legal Aid Society of Northeastern New York
AND
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Overview

Tax Reform Act of 1986

Basic Overview

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    - 90% of all "multi-family" low-income rental housing built since 1990 is LIHTC.
- LIHTC is different from other types of low-income housing such as public housing in several ways:
    - It is not overseen by a PHA
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    - It is a tax credit program designed to spur private investment in the affordable housing market
        - Developers can sell tax credits to raise cash for construction and rehabilitation for LIHTC projects.
- LIHTC housing is primarily constructed and managed by corporations who are best positioned to take financial advantage of the tax credit system.
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History of LIHTC

- Tax Reform Act of 1986
    - Act drastically shifted the economic value of investing in owner-occupied housing instead of rental housing.
    - In an attempt to try to ameliorate the effect of the TRA86 on an already overburdened affordable housing market, LIHTC was created to spur private investment in affordable housing.
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    - Tax Deduction- reduces income that is considered taxable
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        - In LIHTC world they are commonly called "Section 42 credits" after the section of the IRS code that regulates LIHTC eligibility.

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    - The equation is multiplying $1.75 by a state's population.
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        - The 9% depreciable credit is for new construction and rehabilitation of new LIHTC housing.
            - Questions about inefficiency of this allocation.
        - The 4% depreciable credit is for acquisition of existing low-income housing.
- There are guidelines for the QAP, though the enforcement of these guidelines is questionable. 21 NYCRR 2188.4
    - QAPs must target areas that are dealing with affordable housing concerns like areas with pockets of poverty or the inner-city.
    - The QAP must also give preference to properties serving the lowest-income households for the longest periods.
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Federal Regulations

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- Again, rent is not income-based; that is, families pay rent that is calculated in accordance with federal law but not adjusted for each individual family by income.
- Federal law also mandates an annual recertification of all tenants to determine continued financial eligibility.

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- Student Eligibility. Special rules apply to students. *See* 26 U.S.C.A. § 42 (i)(3)(D) (West 2011). Students are eligible if they meet one of the following criteria:
    - Student receives assistance under Title IV of the Social Security Act, i.e., TANF; or
    - Student was previously under the care and placement responsibility of the State agency responsible for administering a plan under part B of part E of Title IV of the Social Security Act, or
    - Student is enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar Federal, State, or local laws; or
    - Students are single parents and such parents are not dependents of another individual and such children are not dependents of another individual other than a parent of such children; or
    - Students are married and file a joint return.
- Criminal history look-back periods. With respect to Section 8 voucher holders, owners should set reasonable time periods on criminal history look-back periods. *See* 42 U.S.C.A. § 13661(c), § 13664(a)(2)-(3) (West 2005).
    - IRS has not published regulations mandating that tax credit owners establish reasonable criminal history look-back periods in screening voucher holders.
- Sec. 8 Voucher Holders
- Applicants who believe the owner is discriminating in its selection policies in violation of the Fair Housing Act may always file a Fair Housing Act complaint with HUD or file a lawsuit.

Leases

- Basics
  - Tax Credit Owners may use their own leases.
  - There are no federal requirements for lease terms. The IRS has not mandated or prohibited any specific lease terms.
  - In New York City there is a lease rider that must be included along with LIHTC housing leases
    - Rider includes several city-specific provisions
- Renewal Requirements
  - Applicants are not entitled to written notice of the grounds for denial unless the owner relies on information provided by a tenant-tracking or consumer-reporting service. In such cases, the Fair Credit Reporting Act requires that the owner notify the applicant of the basis for the denial and the right to obtain a copy of the report. *See* 15 U.S.C.A. § 1681(d) (West 2009).
  - Applicants denied admission are not entitled to any administrative appeal procedure, a stark difference from the public housing and project-based section 8 program in which applicants are entitled to written notice and an opportunity for an appeal meeting.
- Rent Calculation
  - Rents are not income-based. Rents are flat rents based on adjusted median income. Tenant rents do not change as family income changes. If the family has a section 8 housing voucher, the tenant's share will change as adjusted by the local public housing authority in accordance with the voucher regulations.
  - Maximum gross rents cannot exceed 30% of 50% of adjusted median family income or 30% of 60% of adjusted median family income. This includes the allowance for utilities.
    - Meaning that the estimated amount a tenant will pay in utilities must be counted into the 30% figure and reduced accordingly. 26 C.F.R. § 1.42-10 (2013).
      - Owners must use one of six methods set forth in 26 C.F.R. § 1.42-10 (2013)
        - The local public housing Section 8 utility allowance;
        - A written estimate from a local utility provider;
        - The HUD Utility Schedule Model;
        - An energy consumption model;
        - An allowance based upon an average of the actual use of similarly constructed and sized unit in the building using actual utility usage date and rates
        - For newly constructed apartment complexes, consumption data for units of similar size and construction in the geographic area.

- **Calculation of Maximum Rent a Tax Credit Complex May Charg**e:
  - Maximum Rents (26 U.S.C. § 42(g) (West Supp. 2013)):
    - Rents set based on Adjusted Median Income
      - Set at 30% of 50% of adjusted median income with assumed family size of 1.5 persons per bedroom, or
      - Set at 30% of 60% of adjusted median income with assumed family size of 1.5 persons per bedroom
      - Must adjust for utility allowance
  - Calculation of Maximum Rent Example: Assume the following facts:
    - Complex is leasing to individuals whose income is 60% or less of area median family income
    - 60 % of AMI is as follows:
      - 2-person Household -- $34,140
      - 3-person Household -- $38,400
    - Regardless of the size of the family -- whether 1-person or 4-persons -- the maximum gross rent that the landlord may charge is 30% of the MFI for 3 persons. (The landlord must set the rent on the 2-bedroom unit based on imputed number of persons of 3 – 1.5 persons per bedroom.)
    - That calculates to $960 maximum rent per month ($38,400 ÷ 12 = $3,200 x.30 = $960) if the family is paying no utilities.
    - If the family is paying utilities, then the maximum rent that the landlord can charge must be reduced by the amount of the utility allowance. So, if utility allowance is $100, then the maximum rent the tax credit landlord can charge is $860.
  - Tenants are not entitled to rent reductions when they suffer a reduction in income.

Recertification

- Annual recertification reviews are required. *See* 26 C.F.R. § 1.42-5(b) (1) (vi) (2013), § 1.42-5(c) (1) (iii) (2013).
- But IRS may waive the annual recertification requirement for an owner of a LIHTC apartment complex in which 100% of the apartments are occupied by low-income tenants. 26 U.S.C.A. § 42(g) (8) (B) (West 2011).
- The owner must document each tenant's income certification with a copy of the tenant's federal income tax return, W-2 Form, or third-party verification from an employer or government agency. 26 C.F.R. § 1.42-5(b) (1) (vii) (2013).
- In determining tenant income, income is calculated under the regulations for the Section 8 Housing Choice Voucher Program.
- If the tenant has a voucher, the owner may satisfy the documentation requirement if the local public housing authority provides a statement to the owner declaring that the tenant's income does not exceed the applicable income limits under 26 U.S.C. § 42(b). *Id.*

- An owner of a complex with less than 100% LIHTC apartments timely complies with the annual recertification obligation if the owner completes the recertification within 120 days before the anniversary of the effective date of the original tenant income certification. *IRS Guide for Completing Form 8823*, chp. 26.
    - An owner who does not timely complete the recertification can self-correct the noncompliance without penalty by IRS. *See id.* Thus, a tenant facing eviction for failing to timely recertify can argue that the violation was not material, i.e., good cause, since the owner can correct it.

Evictions Practice Tips

- How to Tell if a Development is LIHTC?
    - Check the HUD LIHTC database: http://lihtc.huduser.org/
        - All LIHTC developments are listed there and it is easily searchable.
        - Can also pick up clues from discussing housing with client. Questions to ask:
            - Has your rent been adjusted when your income changed?
            - When you re-certify do you do so with your property management office or with the local housing authority?
- Tenants in LIHTC housing have "Good Cause" protection from eviction and refusals to renew leases. 26 U.S.C.A. § 42
    - Good cause is not defined in the tax policy and is adjudicated on a case-by-case basis.
    - It does not need to be in the lease but it will need to be proven in court if challenged.
    - The notice of termination or lease renewal refusal must include a list of specific good cause reasons for the action.
    - "Lack of good cause" can be raised as a defense by tenants if a landlord fails to follow these steps.
- Strategy for enforcing the good cause requirement is to appeal to the transaction attorney for the development.
    - Eviction or refusal to renew a lease without good cause can jeopardize a developments tax credit status.
    - The transactional attorney will have more knowledge about the regulations related to maintaining good standing in the tax credit program and may be more willing to resolve the eviction/lease non-renewal if the property manager has not met the good cause requirements.

Appendix 1

Federal and State Statutes Governing the LIHTC Housing Program

Table of Contents

Section 2188.3. Goals and needs assessment

21 NYCRR 2188.3

(a) The goals and needs assessments which produce the housing priorities contained in this QAP are based on the State's Consolidated Plan which includes an analysis of the housing needs of New York residents along with the State's housing market and inventory conditions. The strategic plan section of the State's Consolidated Plan delineates the State's general priorities for assisting low income residents and includes these three housing objectives, which to the extent consistent with the Code, are intended to be implemented by this QAP:

(1) Preserve and increase the supply of decent, safe and affordable housing available to all low and moderate income households, and help identify and develop available resources to assist in the development of housing;

(2) Improve the ability of low and moderate income New Yorkers to access rental housing and home ownership opportunities; and,

(3) Address the shelter, housing, and service needs of the homeless poor and others with special needs.

(b) While the demographic analysis and statewide market analysis contained in the Consolidated Plan demonstrate a need for more affordable rental housing for all types of low and extremely low income households, the Consolidated Plan also indicates that there are substantially more low and extremely low income elderly rental households with housing problems as opposed to low and extremely low income large family rental households with housing problems. For the purposes of this Plan, low and extremely low income elderly rental households will therefore be considered as a population with special needs.

Section 2188.4. HFA allocation process

21 NYCRR 2188.4

(a) Under New York State's overall tax credit allocation process as it pertains to the HFA, the Agency typically allocates LIHTC to projects that receive financing from the Agency and, as provided in section 42(h)(4) of the Code, allows Private Activity Bond Credits to qualified residential rental projects located in New York State financed by obligations subject to the Private Activity Bond Cap, the interest on which is exempt from Federal income tax. Applications for both State Credit Ceiling LIHTCs and Private Activity Bond Credits for projects financed by the Agency are therefore only made as part of the Agency's overall financing application process as described in subdivisions (c) through (h) of this section. Applications for the allowance of As of Right Credits to projects financed by tax exempt bonds from an issuer other than the Agency are governed by the provisions of (i) of this section.

(b) Applications for HFA financing and/or LIHTC through the Agency will be accepted and processed as they are received throughout the year

(c) Preliminary underwriting information must be submitted in the form required by the Agency.

(d) The preliminary underwriting information, additional material required by the Agency as part of the

HFA financing application and the appropriate Due Diligence reports to be obtained by the Agency, will serve as the application for LIHTC from HFA.

(e) Upon, or before, completion of the second phase of underwriting prior to submission to the Members, the following actions are taken and reviews are performed:

(1)

(i) The first of three LIHTC Underwritings and Feasibility Reviews required by section 42(m)(2)(C) of the Code is performed.

(ii) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under section 42(d)(5)(B) of the Code, exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.

(2) All applicants must meet the Threshold Eligibility Requirements listed below.

(3) If an applicant for Private Activity Bond Credits meets the Threshold Eligibility Requirements listed below, the application is consistent with this QAP and the application may be considered by the Members for a Members' Approval of an allocation of Private Activity Bond Credits.

(4) State Credit Ceiling LIHTC projects are also evaluated pursuant to the Scoring Criteria listed below and ranked against all other State Credit Ceiling LIHTC applicants which have met the Threshold Eligibility Requirements and have not yet received a Members' Approval:

(i) A State Credit Ceiling LIHTC applicant's request generally will only be submitted to the Members for Members' Approval if HFA has unallocated Credit Allocation Authority. The Members, however, reserve the right, in their sole discretion, to consider any State Credit Ceiling LIHTC applicant's request when the Agency does not have unallocated Credit Allocation Authority. Any Members' Approval issued when HFA does not have unallocated Credit Allocation Authority will be contingent upon DHCR making available the requisite Credit Allocation Authority.
(ii) Applications shall be submitted to the Members for consideration in the order of their ranking pursuant to the Scoring Criteria.

(iii) The Members may designate a building or buildings in a State Credit Ceiling LIHTC project as a State Designated Building eligible for a credit increase as if the building was located in a difficult to develop area if the Members find, based on the facts and circumstances pertaining to the building or buildings, that such a designation is necessary for the financial feasibility of the building and find that such a designation will promote one or more of the State's housing priorities as stated in section 2188.3 of this Part or any other statement of housing policy from the Agency or the State.

(iv) Notwithstanding the Scoring Criteria set forth in this QAP, the Members retain the right to deny any request for an allocation of LIHTC irrespective of its ranking if such request is inconsistent with the housing goals reflected herein and shall have the power to allocate LIHTC to a project irrespective of its ranking, if such intended allocation is: in compliance with the Code; in

furtherance of the State's housing goals reflected herein; and determined by the Members to be in the interests of the citizens of the State.

(iv) A Members' Approval of State Credit Ceiling LIHTC merely represents a reservation of LIHTC and does not obligate the Agency to allocate LIHTC.

(f) After a project receives the Members' Approval, and after all relevant requirements in the applicable Term Sheet, and Members' Approval are met, the second LIHTC Underwriting and Feasibility Review required by section 42 is performed prior to the financing of the project.

(1) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under section 42(d)(5)(B), exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.
(2) Projects financed by tax exempt obligations of the Agency and expected to receive Private Activity Bond Credits will receive a 42(m) Letter prior to the issuance of the tax exempt obligations.

(3) Projects which have received a Members' Approval of State Credit Ceiling LIHTCs will be issued a Binding Agreement prior to the financing of the project. The Binding Agreement must be executed by the applicant and returned to the Agency prior to the financing. If a project is not financed by the Agency, the Binding Agreement will incorporate all relevant terms usually contained in Agency financing documents including the setting of appropriate fees.

(g) Projects receiving State Credit Ceiling LIHTC must be placed in service during the calendar year of allocation or obtain a Carryover Allocation Document.

(1) The Cost Certification required to obtain a Carryover Allocation Document must be in form and substance acceptable to the Agency.

(2) The Cost Certification must be filed with the Agency by the later of the date which is 11 months after the date that the allocation was made, unless the Agency grants an extension of time in writing to file this Cost Certification.

(h) The third and final LIHTC underwriting and Feasibility Review required by section 42 is performed prior to the issuance of the IRS Form or Forms 8609, Low Income Housing Credit Allocation Certification.

(1) All projects must provide the Agency with Certificates of Occupancy or Temporary Certificates of Occupancy as they are issued.

(2) The third and final LIHTC underwriting and Feasibility Review must be based on a final Cost Certification satisfactory to the Agency in form and substance and in all ways in compliance with section 42.

(3) The final Cost Certification must be filed with the Agency within 120 days after the end of the first

year of the credit period for the building within a project with the latest credit period. The Agency may extend this period in its sole discretion.

(4) Form or Forms IRS 8609 formally allocating any LIHTC will not be issued until after the third and final LIHTC underwriting and Feasibility Review, based on a final Cost Certification satisfactory to the Agency in form and substance and in all ways in compliance with section 42, is completed.

(5) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under section 42(d)(5)(C), exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.

(i) Projects Financed By Other Issuer's Private Activity Bonds.

(1) Projects financed by tax-exempt bonds from an issuer other than the Agency subject to the Private Activity Bond Volume Cap in accordance with Section 42(h)(4)(A) of the Code may be allowed LIHTC which is not taken into account regarding the State Credit Ceiling. The Agency's President and Chief Executive Officer, or his or her designee, is hereby authorized to take any actions necessary and appropriate to allow LIHTC to qualified residential rental projects located in New York State that are financed by the proceeds of tax-exempt bonds of an Other Issuer subject to the Private Activity Bond Volume Cap, where such allowance is consistent with this QAP.

(2) Complete applications for the allowance of such LIHTCs must be submitted at least 60 days prior to the later of the proposed construction start date or the planned bond sale date in a form approved by the Agency, and will be accepted and processed throughout the calendar year. The Agency may request any and all information it deems necessary or appropriate for project evaluation. If, in the Agency's sole discretion, any submission is incomplete or if documentation is insufficient to complete any evaluation of the proposed project, processing will be suspended. In such instances, the Agency will notify the respective applicant of how the submission is incomplete and provide at least 10 business days for the applicant to submit the requested documentation. Complete applications will be reviewed relative to criteria contained herein at section 2188.5 of this Part for eligibility and public purpose. Within 60 days after receipt of a complete application the Agency will issue to the applicant a finding as to whether the application is consistent with this QAP and the amount of LIHTC for which the project qualifies pursuant to Financial Feasibility Review. If the application is consistent with this QAP, the applicant will receive processing instructions for a final allocation of credit. If the project is found to be inconsistent with this Plan, the owner will be notified of the reasons for such finding.

(3) The Agency shall charge a reasonable application fee, due at the time of application. A credit allocation fee, in a reasonable amount determined by the Agency, also is due upon request for issuance of IRS Form 8609. A not-for-profit applicant (or its wholly-owned subsidiary) which will be the sole general partner of the partnership/project owner or sole managing member of the limited liability company/project owner may request and be approved for deferral of payment of the application fee until the date of issuance of IRS Form 8609.

(4) In accordance with Code Section 42(m)(2)(D), the issuer of the tax exempt bonds financing a project is responsible for determining the dollar amount of LIHTCs which is necessary for the

financial feasibility of such project and its viability as a qualified low-income housing project pursuant to Section 42(g)(1) of the Code throughout the applicable credit period. Such determination must be included in the applicant's request to the Agency for a final allocation of credit. The Agency will process requests for a final allocation of credit within 60 days after the date of receipt of all required documentation including an executed credit regulatory agreement in a form satisfactory to the Agency with proof of recording. The Agency will apply the criteria for Feasibility Review and LIHTC Underwriting, as described herein at section 2188.5(d) of this Part, in determining the amount for the final credit allocation with respect to such project.

(5) Regulatory Term. The regulatory requirements of projects receiving an allocation or allowance of LIHTC under the terms of this Plan are described in section 2188.5 of this Part and shall be subject to compliance monitoring as described in section 2188.7 of this Part.

Section 2188.6. Scoring criteria for state credit ceiling LIHTC allocation

21 NYCRR 2188.6

All projects applying for a State Credit Ceiling LIHTC Allocation shall be evaluated in accordance with the following scoring criteria (maximum of 100 points):

(a) Project Location (maximum of five points):

(1) the project fosters the geographic dispersion of low income housing, by siting Low Income Units in an area with few such units;

(2) the project location is suitable for the intended low income tenant population. Depending on the intended population (elderly, families with children etc.), this criterion requires the evaluation of the proximity of schools, medical and recreational facilities, employment opportunities, appropriate social services, mass transit, etc; and

(3) the project site is appropriate for the planned development and will not require extraordinary sitework or infrastructure development.

(b) Housing Needs Characteristics (maximum of five points):

(1) the project satisfies a demonstrated need and demand in the market area for the number and size of units and the mix of Low Income Units and Market Rate Units; and

(2) the project has support from State or local officials or community groups. Local support may be demonstrated by the award of a locally administered grant, subsidy or tax abatement, by reference to a formally adopted local development plan, or by statements submitted by local officials or leaders of community groups. State support may be demonstrated by statements, actions or awards of DHCR or any other State housing agency.

(c) Project Characteristics (maximum of 15 points):

(1) the project promotes the economic integration of tenants, by providing units at a variety of sizes and rents;

(2) the project provides social services suitable for the intended tenant population (e.g., employment

counseling, subsidized day care, etc.);

(3) the project provides appropriate facilities for residents (e.g., community rooms, children's play areas, etc.);

(4) the project's design and engineering will minimize maintenance and operating costs over the useful life of the project;

(5) the project's design, engineering and proposed operations will result in a more energy efficient project than required by the applicable building codes; other applicable laws, ordinances or regulations and the Agency's policies on energy efficiency and sustainable development;

(6) the project includes the preservation and/or adaptive reuse of the historic nature of the project's existing structure, structures or site, for example, by including the rehabilitation of certified historic structures; and

(7) the project includes the use of existing housing as part of a community revitalization plan.

(d) Sponsor Characteristics (maximum of 10 points):

(1) the sponsor and the development team have a track record in developing housing of the type and scale proposed; and

(2) the development team includes one or more State certified minority business enterprises or women owned business enterprises.

(e) The project is intended to serve a population of individuals with children (maximum of five points).

(f) The project is intended for eventual tenant ownership (maximum of five points).

(g) Tenant Populations with Special Housing Needs (maximum of 10 points):

(1) to the extent permitted by law, the project provides a significant amount of housing for populations with special housing needs such as the elderly or the homeless; and

(2) the project provides handicapped adaptable units above the minimum required by the Americans with Disabilities Act and/or any other applicable statute, ordinance or regulation.

(h) The project's marketing plan includes outreach to persons on public housing waiting lists (maximum of five points).

(i) Serving the Lowest Income Tenants (maximum of 10 points):

(1) the project provides housing for a higher percentage of Low Income Units than required by Section 42's minimum low income set aside; and

(2) the project provides housing to a lower income population than required by section 42's minimum low income set aside.

(j) The applicant agrees to extend the period of low income use beyond the minimum required by section 42 (maximum of 10 points).

(k) The project is located in a qualified census tract and the development of the project contributes to a concerted community revitalization plan (maximum of 15 points).

(l) The applicant agrees to waive the right under Code Section 42(h)(6)(E)(i)(II) to terminate the "extended use period" (as defined in Code section 42(h)(6)(D)) if the Agency is unable to present the project owner with a "qualified contract" (as defined in Code section 42(h)(6)(F)) (maximum of 15 points).

Low-Income Housing Credit

26 U.S.C.A. § 42(h)(6)(B)(iv)

(6) Buildings eligible for credit only if minimum long-term commitment to low-income housing.--

(A) In general.--No credit shall be allowed by reason of this section with respect to any building for the taxable year unless an extended low-income housing commitment is in effect as of the end of such taxable year.

(B) Extended low-income housing commitment.--For purposes of this paragraph, the term "extended low-income housing commitment" means any agreement between the taxpayer and the housing credit agency--

(i) which requires that the applicable fraction (as defined in subsection (c)(1)) for the building for each taxable year in the extended use period will not be less than the applicable fraction specified in such agreement, and which prohibits the actions described in subclauses (I) and (II) of subparagraph (E)(ii),

(ii) which allows individuals who meet the income limitation applicable to the building under subsection (g) (whether prospective, present, or former occupants of the building) the right to enforce in any State court the requirement and prohibitions of clause (i),

(iii) which prohibits the disposition to any person of any portion of the building to which such agreement applies unless all of the building to which such agreement applies is disposed of to such person,

(iv) which prohibits the refusal to lease to a holder of a voucher or certificate of eligibility under section 8 of the United States Housing Act of 1937 because of the status of the prospective tenant as such a holder,

(v) which is binding on all successors of the taxpayer, and

(vi) which, with respect to the property, is recorded pursuant to State law as a restrictive covenant.

Monitoring compliance with low-income housing credit requirements

26 C.F.R. § 1.42-5(c)(1)(xi)(2013)

(c) Certification and review provisions--(1) Certification. Under the certification provision, the owner of a low-income housing project must be required to certify at least annually to the Agency that, for the preceding 12–month period--

> **(vi)** The buildings and low-income units in the project were suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards), and the State or local government unit responsible for making local health, safety, or building code inspections did not issue a violation report for any building or low-income unit in the project. If a violation report or notice was issued by the governmental unit, the owner must attach a statement summarizing the violation report or notice or a copy of the violation report or notice to the annual certification submitted to the Agency under paragraph (c)(1) of this section. In addition, the owner must state whether the violation has been corrected;

(a) Covered programs/assistance. This subpart E implements Section 214 of the Housing and Community Development Act of 1980, as amended (42 U.S.C. 1436a). Section 214 prohibits HUD from making financial assistance available to persons who are not in eligible status with respect to citizenship or noncitizen immigration status. This subpart E is applicable to financial assistance provided under:

> (1) Section 235 of the National Housing Act (12 U.S.C. 1715z) (the Section 235 Program);
>
> (2) Section 236 of the National Housing Act (12 U.S.C. 1715z–1) (tenants paying below market rent only) (the Section 236 Program);
>
> (3) Section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s) (the Rent Supplement Program); and
>
> (4) The United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) which covers:
>
> (i) HUD's Public Housing Programs;
>
> (ii) The Section 8 Housing Assistance Programs; and
>
> (iii) The Housing Development Grant Programs (with respect to low income units only).

(b) Covered individuals and entities--

> (1) Covered individuals/persons and families. The provisions of this subpart E apply to both applicants for assistance and persons already receiving assistance covered under this subpart E.
>
> (2) Covered entities. The provisions of this subpart E apply to Public Housing Agencies (PHAs), project (or housing) owners, and mortgagees under the Section 235 Program. The term "responsible entity" is used in this subpart E to refer collectively to these entities, and is further defined in § 5.504.

§ 5.502 Requirements concerning documents

For any notice or document (decision, declaration, consent form, etc.) that this subpart E requires the responsible entity to provide to an individual, or requires the responsible entity to obtain the signature of an individual, the responsible entity, where feasible, must arrange for the notice or document to be provided to the individual in a language that is understood by the individual if the individual is not proficient in English. (See 24 CFR 8.6 of HUD's regulations for requirements concerning communications with persons with disabilities.)

§ 5.504 Definitions.

Currentness

(a) The definitions 1937 Act, HUD, Public Housing Agency (PHA), and Section 8 are defined in subpart A of this part.

(b) As used in this subpart E:

Child means a member of the family other than the family head or spouse who is under 18 years of age.

Citizen means a citizen or national of the United States.

Evidence of citizenship or eligible status means the documents which must be submitted to evidence citizenship or eligible immigration status. (See § 5.508(b).)

Family has the same meaning as provided in the program regulations of the relevant Section 214 covered program.

Head of household means the adult member of the family who is the head of the household for purposes of determining income eligibility and rent.

Housing covered programs means the following programs administered by the Assistant Secretary for Housing:

(1) Section 235 of the National Housing Act (12 U.S.C. 1715z) (the Section 235 Program);

(2) Section 236 of the National Housing Act (12 U.S.C. 1715z–1) (tenants paying below market rent only) (the Section 236 Program); and

(3) Section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s) (the Rent Supplement Program).

INS means the U.S. Immigration and Naturalization Service.

Mixed family means a family whose members include those with citizenship or eligible immigration status, and those without citizenship or eligible immigration status.

National means a person who owes permanent allegiance to the United States, for example, as a result of birth in a United States territory or possession.

Noncitizen means a person who is neither a citizen nor national of the United States.

Project owner means the person or entity that owns the housing project containing the assisted dwelling unit.

Public Housing covered programs means the public housing programs administered by the Assistant Secretary for Public and Indian Housing under title I of the 1937 Act. This definition does not encompass HUD's Indian Housing programs administered under title II of the 1937 Act. Further, this term does not include those programs providing assistance under section 8 of the 1937 Act. (See definition of "Section 8 Covered Programs" in this section.)

Responsible entity means the person or entity responsible for administering the restrictions on providing assistance to noncitizens with ineligible immigrations status. The entity responsible for administering the

restrictions on providing assistance to noncitizens with ineligible immigration status under the various covered programs is as follows:
(1) For the Section 235 Program, the mortgagee.
(2) For Public Housing, the Section 8 Rental Certificate, the Section 8 Rental Voucher, and the Section 8 Moderate Rehabilitation programs, the PHA administering the program under an ACC with HUD.
(3) For all other Section 8 programs, the Section 236 Program, and the Rent Supplement Program, the owner.
Section 8 covered programs means all HUD programs which assist housing under Section 8 of the 1937 Act, including Section 8–assisted housing for which loans are made under section 202 of the Housing Act of 1959.
Section 214 means section 214 of the Housing and Community Development Act of 1980, as amended (42 U.S.C. 1436a).
Section 214 covered programs is the collective term for the HUD programs to which the restrictions imposed by Section 214 apply. These programs are set forth in § 5.500.
Tenant means an individual or a family renting or occupying an assisted dwelling unit. For purposes of this subpart E, the term tenant will also be used to include a homebuyer, where appropriate.

§ 5.506 General provisions.

(a) Restrictions on assistance. Financial assistance under a Section 214 covered program is restricted to:
(1) Citizens; or
(2) Noncitizens who have eligible immigration status under one of the categories set forth in Section 214 (see 42 U.S.C. 1436a(a)).
(b) Family eligibility for assistance.
(1) A family shall not be eligible for assistance unless every member of the family residing in the unit is determined to have eligible status, as described in paragraph (a) of this section, or unless the family meets the conditions set forth in paragraph (b)(2) of this section.
(2) Despite the ineligibility of one or more family members, a mixed family may be eligible for one of the three types of assistance provided in §§ 5.516 and 5.518. A family without any eligible members and receiving assistance on June 19, 1995 may be eligible for temporary deferral of termination of assistance as provided in §§ 5.516 and 5.518.
(c) Preferences. Citizens of the Republic of Marshall Islands, the Federated States of Micronesia, and the Republic of Palau who are eligible for assistance under paragraph (a)(2) of this section are entitled to receive local preferences for housing assistance, except that, within Guam, such citizens who have such local preference will not be entitled to housing assistance in preference to any United States citizen or national resident therein who is otherwise eligible for such assistance.

§ 5.508 Submission of evidence of citizenship or eligible immigration status.

Currentness

(a) General. Eligibility for assistance or continued assistance under a Section 214 covered program is contingent upon a family's submission to the responsible entity of the documents described in paragraph (b) of this section for each family member. If one or more family members do not have citizenship or eligible immigration status, the family members may exercise the election not to contend to have eligible immigration status as provided in paragraph (e) of this section, and the provisions of §§ 5.516 and 5.518 shall apply.
(b) Evidence of citizenship or eligible immigration status. Each family member, regardless of age, must submit the following evidence to the responsible entity.

(1) For U.S. citizens or U.S. nationals, the evidence consists of a signed declaration of U.S. citizenship or U.S. nationality. The responsible entity may request verification of the declaration by requiring presentation of a United States passport or other appropriate documentation, as specified in HUD guidance.
(2) For noncitizens who are 62 years of age or older or who will be 62 years of age or older and receiving assistance under a Section 214 covered program on September 30, 1996 or applying for assistance on or after that date, the evidence consists of:
(i) A signed declaration of eligible immigration status; and
(ii) Proof of age document.
(3) For all other noncitizens, the evidence consists of:
(i) A signed declaration of eligible immigration status;
(ii) One of the INS documents referred to in § 5.510; and
(iii) A signed verification consent form.
(c) Declaration.
(1) For each family member who contends that he or she is a U.S. citizen or a noncitizen with eligible immigration status, the family must submit to the responsible entity a written declaration, signed under penalty of perjury, by which the family member declares whether he or she is a U.S. citizen or a noncitizen with eligible immigration status.
(i) For each adult, the declaration must be signed by the adult.
(ii) For each child, the declaration must be signed by an adult residing in the assisted dwelling unit who is responsible for the child.
(2) For Housing covered programs: The written declaration may be incorporated as part of the application for housing assistance or may constitute a separate document.
(d) Verification consent form--
(1) Who signs. Each noncitizen who declares eligible immigration status (except certain noncitizens who are 62 years of age or older as described in paragraph (b)(2) of this section) must sign a verification consent form as follows.
(i) For each adult, the form must be signed by the adult.
(ii) For each child, the form must be signed by an adult residing in the assisted dwelling unit who is responsible for the child.
(2) Notice of release of evidence by responsible entity. The verification consent form shall provide that evidence of eligible immigration status may be released by the responsible entity without responsibility for the further use or transmission of the evidence by the entity receiving it, to:
(i) HUD, as required by HUD; and
(ii) The INS for purposes of verification of the immigration status of the individual.
(3) Notice of release of evidence by HUD. The verification consent form also shall notify the individual of the possible release of evidence of eligible immigration status by HUD. Evidence of eligible immigration status shall only be released to the INS for purposes of establishing eligibility for financial assistance and not for any other purpose. HUD is not responsible for the further use or transmission of the evidence or other information by the INS.
(e) Individuals who do not contend that they have eligible status. If one or more members of a family elect not to contend that they have eligible immigration status, and other members of the family establish their citizenship or eligible immigration status, the family may be eligible for assistance under §§ 5.516 and 5.518, or § 5.520, despite the fact that no declaration or documentation of eligible status is submitted for one or more members of the family. The family, however, must identify in writing to the responsible entity, the family member (or members) who will elect not to contend that he or she has eligible immigration status.
(f) Notification of requirements of Section 214--

(1) When notice is to be issued. Notification of the requirement to submit evidence of citizenship or eligible immigration status, as required by this section, or to elect not to contend that one has eligible status as provided by paragraph (e) of this section, shall be given by the responsible entity as follows:
(i) Applicant's notice. The notification described in paragraph (f)(1) of this section shall be given to each applicant at the time of application for assistance. Applicants whose applications are pending on June 19, 1995, shall be notified of the requirement to submit evidence of eligible status as soon as possible after June 19, 1995.
(ii) Notice to tenants. The notification described in paragraph (f)(1) of this section shall be given to each tenant at the time of, and together with, the responsible entity's notice of regular reexamination of income, but not later than one year following June 19, 1995.
(iii) Timing of mortgagor's notice. A mortgagor receiving Section 235 assistance must be provided the notification described in paragraph (f)(1) of this section and any additional requirements imposed under the Section 235 Program.
(2) Form and content of notice. The notice shall:
(i) State that financial assistance is contingent upon the submission and verification, as appropriate, of evidence of citizenship or eligible immigration status as required by paragraph (a) of this section;
(ii) Describe the type of evidence that must be submitted, and state the time period in which that evidence must be submitted (see paragraph (g) of this section concerning when evidence must be submitted); and
(iii) State that assistance will be prorated, denied or terminated, as appropriate, upon a final determination of ineligibility after all appeals have been exhausted (see § 5.514 concerning INS appeal, and informal hearing process) or, if appeals are not pursued, at a time to be specified in accordance with HUD requirements. Tenants also shall be informed of how to obtain assistance under the preservation of families provisions of §§ 5.516 and 5.518.
(g) When evidence of eligible status is required to be submitted. The responsible entity shall require evidence of eligible status to be submitted at the times specified in paragraph (g) of this section, subject to any extension granted in accordance with paragraph (h) of this section.
(1) Applicants. For applicants, responsible entities must ensure that evidence of eligible status is submitted not later than the date the responsible entity anticipates or has knowledge that verification of other aspects of eligibility for assistance will occur (see § 5.512(a)).
(2) Tenants. For tenants, evidence of eligible status is required to be submitted as follows:
(i) For financial assistance under a Section 214 covered program, with the exception of Section 235 assistance payments, the required evidence shall be submitted at the first regular reexamination after June 19, 1995, in accordance with program requirements.
(ii) For financial assistance in the form of Section 235 assistance payments, the mortgagor shall submit the required evidence in accordance with requirements imposed under the Section 235 Program.
(3) New occupants of assisted units. For any new occupant of an assisted unit (e.g., a new family member comes to reside in the assisted unit), the required evidence shall be submitted at the first interim or regular reexamination following the person's occupancy.
(4) Changing participation in a HUD program. Whenever a family applies for admission to a Section 214 covered program, evidence of eligible status is required to be submitted in accordance with the requirements of this subpart unless the family already has submitted the evidence to the responsible entity for a Section 214 covered program.
(5) One-time evidence requirement for continuous occupancy. For each family member, the family is required to submit evidence of eligible status only one time during continuously assisted occupancy under any Section 214 covered program.
(h) Extensions of time to submit evidence of eligible status--
(1) When extension must be granted. The responsible entity shall extend the time, provided in paragraph (g) of this section, to submit evidence of eligible immigration status if the family member:

(i) Submits the declaration required under § 5.508(a) certifying that any person for whom required evidence has not been submitted is a noncitizen with eligible immigration status; and
(ii) Certifies that the evidence needed to support a claim of eligible immigration status is temporarily unavailable, additional time is needed to obtain and submit the evidence, and prompt and diligent efforts will be undertaken to obtain the evidence.
(2) Thirty-day extension period. Any extension of time, if granted, shall not exceed thirty (30) days. The additional time provided should be sufficient to allow the individual the time to obtain the evidence needed. The responsible entity's determination of the length of the extension needed shall be based on the circumstances of the individual case.
(3) Grant or denial of extension to be in writing. The responsible entity's decision to grant or deny an extension as provided in paragraph (h)(1) of this section shall be issued to the family by written notice. If the extension is granted, the notice shall specify the extension period granted (which shall not exceed thirty (30) days). If the extension is denied, the notice shall explain the reasons for denial of the extension.
(i) Failure to submit evidence or to establish eligible status. If the family fails to submit required evidence of eligible immigration status within the time period specified in the notice, or any extension granted in accordance with paragraph (h) of this section, or if the evidence is timely submitted but fails to establish eligible immigration status, the responsible entity shall proceed to deny, prorate or terminate assistance, or provide continued assistance or temporary deferral of termination of assistance, as appropriate, in accordance with the provisions of §§ 5.514, 5.516, and 5.518.
(ii) [Reserved]

§ 5.510 Documents of eligible immigration status.

(a) General. A responsible entity shall request and review original documents of eligible immigration status. The responsible entity shall retain photocopies of the documents for its own records and return the original documents to the family.
(b) Acceptable evidence of eligible immigration status. Acceptable evidence of eligible immigration status shall be the original of a document designated by INS as acceptable evidence of immigration status in one of the six categories mentioned in § 5.506(a) for the specific immigration status claimed by the individual.

§ 5.512 Verification of eligible immigration status.

Currentness

(a) General. Except as described in paragraph (b) of this section and § 5.514, no individual or family applying for assistance may receive such assistance prior to the verification of the eligibility of at least the individual or one family member. Verification of eligibility consistent with § 5.514 occurs when the individual or family members have submitted documentation to the responsible entity in accordance with § 5.508.
(b) PHA election to provide assistance before verification. A PHA that is a responsible entity under this subpart may elect to provide assistance to a family before the verification of the eligibility of the individual or one family member.
(c) Primary verification--
(1) Automated verification system. Primary verification of the immigration status of the person is conducted by the responsible entity through the INS automated system (INS Systematic Alien Verification for Entitlements (SAVE)). The INS SAVE system provides access to names, file numbers and admission numbers of noncitizens.
(2) Failure of primary verification to confirm eligible immigration status. If the INS SAVE system does not verify eligible immigration status, secondary verification must be performed.
(d) Secondary verification--

(1) Manual search of INS records. Secondary verification is a manual search by the INS of its records to determine an individual's immigration status. The responsible entity must request secondary verification, within 10 days of receiving the results of the primary verification, if the primary verification system does not confirm eligible immigration status, or if the primary verification system verifies immigration status that is ineligible for assistance under a Section 214 covered program.
(2) Secondary verification initiated by responsible entity. Secondary verification is initiated by the responsible entity forwarding photocopies of the original INS documents required for the immigration status declared (front and back), attached to the INS document verification request form G–845S (Document Verification Request), or such other form specified by the INS to a designated INS office for review. (Form G–845S is available from the local INS Office.)
(3) Failure of secondary verification to confirm eligible immigration status. If the secondary verification does not confirm eligible immigration status, the responsible entity shall issue to the family the notice described in § 5.514(d), which includes notification of the right to appeal to the INS of the INS finding on immigration status (see § 5.514(d)(4)).
(e) Exemption from liability for INS verification. The responsible entity shall not be liable for any action, delay, or failure of the INS in conducting the automated or manual verification.

§ 5.514 Delay, denial, reduction or termination of assistance.

Currentness

(a) General. Assistance to a family may not be delayed, denied, reduced or terminated because of the immigration status of a family member except as provided in this section.
(b) Restrictions on delay, denial, reduction or termination of assistance.
(1) Restrictions on reduction, denial or termination of assistance for applicants and tenants. Assistance to an applicant or tenant shall not be delayed, denied, reduced, or terminated, on the basis of ineligible immigration status of a family member if:
(i) The primary and secondary verification of any immigration documents that were timely submitted has not been completed;
(ii) The family member for whom required evidence has not been submitted has moved from the assisted dwelling unit;
(iii) The family member who is determined not to be in an eligible immigration status following INS verification has moved from the assisted dwelling unit;
(iv) The INS appeals process under § 5.514(e) has not been concluded;
(v) Assistance is prorated in accordance with § 5.520; or
(vi) Assistance for a mixed family is continued in accordance with §§ 5.516 and 5.518; or
(vii) Deferral of termination of assistance is granted in accordance with §§ 5.516 and 5.518.
(2) Restrictions on delay, denial, reduction or termination of assistance pending fair hearing for tenants. In addition to the factors listed in paragraph (b)(1) of this section, assistance to a tenant cannot be delayed, denied, reduced or terminated until the completion of the informal hearing described in paragraph (f) of this section.
(c) Events causing denial or termination of assistance.
(1) General. Assistance to an applicant shall be denied, and a tenant's assistance shall be terminated, in accordance with the procedures of this section, upon the occurrence of any of the following events:
(i) Evidence of citizenship (i.e., the declaration) and eligible immigration status is not submitted by the date specified in § 5.508(g)or by the expiration of any extension granted in accordance with § 5.508(h);
(ii) Evidence of citizenship and eligible immigration status is timely submitted, but INS primary and secondary verification does not verify eligible immigration status of a family member; and
(A) The family does not pursue INS appeal or informal hearing rights as provided in this section; or

(B) INS appeal and informal hearing rights are pursued, but the final appeal or hearing decisions are decided against the family member; or
(iii) The responsible entity determines that a family member has knowingly permitted another individual who is not eligible for assistance to reside (on a permanent basis) in the public or assisted housing unit of the family member. Such termination shall be for a period of not less than 24 months. This provision does not apply to a family if the ineligibility of the ineligible individual was considered in calculating any proration of assistance provided for the family.
(2) Termination of assisted occupancy. For termination of assisted occupancy, see paragraph (i) of this section.
(d) Notice of denial or termination of assistance. The notice of denial or termination of assistance shall advise the family:
(1) That financial assistance will be denied or terminated, and provide a brief explanation of the reasons for the proposed denial or termination of assistance;
(2) That the family may be eligible for proration of assistance as provided under § 5.520;
(3) In the case of a tenant, the criteria and procedures for obtaining relief under the provisions for preservation of families in §§ 5.514 and 5.518;
(4) That the family has a right to request an appeal to the INS of the results of secondary verification of immigration status and to submit additional documentation or a written explanation in support of the appeal in accordance with the procedures of paragraph (e) of this section;
(5) That the family has a right to request an informal hearing with the responsible entity either upon completion of the INS appeal or in lieu of the INS appeal as provided in paragraph (f) of this section;
(6) For applicants, the notice shall advise that assistance may not be delayed until the conclusion of the INS appeal process, but assistance may be delayed during the pendency of the informal hearing process.
(e) Appeal to the INS--
(1) Submission of request for appeal. Upon receipt of notification by the responsible entity that INS secondary verification failed to confirm eligible immigration status, the responsible entity shall notify the family of the results of the INS verification, and the family shall have 30 days from the date of the responsible entity's notification, to request an appeal of the INS results. The request for appeal shall be made by the family communicating that request in writing directly to the INS. The family must provide the responsible entity with a copy of the written request for appeal and proof of mailing.
(2) Documentation to be submitted as part of appeal to INS. The family shall forward to the designated INS office any additional documentation or written explanation in support of the appeal. This material must include a copy of the INS document verification request form G–845S (used to process the secondary verification request) or such other form specified by the INS, and a cover letter indicating that the family is requesting an appeal of the INS immigration status verification results.
(3) Decision by INS--
(i) When decision will be issued. The INS will issue to the family, with a copy to the responsible entity, a decision within 30 days of its receipt of documentation concerning the family's appeal of the verification of immigration status. If, for any reason, the INS is unable to issue a decision within the 30 day time period, the INS will inform the family and responsible entity of the reasons for the delay.
(ii) Notification of INS decision and of informal hearing procedures. When the responsible entity receives a copy of the INS decision, the responsible entity shall notify the family of its right to request an informal hearing on the responsible entity's ineligibility determination in accordance with the procedures of paragraph (f) of this section.
(4) No delay, denial, reduction, or termination of assistance until completion of INS appeal process; direct appeal to INS. Pending the completion of the INS appeal under this section, assistance may not be delayed, denied, reduced or terminated on the basis of immigration status.
(f) Informal hearing.

(1) When request for hearing is to be made. After notification of the INS decision on appeal, or in lieu of request of appeal to the INS, the family may request that the responsible entity provide a hearing. This request must be made either within 30 days of receipt of the notice described in paragraph (d) of this section, or within 30 days of receipt of the INS appeal decision issued in accordance with paragraph (e) of this section.
(2) Informal hearing procedures--
(i) Tenants assisted under a Section 8 covered program: For tenants assisted under a Section 8 covered program, the procedures for the hearing before the responsible entity are set forth in:
(A) For Section 8 Moderate Rehabilitation assistance: 24 CFR part 882;
(B) For Section 8 tenant-based assistance: 24 CFR part 982; or
(C) For Section 8 project-based certificate program: 24 CFR part 983.
(ii) Tenants assisted under any other Section 8 covered program or a Public Housing covered program: For tenants assisted under a Section 8 covered program not listed in paragraph (f)(3)(i) of this section or a Public Housing covered program, the procedures for the hearing before the responsible entity are set forth in 24 CFR part 966.
(iii) Families under Housing covered programs and applicants for assistance under all covered programs. For all families under Housing covered programs (applicants as well as tenants already receiving assistance) and for applicants for assistance under all covered programs, the procedures for the informal hearing before the responsible entity are as follows:
(A) Hearing before an impartial individual. The family shall be provided a hearing before any person(s) designated by the responsible entity (including an officer or employee of the responsible entity), other than a person who made or approved the decision under review, and other than a person who is a subordinate of the person who made or approved the decision;
(B) Examination of evidence. The family shall be provided the opportunity to examine and copy at the individual's expense, at a reasonable time in advance of the hearing, any documents in the possession of the responsible entity pertaining to the family's eligibility status, or in the possession of the INS (as permitted by INS requirements), including any records and regulations that may be relevant to the hearing;
(C) Presentation of evidence and arguments in support of eligible status. The family shall be provided the opportunity to present evidence and arguments in support of eligible status. Evidence may be considered without regard to admissibility under the rules of evidence applicable to judicial proceedings;
(D) Controverting evidence of the responsible entity. The family shall be provided the opportunity to controvert evidence relied upon by the responsible entity and to confront and cross-examine all witnesses on whose testimony or information the responsible entity relies;
(E) Representation. The family shall be entitled to be represented by an attorney, or other designee, at the family's expense, and to have such person make statements on the family's behalf;
(F) Interpretive services. The family shall be entitled to arrange for an interpreter to attend the hearing, at the expense of the family, or responsible entity, as may be agreed upon by the two parties to the proceeding; and
(G) Hearing to be recorded. The family shall be entitled to have the hearing recorded by audiotape (a transcript of the hearing may, but is not required to, be provided by the responsible entity).
(3) Hearing decision. The responsible entity shall provide the family with a written final decision, based solely on the facts presented at the hearing, within 14 days of the date of the informal hearing. The decision shall state the basis for the decision.
(g) Judicial relief. A decision against a family member, issued in accordance with paragraphs (e) or (f) of this section, does not preclude the family from exercising the right, that may otherwise be available, to seek redress directly through judicial procedures.

(h) Retention of documents. The responsible entity shall retain for a minimum of 5 years the following documents that may have been submitted to the responsible entity by the family, or provided to the responsible entity as part of the INS appeal or the informal hearing process:
(1) The application for financial assistance;
(2) The form completed by the family for income reexamination;
(3) Photocopies of any original documents (front and back), including original INS documents;
(4) The signed verification consent form;
(5) The INS verification results;
(6) The request for an INS appeal;
(7) The final INS determination;
(8) The request for an informal hearing; and
(9) The final informal hearing decision.
(i) Termination of assisted occupancy.
(1) Under Housing covered programs, and in the Section 8 covered programs other than the Section 8 Rental Certificate, Rental Voucher, and Moderate Rehabilitation programs, assisted occupancy is terminated by:
(i) If permitted under the lease, the responsible entity notifying the tenant that because of the termination of assisted occupancy the tenant is required to pay the HUD-approved market rent for the dwelling unit.
(ii) The responsible entity and tenant entering into a new lease without financial assistance.
(iii) The responsible entity evicting the tenant. While the tenant continues in occupancy of the unit, the responsible entity may continue to receive assistance payments if action to terminate the tenancy under an assisted lease is promptly initiated and diligently pursued, in accordance with the terms of the lease, and if eviction of the tenant is undertaken by judicial action pursuant to State and local law. Action by the responsible entity to terminate the tenancy and to evict the tenant must be in accordance with applicable HUD regulations and other HUD requirements. For any jurisdiction, HUD may prescribe a maximum period during which assistance payments may be continued during eviction proceedings and may prescribe other standards of reasonable diligence for the prosecution of eviction proceedings.
(2) In the Section 8 Rental Certificate, Rental Voucher, and Moderate Rehabilitation programs, assisted occupancy is terminated by terminating assistance payments. (See provisions of this section concerning termination of assistance.) The PHA shall not make any additional assistance payments to the owner after the required procedures specified in this section have been completed. In addition, the PHA shall not approve a lease, enter into an assistance contract, or process a portability move for the family after those procedures have been completed.

§ 5.516 Availability of preservation assistance to mixed families and other families.

Currentness

(a) Assistance available for tenant mixed families--
(1) General. Preservation assistance is available to tenant mixed families, following completion of the appeals and informal hearing procedures provided in § 5.514. There are three types of preservation assistance:
(i) Continued assistance (see paragraph (a) of § 5.518);
(ii) Temporary deferral of termination of assistance (see paragraph (b) of § 5.518); or
(iii) Prorated assistance (see § 5.520, a mixed family must be provided prorated assistance if the family so requests).
(2) Availability of assistance--
(i) For Housing covered programs: One of the three types of assistance described is available to tenant mixed families assisted under a National Housing Act or 1965 HUD Act covered program, depending

upon the family's eligibility for such assistance. Continued assistance must be provided to a mixed family that meets the conditions for eligibility for continued assistance.
(ii) For Section 8 or Public Housing covered programs. One of the three types of assistance described may be available to tenant mixed families assisted under a Section 8 or Public Housing covered program.
(b) Assistance available for applicant mixed families. Prorated assistance is also available for mixed families applying for assistance as provided in § 5.520.
(c) Assistance available to other families in occupancy. Temporary deferral of termination of assistance may be available to families receiving assistance under a Section 214 covered program on June 19, 1995, and who have no members with eligible immigration status, as set forth in paragraphs (c)(1) and (2) of this section.
(1) For Housing covered programs: Temporary deferral of termination of assistance is available to families assisted under a Housing covered program.
(2) For Section 8 or Public Housing covered programs: The responsible entity may make temporary deferral of termination of assistance to families assisted under a Section 8 or Public Housing covered program.
(d) Section 8 covered programs: Discretion afforded to provide certain family preservation assistance--
(1) Project owners. With respect to assistance under a Section 8 Act covered program administered by a project owner, HUD has the discretion to determine under what circumstances families are to be provided one of the two statutory forms of assistance for preservation of the family (continued assistance or temporary deferral of assistance). HUD is exercising its discretion by specifying the standards in this section under which a project owner must provide one of these two types of assistance to a family. However, project owners and PHAs must offer prorated assistance to eligible mixed families.
(2) PHAs. The PHA, rather than HUD, has the discretion to determine the circumstances under which a family will be offered one of the two statutory forms of assistance (continued assistance or temporary deferral of termination of assistance). The PHA must establish its own policy and criteria to follow in making its decision. In establishing the criteria for granting continued assistance or temporary deferral of termination of assistance, the PHA must incorporate the statutory criteria, which are set forth in paragraphs (a) and (b) of § 5.518. However, the PHA must offer prorated assistance to eligible families.

§ 5.518 Types of preservation assistance available to mixed families and other families.

Currentness

(a) Continued assistance.
(1) General. A mixed family may receive continued housing assistance if all of the following conditions are met (a mixed family assisted under a Housing covered program must be provided continued assistance if the family meets the following conditions):
(i) The family was receiving assistance under a Section 214 covered program on June 19, 1995;
(ii) The family's head of household or spouse has eligible immigration status as described in § 5.506; and
(iii) The family does not include any person (who does not have eligible immigration status) other than the head of household, any spouse of the head of household, any parents of the head of household, any parents of the spouse, or any children of the head of household or spouse.
(2) Proration of continued assistance. A family entitled to continued assistance before November 29, 1996 is entitled to continued assistance as described in paragraph (a) of this section. A family entitled to continued assistance after November 29, 1996 shall receive prorated assistance as described in § 5.520.
(b) Temporary deferral of termination of assistance--
(1) Eligibility for this type of assistance. If a mixed family qualifies for prorated assistance (and does not qualify for continued assistance), but decides not to accept prorated assistance, or if a family has no members with eligible immigration status, the family may be eligible for temporary deferral of

termination of assistance if necessary to permit the family additional time for the orderly transition of those family members with ineligible status, and any other family members involved, to other affordable housing. Other affordable housing is used in the context of transition of an ineligible family from a rent level that reflects HUD assistance to a rent level that is unassisted; the term refers to housing that is not substandard, that is of appropriate size for the family and that can be rented for an amount not exceeding the amount that the family pays for rent, including utilities, plus 25 percent.

(2) Housing covered programs: Conditions for granting temporary deferral of termination of assistance. The responsible entity shall grant a temporary deferral of termination of assistance to a mixed family if the family is assisted under a Housing covered program and one of the following conditions is met:

(i) The family demonstrates that reasonable efforts to find other affordable housing of appropriate size have been unsuccessful (for purposes of this section, reasonable efforts include seeking information from, and pursuing leads obtained from the State housing agency, the city government, local newspapers, rental agencies and the owner);

(ii) The vacancy rate for affordable housing of appropriate size is below five percent in the housing market for the area in which the project is located; or

(iii) The consolidated plan, as described in 24 CFR part 91 and if applicable to the covered program, indicates that the local jurisdiction's housing market lacks sufficient affordable housing opportunities for households having a size and income similar to the family seeking the deferral.

(3) Time limit on deferral period. If temporary deferral of termination of assistance is granted, the deferral period shall be for an initial period not to exceed six months. The initial period may be renewed for additional periods of six months, but the aggregate deferral period for deferrals provided after November 29, 1996 shall not exceed a period of eighteen months. The aggregate deferral period for deferrals granted prior to November 29, 1996 shall not exceed 3 years. These time periods do not apply to a family which includes a refugee under section 207 of the Immigration and Nationality Act or an individual seeking asylum under section 208 of that Act.

(4) Notification requirements for beginning of each deferral period. At the beginning of each deferral period, the responsible entity must inform the family of its ineligibility for financial assistance and offer the family information concerning, and referrals to assist in finding, other affordable housing.

(5) Determination of availability of affordable housing at end of each deferral period.

(i) Before the end of each deferral period, the responsible entity must satisfy the applicable requirements of either paragraph (b)(5)(i)(A) or (B) of this section. Specifically, the responsible entity must:

(A) For Housing covered programs: Make a determination that one of the two conditions specified in paragraph (b)(2) of this section continues to be met (note: affordable housing will be determined to be available if the vacancy rate is five percent or greater), the owner's knowledge and the tenant's evidence indicate that other affordable housing is available; or

(B) For Section 8 or Public Housing covered programs: Make a determination of the availability of affordable housing of appropriate size based on evidence of conditions which when taken together will demonstrate an inadequate supply of affordable housing for the area in which the project is located, the consolidated plan (if applicable, as described in 24 CFR part 91), the responsible entity's own knowledge of the availability of affordable housing, and on evidence of the tenant family's efforts to locate such housing.

(ii) The responsible entity must also:

(A) Notify the tenant family in writing, at least 60 days in advance of the expiration of the deferral period, that termination will be deferred again (provided that the granting of another deferral will not result in aggregate deferral periods that exceeds the maximum deferral period). This time period does not apply to a family which includes a refugee under section 207 of the Immigration and Nationality Act or an individual seeking asylum under section 208 of that Act, and a determination was made that other affordable housing is not available; or

(B) Notify the tenant family in writing, at least 60 days in advance of the expiration of the deferral period, that termination of financial assistance will not be deferred because either granting another deferral will result in aggregate deferral periods that exceed the maximum deferral period (unless the family includes a refugee under section 207 of the Immigration and Nationality Act or an individual seeking asylum under section 208 of that Act), or a determination has been made that other affordable housing is available.
(c) Option to select proration of assistance at end of deferral period. A family who is eligible for, and receives temporary deferral of termination of assistance, may request, and the responsible entity shall provide proration of assistance at the end of the deferral period if the family has made a good faith effort during the deferral period to locate other affordable housing.
(d) Notification of decision on family preservation assistance. A responsible entity shall notify the family of its decision concerning the family's qualification for family preservation assistance. If the family is ineligible for family preservation assistance, the notification shall state the reasons, which must be based on relevant factors. For tenant families, the notice also shall inform the family of any applicable appeal rights.

§ 5.520 Proration of assistance.

(a) Applicability. This section applies to a mixed family other than a family receiving continued assistance, or other than a family who is eligible for and requests and receives temporary deferral of termination of assistance. An eligible mixed family who requests prorated assistance must be provided prorated assistance.
(b) Method of prorating assistance for Housing covered programs--
(1) Proration under Rent Supplement Program. If the household participates in the Rent Supplement Program, the rent supplement paid on the household's behalf shall be the rent supplement the household would otherwise be entitled to, multiplied by a fraction, the denominator of which is the number of people in the household and the numerator of which is the number of eligible persons in the household;
(2) Proration under Section 235 Program. If the household participates in the Section 235 Program, the interest reduction payments paid on the household's behalf shall be the payments the household would otherwise be entitled to, multiplied by a fraction the denominator of which is the number of people in the household and the numerator of which is the number of eligible persons in the household;
(3) Proration under Section 236 Program without the benefit of additional assistance. If the household participates in the Section 236 Program without the benefit of any additional assistance, the household's rent shall be increased above the rent the household would otherwise pay by an amount equal to the difference between the market rate rent for the unit and the rent the household would otherwise pay multiplied by a fraction the denominator of which is the number of people in the household and the numerator of which is the number of ineligible persons in the household;
(4) Proration under Section 236 Program with the benefit of additional assistance. If the household participates in the Section 236 Program with the benefit of additional assistance under the rent supplement, rental assistance payment or Section 8 programs, the household's rent shall be increased above the rent the household would otherwise pay by:
(i) An amount equal to the difference between the market rate rent for the unit and the basic rent for the unit multiplied by a fraction, the denominator of which is the number of people in the household, and the numerator of which is the number of ineligible persons in the household, plus;
(ii) An amount equal to the rent supplement, housing assistance payment or rental assistance payment the household would otherwise be entitled to multiplied by a fraction, the denominator of which is the number of people in the household and the numerator of which is the number of ineligible persons in the household.
(c) Method of prorating assistance for Section 8 covered programs--

(1) Section 8 assistance other than assistance provided for a tenancy under the Section 8 Rental Voucher Program or for an over–FMR tenancy in the Section 8 Rental Certificate Program. For Section 8 assistance other than assistance for a tenancy under the voucher program or an over–FMR tenancy under the certificate program, the PHA must prorate the family's assistance as follows:
(i) Step 1. Determine gross rent for the unit. (Gross rent is contract rent plus any allowance for tenant paid utilities).
(ii) Step 2. Determine total tenant payment in accordance with section 5.613(a). (Annual income includes income of all family members, including any family member who has not established eligible immigration status.)
(iii) Step 3. Subtract amount determined in paragraph (c)(1)(ii), (Step 2), from amount determined in paragraph (c)(1)(i), (Step 1).
(iv) Step 4. Multiply the amount determined in paragraph (c)(1)(iii), (Step 3) by a fraction for which:
(A) The numerator is the number of family members who have established eligible immigration status; and
(B) The denominator is the total number of family members.
(v) Prorated housing assistance. The amount determined in paragraph (c)(1)(iv), (Step 4) is the prorated housing assistance payment for a mixed family.
(vi) No effect on contract rent. Proration of the housing assistance payment does not affect contract rent to the owner. The family must pay as rent the portion of contract rent not covered by the prorated housing assistance payment.
(2) Assistance for a Section 8 voucher tenancy or over–FMR tenancy. For a tenancy under the voucher program or for an over–FMR tenancy under the certificate program, the PHA must prorate the family's assistance as follows:
(i) Step 1. Determine the amount of the pre-proration housing assistance payment. (Annual income includes income of all family members, including any family member who has not established eligible immigration status.)
(ii) Step 2. Multiply the amount determined in paragraph (c)(2)(i), (Step 1) by a fraction for which:
(A) The numerator is the number of family members who have established eligible immigration status; and
(B) The denominator is the total number of family members.
(iii) Prorated housing assistance. The amount determined in paragraph (c)(2)(ii), (Step 2) is the prorated housing assistance payment for a mixed family.
(iv) No effect on rent to owner. Proration of the housing assistance payment does not affect rent to owner. The family must pay the portion of rent to owner not covered by the prorated housing assistance payment.
(d) Method of prorating assistance for Public Housing covered programs. The PHA shall prorate the family's assistance by:
(1) Step 1. Determining total tenant payment in accordance with 24 CFR 913.107(a). (Annual income includes income of all family members, including any family member who has not established eligible immigration status.)
(2) Step 2. Subtracting the total tenant payment from a HUD-supplied “public housing maximum rent” applicable to the unit or the PHA. (This “maximum rent” shall be determined by HUD using the 95th percentile rent for the PHA.) The result is the maximum subsidy for which the family could qualify if all members were eligible (“family maximum subsidy”).
(3) Step 3. Dividing the family maximum subsidy by the number of persons in the family (all persons) to determine the maximum subsidy per each family member who has citizenship or eligible immigration status (“eligible family member”). The subsidy per eligible family member is the “member maximum subsidy”.

(4) Step 4. Multiplying the member maximum subsidy by the number of family members who have citizenship or eligible immigration status (“eligible family members”).
(5) Step 5. The product of steps 1 through 4, as set forth in paragraph (d)(2) of this section is the amount of subsidy for which the family is eligible (“eligible subsidy”). The family's rent is the “public housing maximum rent” minus the amount of the eligible subsidy.

§ 5.522 Prohibition of assistance to noncitizen students.

(a) General. The provisions of §§ 5.516 and 5.518 permitting continued assistance or temporary deferral of termination of assistance for certain families do not apply to any person who is determined to be a noncitizen student as in paragraph (c)(2)(A) of Section 214 (42 U.S.C. 1436a(c)(2)(A)). The family of a noncitizen student may be eligible for prorated assistance, as provided in paragraph (b)(2) of this section.
(b) Family of noncitizen students.
(1) The prohibition on providing assistance to a noncitizen student as described in paragraph (a) of this section extends to the noncitizen spouse of the noncitizen student and minor children accompanying the student or following to join the student.
(2) The prohibition on providing assistance to a noncitizen student does not extend to the citizen spouse of the noncitizen student and the children of the citizen spouse and noncitizen student.

§ 5.524 Compliance with nondiscrimination requirements.

The responsible entity shall administer the restrictions on use of assisted housing by noncitizens with ineligible immigration status imposed by this part in conformity with all applicable nondiscrimination and equal opportunity requirements, including, but not limited to, title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–2000d–5) and the implementing regulations in 24 CFR part 1, section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and the implementing regulations in 24 CFR part 8, the Fair Housing Act (42 U.S.C. 3601–3619) and the implementing regulations in 24 CFR part 100.

§ 5.526 Protection from liability for responsible entities and State and local government agencies and officials.

(a) Protection from liability for responsible entities. Responsible entities are protected from liability as set forth in Section 214(e) (42 U.S.C 1436a(e)).
(b) Protection from liability for State and local government agencies and officials. State and local government agencies and officials shall not be liable for the design or implementation of the verification system described in § 5.512, as long as the implementation by the State and local government agency or official is in accordance with prescribed HUD rules and requirements.

§ 5.528 Liability of ineligible tenants for reimbursement of benefits.

Where a tenant has received the benefit of HUD financial assistance to which the tenant was not entitled because the tenant intentionally misrepresented eligible status, the ineligible tenant is responsible for reimbursing HUD for the assistance improperly paid. If the amount of the assistance is substantial, the responsible entity is encouraged to refer the case to the HUD Inspector General's office for further investigation. Possible criminal prosecution may follow based on the False Statements Act (18 U.S.C. 1001 and 1010).
SOURCE: 61 FR 5202, Feb. 9, 1996; 61 FR 9041, March 6, 1996; 61 FR 9537, March 8, 1996; 61 FR 11113, March 18, 1996; 61 FR 13616, March 27, 1996; 61 FR 54498, Oct. 18, 1996; 70 FR 77743, Dec. 30, 2005; 73 FR 72340, Nov. 28, 2008; 75 FR 66258, Oct. 27, 2010, unless otherwise noted.

Chapter 13 - Category 11h Project not Available to the General Public (Notifications of Fair Housing Act Administrative and Legal Actions)

Definition

State agencies must report the receipt of notices of Fair Housing Act (FHA) administrative and legal action issued by HUD or the Department of Justice to the Internal Revenue Service.

The Fair Housing Act

LIHC properties are subject to Title VIII of the Civil Rights Act of 1968[1], which makes it unlawful to discriminate in any aspect relating to the sale or rental of dwellings, in the availability of transactions related to residential real estate, or in the provision of services and facilities in connection therewith because of race, color, religion, sex, disability, familial status, or national origin.

Reasonable Modification and Accommodation

The FHA specifically makes it unlawful to refuse to permit, at the expense of the person with a disability, reasonable modifications to existing premises if the modifications are necessary to accommodate a person with a disability to occupy the premises. A landlord may, where reasonable, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification.

The FHA also makes it unlawful to refuse to make reasonable accommodations in rules, policies, practices or services to afford a person with a disability equal opportunity to use and enjoy a dwelling.

Accessibility

The FHA makes it unlawful to design and construct certain multifamily dwellings for first occupancy after March 13, 1991, in a manner that makes them inaccessible to persons with disabilities. The Fair Housing Act defines multifamily dwellings as buildings consisting of four or more units if such buildings have one or more elevators; and ground floor units in other buildings consisting of four or more units.

All premises within such dwellings are also specifically required to contain features of adaptive design so that the dwelling is readily accessible to and useable by persons with disabilities.[2] The FHA provides a list of the accessibility features necessary for compliance with the design and construction requirements[3]:

1. the public and common use portions of such dwellings are readily accessible to and usable by disabled persons;
2. all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by disabled persons in wheelchairs;
3. all premises within such dwelling contain the following features of adaptive design:
    1. an accessible route into and through the dwelling;
    2. light switches, electrical outlet, thermostats, and other environmental controls in accessible locations;
    3. reinforcements in bathroom walls to allow later installation of grab bars;
    4. usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

Citizenship Status

The FHA does not prohibit discrimination based solely on a person's citizenship status. Therefore, asking housing applicants to provide documentation of their citizenship or immigration status during the screening process would not violate the FHA. Owners implementing citizenship or immigration status screening measures must make sure they are carried out in a uniform, nondiscriminatory fashion.

Example 1: Visa Expiration

A person applying for an LIHC apartment mentions in the interview that he left his native country to study in the United States. The landlord, concerned that the student's visa may expire during tenancy, asks the student for documentation to determine how long he is legally allowed to be in the United States.

If the landlord requests this information, regardless of the applicant's race or specific national origin, the landlord has not violated the Fair Housing Act.

Questions concerning the Fair Housing Act should be referred to the state's HUD regional office. HUD's regional offices are listed in Exhibit 13-1.Role of the U.S. Department of Housing and Urban Development (HUD)

HUD is responsible for enforcing the Fair Housing Act. In so doing, HUD investigates allegations of housing discrimination, attempts to resolve the complaint, and determines whether there is reasonable cause to pursue civil action. If reasonable cause is present, HUD must bring the case before an administrative law judge. In the alternative, if either party elects to have claims or complaints decided in a civil action, HUD must refer the complaint to the U.S. Department of Justice for prosecution in the United States District Court.

Role of the U.S. Department of Justice

The Department of Justice (DOJ) may file a lawsuit whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination or denial of rights to a group of persons where such denial raises an issue of general public importance. DOJ may also file a lawsuit based upon HUD referrals involving the legality of any state or local zoning, or other land use law or ordinance if the parties agree to a civil action. DOJ may also enter into settlement/consent agreements with property owners to obtain compliance with the Fair Housing Act. DOJ may also seek a court judgment to enforce the terms of a settlement/consent agreement.

Role of Substantially Equivalent State or Local Fair Housing Agency

Where HUD has determined that state or local laws are substantially equivalent to the federal Fair Housing Act, a state or local fair housing agency investigates fair housing allegations, attempts conciliation, and determines whether reasonable cause exists to believe a discriminatory housing practice has occurred. If the fair housing agency makes a determination of reasonable cause, then a charge is filed with representation of the complainant provided by a state or local representative.

Memorandum of Understanding (MOU) Among Treasury , HUD and DOJ

Treasury, HUD, and DOJ entered into an MOU in a cooperative effort to promote enhanced compliance with the Fair Housing Act for the benefit of residents of LIHC properties and the general public. Key points of the MOU include coordinated procedures for notifying the state

agencies and IRS of charges, lawsuits, or other actions under the Fair Housing Act involving an LIHC property. The MOU also calls for interagency assistance and training, training for the state agencies and industry stakeholders, and training for architects on the accessibility requirements. See Exhibit 13-2 for the full text of the MOU.

Reporting of Fair Housing Act Administrative and Legal Actions

HUD or DOJ will notify a state agency of:

1. a charge by the Secretary of HUD for a violation of the Fair Housing Act,
2. a probable cause finding under a substantially equivalent fair housing state law or local ordinance by a substantially equivalent state or local agency,
3. a lawsuit under the Fair Housing Act filed by the DOJ, or
4. a settlement agreement or consent decree entered into between HUD or DOJ and the owner of an LIHC property.

Other non-FHA civil rights actions and lawsuits, such as section 504 Rehabilitation Act lawsuits or administrative actions, are not covered under the terms of the MOU and should not be reported to the IRS.

On receipt of such a notification, a state agency should immediately file a Form 8823 with the IRS noting the potential violation using the "out of compliance" box and notify the owner in writing. A sample letter that a state agency should send to the owner is included as Exhibit 13-3.

When a Form 8823 pertaining to the above is received, the IRS will send a letter to the owner notifying the owner that a finding of discrimination, including an adverse final decision by the Secretary of HUD, an adverse final decision by a substantially equivalent state or local fair housing agency, or an adverse judgment by a federal court, will result in the loss of low-income housing credits. Similarly, the IRS will also send a letter to owners notifying them that a judgment enforcing the terms of a settlement agreement or consent decree will result in the loss of low-income housing credits.

Potential Violations Discovered by State Agencies

State agencies should report potential Fair Housing Act violations discovered during their compliance monitoring activities to their HUD Regional offices, or other fair housing enforcement agencies, as appropriate. HUD's Regional offices are listed in Exhibit 13-1. Do not submit this information to the IRS via Form 8823.

State Agency Notified by HUD or DOJ that the Terms of Settlement Agreement, Consent Decree, or Judgment are Satisfied

Form 8823 should be filed with the IRS when the civil action is completed. HUD or DOJ will notify the state agency of the resolution of an alleged violation of the Fair Housing Act. Documentation that the owner has complied with the court order and/or HUD's requirements and that the violation has been corrected is needed.

IRS Determinations

The state agencies are responsible for reporting their receipt of notifications of administrative and legal action by HUD and the Department of Justice as outlined in the MOU. The IRS is responsible for determining whether the owner is out of compliance for purposes of IRC §42, and the associated out of compliance and back in compliance dates, based on the findings of the court proceeding. The determination will be based on the facts of the individual case.

Example 1: Violation of Fair Housing Act
A LIHC project discriminated against single women in its rental practices. The U.S. Department of Justice initiated a lawsuit and obtained a judgment covering all units in the project. The property violates the Fair Housing Act and is in violation of Treas. Reg. §1.42-9.

Depending on the nature of the violation, noncompliance may be determined at the unit, building, or project level. The costs attributable to a residential rental unit that is not for use by the general public are not excludable from eligible basis by reason of the unit's ineligibility for the credit under this section. However, in calculating the applicable fraction, the unit is treated as a residential rental unit that is not a low-income unit.

Reference

Treas. Reg. §1.42-9(a)

Footnotes:

[1]42 USC 3601 et.seq., as amended

[2]42 USC §3604(f)(3)(c)(iii)

[3]Refer to the Fair Housing Act Design Manual: A Manual to Assist Designers and Buildings in Meeting the Accessibility Requirements of the Fair Housing Act for more specific information about these requirements. The manual is available through HUD USER 1-800-245-2691.

§ 42. Low-income housing credit
Definition
26 U.S.C.A. § 42(i)(3)(D) (West 2011)

(i) Definitions and special rules.--For purposes of this section--

(1) Compliance period.--The term "compliance period" means, with respect to any building, the period of 15 taxable years beginning with the 1st taxable year of the credit period with respect thereto.

(2) Determination of whether building is federally subsidized.--

(A) In general.--Except as otherwise provided in this paragraph, for purposes of subsection (b)(1), a new building shall be treated as federally subsidized for any taxable year if, at any time during such taxable year or any prior taxable year, there is or was outstanding any obligation the interest on which is exempt from tax under section 103 the proceeds of which are or were used (directly or indirectly) with respect to such building or the operation thereof.

(B) Election to reduce eligible basis by proceeds of obligations.--A tax-exempt obligation shall not be taken into account under subparagraph (A) if the taxpayer elects to exclude from the eligible basis of the building for purposes of subsection (d) the proceeds of such obligation.

(C) Special rule for subsidized construction financing.--Subparagraph (A) shall not apply to any tax-exempt obligation used to provide construction financing for any building if--

(i) such obligation (when issued) identified the building for which the proceeds of such obligation would be used, and

(ii) such obligation is redeemed before such building is placed in service.

(3) Low-income unit.--

(A) In general.--The term "low-income unit" means any unit in a building if--

(i) such unit is rent-restricted (as defined in subsection (g)(2)), and

(ii) the individuals occupying such unit meet the income limitation applicable under subsection (g)(1) to the project of which such building is a part.

(B) Exceptions.--

(i) In general.--A unit shall not be treated as a low-income unit unless the unit is suitable for occupancy and used other than on a transient basis.

(ii) Suitability for occupancy.--For purposes of clause (i), the suitability of a unit for occupancy shall be determined under regulations prescribed by the Secretary taking into account local health, safety, and building codes.

(iii) Transitional housing for homeless.--For purposes of clause (i), a unit shall be considered to be used other than on a transient basis if the unit contains sleeping accommodations and kitchen and bathroom facilities and is located in a building--

(I) which is used exclusively to facilitate the transition of homeless individuals (within the meaning of section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302), as in effect on the date of the enactment of this clause) to independent living within 24 months, and

(II) in which a governmental entity or qualified nonprofit organization (as defined in subsection (h)(5)) provides such individuals with temporary housing and supportive services designed to assist such individuals in locating and retaining permanent housing.

(iv) Single-room occupancy units.--For purposes of clause (i), a single-room occupancy unit shall not be treated as used on a transient basis merely because it is rented on a month-by-month basis.

(C) Special rule for buildings having 4 or fewer units.--In the case of any building which has 4 or fewer residential rental units, no unit in such building shall be treated as a low-income unit if the units in such building are owned by--

(i) any individual who occupies a residential unit in such building, or

(ii) any person who is related (as defined in subsection (d)(2)(D)(iii)) to such individual.

(D) Certain students not to disqualify unit.--A unit shall not fail to be treated as a low-income unit merely because it is occupied--

(i) by an individual who is--

(I) a student and receiving assistance under title IV of the Social Security Act,

(II) a student who was previously under the care and placement responsibility of the State agency responsible for administering a plan under part B or part E of title IV of the Social Security Act, or

(III) enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar Federal, State, or local laws, or

(ii) entirely by full-time students if such students are--

(I) single parents and their children and such parents are not dependents (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof) of another individual and such children are not dependents (as so defined) of another individual other than a parent of such children, or.[4]

(II) married and file a joint return.

(E) Owner-occupied buildings having 4 or fewer units eligible for credit where development plan.--

(i) In general.--Subparagraph (C) shall not apply to the acquisition or rehabilitation of a building pursuant to a development plan of action sponsored by a State or local government or a qualified nonprofit organization (as defined in subsection (h)(5)(C)).

(ii) Limitation on credit.--In the case of a building to which clause (i) applies, the applicable fraction shall not exceed 80 percent of the unit fraction.

(iii) Certain unrented units treated as owner-occupied.--In the case of a building to which clause (i) applies, any unit which is not rented for 90 days or more shall be treated as occupied by the owner of the building as of the 1st day it is not rented.

(4) New building.--The term “new building” means a building the original use of which begins with the taxpayer.

(5) Existing building.--The term “existing building” means any building which is not a new building.

(6) Application to estates and trusts.--In the case of an estate or trust, the amount of the credit determined under subsection (a) and any increase in tax under subsection (j) shall be apportioned between the estate or trust and the beneficiaries on the basis of the income of the estate or trust allocable to each.

(7) Impact of tenant's right of 1st refusal to acquire property.--

(A) In general.--No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by the tenants (in cooperative form or otherwise) or resident management corporation of such building or by a qualified nonprofit organization (as defined in subsection (h)(5)(C)) or government agency to purchase the property after the close of the compliance period for a price which is not less than the minimum purchase price determined under subparagraph (B).

(B) Minimum purchase price.--For purposes of subparagraph (A), the minimum purchase price under this subparagraph is an amount equal to the sum of--

(i) the principal amount of outstanding indebtedness secured by the building (other than indebtedness incurred within the 5-year period ending on the date of the sale to the tenants), and

(ii) all Federal, State, and local taxes attributable to such sale.

Except in the case of Federal income taxes, there shall not be taken into account under clause (ii) any additional tax attributable to the application of clause (ii).

(8) Treatment of rural projects.--For purposes of this section, in the case of any project for residential rental property located in a rural area (as defined in section 520 of the Housing Act of 1949), any income limitation measured by reference to area median gross income shall be measured by reference to the greater of area median gross income or national non-metropolitan median income. The preceding sentence shall not apply with respect to any building if paragraph (1) of section 42(h) does not apply by reason of paragraph (4) thereof to any portion of the credit determined under this section with respect to such building.

(9) Coordination with low-income housing grants.--

(A) Reduction in State housing credit ceiling for low-income housing grants received in 2009.--For purposes of this section, the amounts described in clauses (i) through (iv) of subsection (h)(3)(C) with respect to any State for 2009 shall each be reduced by so much of such amount as is taken into account in determining the amount of any grant to such State under section 1602 of the American Recovery and Reinvestment Tax Act of 2009.

(B) Special rule for basis.--Basis of a qualified low-income building shall not be reduced by the amount of any grant described in subparagraph (A).

§ 13661. Screening of applicants for Federally assisted housing

26 U.S.C.A. § 13661(C)

(c) Authority to deny admission to criminal offenders

Except as provided in subsections (a) and (b) of this section and in addition to any other authority to screen applicants, in selecting among applicants for admission to the program or to federally assisted housing, if the public housing agency or owner of such housing (as applicable) determines that an applicant or any member of the applicant's household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees, the public housing agency or owner may--

(1) deny such applicant admission to the program or to federally assisted housing; and

(2) after the expiration of the reasonable period beginning upon such activity, require the applicant, as a condition of admission to the program or to federally assisted housing, to submit to the public housing agency or owner evidence sufficient (as the Secretary shall by regulation provide) to ensure that the individual or individuals in the applicant's household who engaged in criminal activity for which denial was made under paragraph (1) have not engaged in any criminal activity during such reasonable period.

Safety and Security in Public and Assisted Housing
§ 13664. Definitions
42 U.S.C.A. § 13664

(a)[1] Definitions

For purposes of this subchapter [42 U.S.C.A. § 13661 et seq.], the following definitions shall apply:

(1) Drug-related criminal activity

The term “drug-related criminal activity” has the meaning given the term in section 1437a(b) of this title.

(2) Federally assisted housing

The term “federally assisted housing” means a dwelling unit--

(A) in public housing (as such term is defined in section 1437a of this title);

(B) assisted with tenant-based assistance under section 1437f of this title;

(C) in housing that is provided project-based assistance under section 1437f of this title, including new construction and substantial rehabilitation projects;

(D) in housing that is assisted under section 1701q of Title 12 (as amended by section 801 of the Cranston-Gonzalez National Affordable Housing Act);

(E) in housing that is assisted under section 1701q of Title 12, as such section existed before the enactment of the Cranston-Gonzalez National Affordable Housing Act [November 28, 1990];

(F) in housing that is assisted under section 8013 of this title;

(G) in housing financed by a loan or mortgage insured under section 1715l(d)(3) of title 12 that bears interest at a rate determined under the proviso of section 1715l(d)(5) of Title 12;

(H) in housing insured, assisted, or held by the Secretary or a State or State agency under section 1715z-1 of Title 12; or

(I) in housing assisted under section 1484 or 1485 of this title.

(3) Owner

The term “owner” means, with respect to federally assisted housing, the entity or private person (including a cooperative or public housing agency) that has the legal right to lease or sublease dwelling units in such housing.

§ 1.42-10 Utility allowances
26 C.F.R. § 1.42-10

(a) Inclusion of utility allowances in gross rent. If the cost of any utility (other than telephone, cable television, or Internet) for a residential rental unit is paid directly by the tenant(s), and not by or through the owner of the building, the gross rent for that unit includes the applicable utility allowance determined under this section. This section only applies for purposes of determining gross rent undersection 42(g)(2)(B)(ii) as to rent-restricted units.

(b) Applicable utility allowances--(1) Buildings assisted by the Rural Housing Service. If a building receives assistance from the Rural Housing Service (RHS–assisted building), the applicable utility allowance for all rent-restricted units in the building is the utility allowance determined under the method prescribed by the Rural Housing Service (RHS) for the building (whether or not the building or its tenants also receive other state or federal assistance).

(2) Buildings with Rural Housing Service assisted tenants. If any tenant in a building receives RHS rental assistance payments (RHS tenant assistance), the applicable utility allowance for all rent-restricted units in the building (including any units occupied by tenants receiving rental assistance payments from the Department of Housing and Urban Development (HUD)) is the applicable RHS utility allowance.

(3) Buildings regulated by the Department of Housing and Urban Development. If neither a building nor any tenant in the building receives RHS housing assistance, and the rents and utility allowances of the building are reviewed by HUD on an annual basis (HUD–regulated building), the applicable utility allowance for all rent-restricted units in the building is the applicable HUD utility allowance.

(4) Other buildings. If a building is neither an RHS–assisted nor a HUD–regulated building, and no tenant in the building receives RHS tenant assistance, the applicable utility allowance for rent-restricted units in the building is determined under the following methods.

(i) Tenants receiving HUD rental assistance. The applicable utility allowance for any rent-restricted units occupied by tenants receiving HUD rental assistance payments (HUD tenant assistance) is the applicable Public Housing Authority (PHA) utility allowance established for the Section 8 Existing Housing Program.

(ii) Other tenants--(A) General rule. If none of the rules of paragraphs (b)(1), (2), (3), and (4)(i) of this section apply to any rent-restricted units in a building, the appropriate utility allowance for the units is the applicable PHA utility allowance. However, if a local utility company estimate is obtained for any unit in the building in accordance with paragraph (b)(4)(ii)(B) of this section, that estimate becomes the appropriate utility allowance for all rent-restricted units of similar size and construction in the building. This local utility company estimate procedure is not available for and does not apply to units to which the rules of paragraphs (b)(1), (2), (3), or (4)(i) of this section apply. However, if a local utility company estimate is obtained for any unit in the building under paragraph (b)(4)(ii)(B) of this section, a State or local housing credit agency (Agency) provides a building owner with an estimate for any unit in a building under paragraph (b)(4)(ii)(C) of this section, a cost estimate is calculated using the HUD Utility Schedule Model under paragraph (b)(4)(ii)(D) of this section, or a cost estimate is calculated by an energy consumption model under paragraph (b)(4)(ii)(E) of this section, then the estimate under paragraph (b)(4)(ii)(B), (C), (D), or (E) becomes the applicable utility allowance for all rent-restricted units of similar size and

construction in the building. Paragraphs (b)(4)(ii)(B), (C), (D), and (E) of this section do not apply to units to which the rules of paragraphs (b)(1), (2), (3), or (4)(i) of this section apply.

(B) Utility company estimate. Any interested party (including a low-income tenant, a building owner, or an Agency) may obtain a local utility company estimate for a unit. The estimate is obtained when the interested party receives, in writing, information from a local utility company providing the estimated cost of that utility for a unit of similar size and construction for the geographic area in which the building containing the unit is located. In the case of deregulated utility services, the interested party is required to obtain an estimate only from one utility company even if multiple companies can provide the same utility service to a unit. However, the utility company must offer utility services to the building in order for that utility company's rates to be used in calculating utility allowances. The estimate should include all component deregulated charges for providing the utility service. The local utility company estimate may be obtained by an interested party at any time during the building's extended use period (see section 42(h)(6)(D)) or, if the building does not have an extended use period, during the building's compliance period (see section 42(i)(1)). Unless the parties agree otherwise, costs incurred in obtaining the estimate are borne by the initiating party. The interested party that obtains the local utility company estimate (the initiating party) must retain the original of the utility company estimate and must furnish a copy of the local utility company estimate to the owner of the building (where the initiating party is not the owner), and the Agency that allocated credit to the building (where the initiating party is not the Agency). The owner of the building must make available copies of the utility company estimate to the tenants in the building.

(C) Agency estimate. A building owner may obtain a utility estimate for each unit in the building from the Agency that has jurisdiction over the building provided the Agency agrees to provide the estimate. The estimate is obtained when the building owner receives, in writing, information from the Agency providing the estimated per-unit cost of the utilities for units of similar size and construction for the geographic area in which the building containing the units is located. The Agency estimate may be obtained by a building owner at any time during the building's extended use period (see section 42(h)(6)(D)). Costs incurred in obtaining the estimate are borne by the building owner. In establishing an accurate utility allowance estimate for a particular building, an Agency (or an agent or other private contractor of the Agency that is a qualified professional within the meaning of paragraph (b)(4)(ii)(E) of this section) must take into account, among other things, local utility rates, property type, climate and degree-day variables by region in the State, taxes and fees on utility charges, building materials, and mechanical systems. If the Agency uses an agent or other private contractor to calculate the utility estimates, the agent or contractor and the owner must not be related within the meaning of section 267(b) or 707(b). An Agency may also use actual utility company usage data and rates for the building. However, use of the Agency estimate is limited to the building's consumption data for the twelve-month period ending no earlier than 60 days prior to the beginning of the 90–day period under paragraph (c)(1) of this section and utility rates used for the Agency estimate must be no older than the rates in place 60 days prior to the beginning of the 90–day period under paragraph (c)(1) of this section. In the case of newly constructed or renovated buildings with less than 12 months of consumption data, the Agency (or an agent or other private contractor of the Agency that is a qualified professional within the meaning of paragraph (b)(4)(ii)(E) of this section) may use consumption data for the 12–month period of units of similar size and construction in the geographic area in which the building containing the units is located.

(D) HUD Utility Schedule Model. A building owner may calculate a utility estimate using the "HUD Utility Schedule Model" that can be found on the Low–Income Housing Tax Credits page at http://www.huduser.org/datasets/lihtc.html (or successor URL). Utility rates used for the HUD Utility Schedule Model must be no older than the rates in place 60 days prior to the beginning of the 90–day period under paragraph (c)(1) of this section.

(E) Energy consumption model. A building owner may calculate utility estimates using an energy and water and sewage consumption and analysis model (energy consumption model). The energy consumption model must, at a minimum, take into account specific factors including, but not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of the building location. The utility consumption estimates must be calculated by either a properly licensed engineer or a qualified professional approved by the Agency that has jurisdiction over the building (together, qualified professional), and the qualified professional and the building owner must not be related within the meaning of section 267(b) or 707(b). Use of the energy consumption model is limited to the building's consumption data for the twelve-month period ending no earlier than 60 days prior to the beginning of the 90–day period under paragraph (c)(1) of this section, and utility rates used for the energy consumption model must be no older than the rates in place 60 days prior to the beginning of the 90–day period under paragraph (c)(1) of this section. In the case of newly constructed or renovated buildings with less than 12 months of consumption data, the qualified professional may use consumption data for the 12–month period of units of similar size and construction in the geographic area in which the building containing the units is located.

(c) Changes in applicable utility allowance--(1) In general. If, at any time during the building's extended use period (as defined insection 42(h)(6)(D)), the applicable utility allowance for units changes, the new utility allowance must be used to compute gross rents of the units due 90 days after the change (the 90–day period). For example, if rent must be lowered because a local utility company estimate is obtained that shows a higher utility cost than the otherwise applicable PHA utility allowance, the lower rent must be in effect for rent due at the end of the 90–day period. A building owner using a utility company estimate under paragraph (b)(4)(ii)(B) of this section, the HUD Utility Schedule Model under paragraph (b)(4)(ii)(D) of this section, or an energy consumption model under paragraph (b)(4)(ii)(E) of this section must submit copies of the utility estimates to the Agency that has jurisdiction over the building and make the estimates available to all tenants in the building at the beginning of the 90–day period before the utility allowances can be used in determining the gross rent of rent-restricted units. An Agency may require additional information from the owner during the 90–day period. Any utility estimates obtained under the Agency estimate under paragraph (b)(4)(ii)(C) of this section must also be made available to all tenants in the building at the beginning of the 90–day period. The building owner must pay for all costs incurred in obtaining the estimates under paragraphs (b)(4)(ii)(B), (C), (D), and (E) of this section and providing the estimates to the Agency and the tenants. The building owner is not required to review the utility allowances, or implement new utility allowances, until the building has achieved 90 percent occupancy for a period of 90 consecutive days or the end of the first year of the credit period, whichever is earlier.

(2) Annual review. A building owner must review at least once during each calendar year the basis on which utility allowances have been established and must update the applicable utility allowance in accordance with paragraph (c)(1) of this section. The review must take into account any changes to the building such as any energy conservation measures that affect energy consumption and changes in utility rates.

(d) Record retention. The building owner must retain any utility consumption estimates and supporting data as part of the taxpayer's records for purposes of § 1.6001–1(a).

Qualified low-income housing project

26 U.S.C. § 42(g)(West Supp. 2013)

(g) Qualified low-income housing project.--For purposes of this section--

(1) In general.--The term “qualified low-income housing project” means any project for residential rental property if the project meets the requirements of subparagraph (A) or (B) whichever is elected by the taxpayer:

(A) 20-50 test.--The project meets the requirements of this subparagraph if 20 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income.

(B) 40-60 test.--The project meets the requirements of this subparagraph if 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income.

Any election under this paragraph, once made, shall be irrevocable. For purposes of this paragraph, any property shall not be treated as failing to be residential rental property merely because part of the building in which such property is located is used for purposes other than residential rental purposes.

(2) Rent-restricted units.--

(A) In general.--For purposes of paragraph (1), a residential unit is rent-restricted if the gross rent with respect to such unit does not exceed 30 percent of the imputed income limitation applicable to such unit. For purposes of the preceding sentence, the amount of the income limitation under paragraph (1) applicable for any period shall not be less than such limitation applicable for the earliest period the building (which contains the unit) was included in the determination of whether the project is a qualified low-income housing project.

(B) Gross rent.--For purposes of subparagraph (A), gross rent--

(i) does not include any payment under section 8 of the United States Housing Act of 1937 or any comparable rental assistance program (with respect to such unit or occupants thereof),

(ii) includes any utility allowance determined by the Secretary after taking into account such determinations under section 8 of the United States Housing Act of 1937,

(iii) does not include any fee for a supportive service which is paid to the owner of the unit (on the basis of the low-income status of the tenant of the unit) by any governmental program of assistance (or by an organization described in section 501(c)(3)and exempt from tax under section 501(a)) if such program (or organization) provides assistance for rent and the amount of assistance provided for rent is not separable from the amount of assistance provided for supportive services, and

(iv) does not include any rental payment to the owner of the unit to the extent such owner pays an equivalent amount to the Farmers' Home Administration under section 515 of the Housing Act of 1949.

For purposes of clause (iii), the term “supportive service” means any service provided under a planned program of services designed to enable residents of a residential rental property to remain independent and avoid placement in a hospital, nursing home, or intermediate care facility for the mentally or physically handicapped. In the case of a single-room occupancy unit or a building described in subsection (i)(3)(B)(iii), such term includes any service provided to assist tenants in locating and retaining permanent housing.

(C) Imputed income limitation applicable to unit.--For purposes of this paragraph, the imputed income limitation applicable to a unit is the income limitation which would apply under paragraph (1) to individuals occupying the unit if the number of individuals occupying the unit were as follows:

(i) In the case of a unit which does not have a separate bedroom, 1 individual.

(ii) In the case of a unit which has 1 or more separate bedrooms, 1.5 individuals for each separate bedroom.

In the case of a project with respect to which a credit is allowable by reason of this section and for which financing is provided by a bond described in section 142(a)(7), the imputed income limitation shall apply in lieu of the otherwise applicable income limitation for purposes of applying section 142(d)(4)(B)(ii).

(D) Treatment of units occupied by individuals whose incomes rise above limit.--

(i) In general.--Except as provided in clause (ii), notwithstanding an increase in the income of the occupants of a low-income unit above the income limitation applicable under paragraph (1), such unit shall continue to be treated as a low-income unit if the income of such occupants initially met such income limitation and such unit continues to be rent-restricted.

(ii) Next available unit must be rented to low-income tenant if income rises above 140 percent of income limit.--If the income of the occupants of the unit increases above 140 percent of the income limitation applicable under paragraph (1), clause (i) shall cease to apply to such unit if any residential rental unit in the building (of a size comparable to, or smaller than, such unit) is occupied by a new resident whose income exceeds such income limitation. In the case of a project described in section 142(d)(4)(B), the preceding sentence shall be applied by substituting “170 percent” for “140 percent” and by substituting “any low-income unit in the building is occupied by a new resident whose income exceeds 40 percent of area median gross income” for “any residential unit in the building (of a size comparable to, or smaller than, such unit) is occupied by a new resident whose income exceeds such income limitation”.

(E) Units where federal rental assistance is reduced as tenant's income increases.--If the gross rent with respect to a residential unit exceeds the limitation under subparagraph (A) by reason of the fact that the income of the occupants thereof exceeds the income limitation applicable under paragraph (1), such unit shall, nevertheless, be treated as a rent-restricted unit for purposes of paragraph (1) if--

(i) a Federal rental assistance payment described in subparagraph (B)(i) is made with respect to such unit or its occupants, and

(ii) the sum of such payment and the gross rent with respect to such unit does not exceed the sum of the amount of such payment which would be made and the gross rent which would be payable with respect to such unit if--

(I) the income of the occupants thereof did not exceed the income limitation applicable under paragraph (1), and

(II) such units were rent-restricted within the meaning of subparagraph (A).

The preceding sentence shall apply to any unit only if the result described in clause (ii) is required by Federal statute as of the date of the enactment of this subparagraph and as of the date the Federal rental assistance payment is made.

(3) Date for meeting requirements.--

(A) In general.--Except as otherwise provided in this paragraph, a building shall be treated as a qualified low-income building only if the project (of which such building is a part) meets the requirements of paragraph (1) not later than the close of the 1st year of the credit period for such building.

(B) Buildings which rely on later buildings for qualification.--

(i) In general.--In determining whether a building (hereinafter in this subparagraph referred to as the “prior building”) is a qualified low-income building, the taxpayer may take into account 1 or more additional buildings placed in service during the 12-month period described in subparagraph (A) with respect to the prior building only if the taxpayer elects to apply clause (ii) with respect to each additional building taken into account.

(ii) Treatment of elected buildings.--In the case of a building which the taxpayer elects to take into account under clause (i), the period under subparagraph (A) for such building shall end at the close of the 12-month period applicable to the prior building.

(iii) Date prior building is treated as placed in service.--For purposes of determining the credit period and the compliance period for the prior building, the prior building shall be treated for purposes of this section as placed in service on the most recent date any additional building elected by the taxpayer (with respect to such prior building) was placed in service.

(C) Special rule.--A building--

(i) other than the 1st building placed in service as part of a project, and

(ii) other than a building which is placed in service during the 12-month period described in subparagraph (A) with respect to a prior building which becomes a qualified low-income building,

shall in no event be treated as a qualified low-income building unless the project is a qualified low-income housing project (without regard to such building) on the date such building is placed in service.

(D) Projects with more than 1 building must be identified.--For purposes of this section, a project shall be treated as consisting of only 1 building unless, before the close of the 1st calendar year in the project period (as defined in subsection (h)(1)(F)(ii)), each building which is

(or will be) part of such project is identified in such form and manner as the Secretary may provide.

(4) Certain rules made applicable.--Paragraphs (2) (other than subparagraph (A) thereof), (3), (4), (5), (6), and (7) of section 142(d), and section 6652(j), shall apply for purposes of determining whether any project is a qualified low-income housing project and whether any unit is a low-income unit; except that, in applying such provisions for such purposes, the term "gross rent" shall have the meaning given such term by paragraph (2)(B) of this subsection.

(5) Election to treat building after compliance period as not part of a project.--For purposes of this section, the taxpayer may elect to treat any building as not part of a qualified low-income housing project for any period beginning after the compliance period for such building.

(6) Special rule where de minimis equity contribution.--Property shall not be treated as failing to be residential rental property for purposes of this section merely because the occupant of a residential unit in the project pays (on a voluntary basis) to the lessor a de minimis amount to be held toward the purchase by such occupant of a residential unit in such project if--

(A) all amounts so paid are refunded to the occupant on the cessation of his occupancy of a unit in the project, and

(B) the purchase of the unit is not permitted until after the close of the compliance period with respect to the building in which the unit is located.

Any amount paid to the lessor as described in the preceding sentence shall be included in gross rent under paragraph (2) for purposes of determining whether the unit is rent-restricted.

(7) Scattered site projects.--Buildings which would (but for their lack of proximity) be treated as a project for purposes of this section shall be so treated if all of the dwelling units in each of the buildings are rent-restricted (within the meaning of paragraph (2)) residential rental units.

(8) Waiver of certain de minimis errors and recertifications.--On application by the taxpayer, the Secretary may waive--

(A) any recapture under subsection (j) in the case of any de minimis error in complying with paragraph (1), or

(B) any annual recertification of tenant income for purposes of this subsection, if the entire building is occupied by low-income tenants.

(9) Clarification of general public use requirement.--A project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants--

(A) with special needs,

(B) who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group, or

(C) who are involved in artistic or literary activities.

§ 1.42-5 Monitoring compliance with low-income housing credit requirements

26 C.F.R. § 1.42-5(b)-(c)(1)(iii) (2013)

(b) Recordkeeping and record retention provisions--(1) Recordkeeping provision. Under the recordkeeping provision, the owner of a low-income housing project must be required to keep records for each qualified low-income building in the project that show for each year in the compliance period--

(i) The total number of residential rental units in the building (including the number of bedrooms and the size in square feet of each residential rental unit);

(ii) The percentage of residential rental units in the building that are low-income units;

(iii) The rent charged on each residential rental unit in the building (including any utility allowances);

(iv) The number of occupants in each low-income unit, but only if rent is determined by the number of occupants in each unit under section 42(g)(2) (as in effect before the amendments made by the Omnibus Budget Reconciliation Act of 1989);

(v) The low-income unit vacancies in the building and information that shows when, and to whom, the next available units were rented;

(vi) The annual income certification of each low-income tenant per unit. For an exception to this requirement, see section 42(g)(8)(B) (which provides a special rule for a 100 percent low-income building);

(vii) Documentation to support each low-income tenant's income certification (for example, a copy of the tenant's federal income tax return, Forms W–2, or verifications of income from third parties such as employers or state agencies paying unemployment compensation). For an exception to this requirement, see section 42(g)(8)(B) (which provides a special rule for a 100 percent low-income building). Tenant income is calculated in a manner consistent with the determination of annual income under section 8 of the United States Housing Act of 1937 (“Section 8”), not in accordance with the determination of gross income for federal income tax liability. In the case of a tenant receiving housing assistance payments under Section 8, the documentation requirement of this paragraph (b)(1)(vii) is satisfied if the public housing authority provides a statement to the building owner declaring that the tenant's income does not exceed the applicable income limit under section 42(g);

(viii) The eligible basis and qualified basis of the building at the end of the first year of the credit period; and

(ix) The character and use of the nonresidential portion of the building included in the building's eligible basis under section 42(d)(*e.g.,* tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities, or facilities reasonably required by the project).

(2) Record retention provision. Under the record retention provision, the owner of a low-income housing project must be required to retain the records described in paragraph (b)(1) of this section for at least 6 years after the due date (with extensions) for filing the federal income

tax return for that year. The records for the first year of the credit period, however, must be retained for at least 6 years beyond the due date (with extensions) for filing the federal income tax return for the last year of the compliance period of the building.

(3) Inspection record retention provision. Under the inspection record retention provision, the owner of a low-income housing project must be required to retain the original local health, safety, or building code violation reports or notices that were issued by the State or local government unit (as described in paragraph (c)(1)(vi) of this section) for the Agency's inspection under paragraph (d) of this section. Retention of the original violation reports or notices is not required once the Agency reviews the violation reports or notices and completes its inspection, unless the violation remains uncorrected.

(c) Certification and review provisions--(1) Certification. Under the certification provision, the owner of a low-income housing project must be required to certify at least annually to the Agency that, for the preceding 12–month period--

(i) The project met the requirements of:

(A) The 20–50 test under section 42(g)(1)(A), the 40–60 test under section 42(g)(1)(B), or the 25–60 test under sections 42(g)(4) and 142(d)(6) for New York City, whichever minimum set-aside test was applicable to the project; and

(B) If applicable to the project, the 15–40 test under sections 42(g)(4) and 142(d)(4)(B) for “deep rent skewed” projects;

(ii) There was no change in the applicable fraction (as defined in section 42(c)(1)(B)) of any building in the project, or that there was a change, and a description of the change;

(iii) The owner has received an annual income certification from each low-income tenant, and documentation to support that certification; or, in the case of a tenant receiving Section 8 housing assistance payments, the statement from a public housing authority described in paragraph (b)(1)(vii) of this section. For an exception to this requirement, see section 42(g)(8)(B) (which provides a special rule for a 100 percent low-income building);

§ 42. Low-income housing credit
Qualified low-income housing project.
26 U.S.C.A. § 42(g)(8)(B) (West 2011)

(g) Qualified low-income housing project.--For purposes of this section--

(1) In general.--The term "qualified low-income housing project" means any project for residential rental property if the project meets the requirements of subparagraph (A) or (B) whichever is elected by the taxpayer:

(A) 20-50 test.--The project meets the requirements of this subparagraph if 20 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income.

(B) 40-60 test.--The project meets the requirements of this subparagraph if 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income.

Any election under this paragraph, once made, shall be irrevocable. For purposes of this paragraph, any property shall not be treated as failing to be residential rental property merely because part of the building in which such property is located is used for purposes other than residential rental purposes.

(2) Rent-restricted units.--

(A) In general.--For purposes of paragraph (1), a residential unit is rent-restricted if the gross rent with respect to such unit does not exceed 30 percent of the imputed income limitation applicable to such unit. For purposes of the preceding sentence, the amount of the income limitation under paragraph (1) applicable for any period shall not be less than such limitation applicable for the earliest period the building (which contains the unit) was included in the determination of whether the project is a qualified low-income housing project.

(B) Gross rent.--For purposes of subparagraph (A), gross rent--

(i) does not include any payment under section 8 of the United States Housing Act of 1937 or any comparable rental assistance program (with respect to such unit or occupants thereof),

(ii) includes any utility allowance determined by the Secretary after taking into account such determinations under section 8 of the United States Housing Act of 1937,

(iii) does not include any fee for a supportive service which is paid to the owner of the unit (on the basis of the low-income status of the tenant of the unit) by any governmental program of assistance (or by an organization described in section 501(c)(3)and exempt from tax under section 501(a)) if such program (or organization) provides assistance for rent and the amount of assistance provided for rent is not separable from the amount of assistance provided for supportive services, and

(iv) does not include any rental payment to the owner of the unit to the extent such owner pays an equivalent amount to the Farmers' Home Administration under section 515 of the Housing Act of 1949.

For purposes of clause (iii), the term “supportive service” means any service provided under a planned program of services designed to enable residents of a residential rental property to remain independent and avoid placement in a hospital, nursing home, or intermediate care facility for the mentally or physically handicapped. In the case of a single-room occupancy unit or a building described in subsection (i)(3)(B)(iii), such term includes any service provided to assist tenants in locating and retaining permanent housing.

(C) Imputed income limitation applicable to unit.--For purposes of this paragraph, the imputed income limitation applicable to a unit is the income limitation which would apply under paragraph (1) to individuals occupying the unit if the number of individuals occupying the unit were as follows:

(i) In the case of a unit which does not have a separate bedroom, 1 individual.

(ii) In the case of a unit which has 1 or more separate bedrooms, 1.5 individuals for each separate bedroom.

In the case of a project with respect to which a credit is allowable by reason of this section and for which financing is provided by a bond described in section 142(a)(7), the imputed income limitation shall apply in lieu of the otherwise applicable income limitation for purposes of applying section 142(d)(4)(B)(ii).

(D) Treatment of units occupied by individuals whose incomes rise above limit.--

(i) In general.--Except as provided in clause (ii), notwithstanding an increase in the income of the occupants of a low-income unit above the income limitation applicable under paragraph (1), such unit shall continue to be treated as a low-income unit if the income of such occupants initially met such income limitation and such unit continues to be rent-restricted.

(ii) Next available unit must be rented to low-income tenant if income rises above 140 percent of income limit.--If the income of the occupants of the unit increases above 140 percent of the income limitation applicable under paragraph (1), clause (i) shall cease to apply to such unit if any residential rental unit in the building (of a size comparable to, or smaller than, such unit) is occupied by a new resident whose income exceeds such income limitation. In the case of a project described in section 142(d)(4)(B), the preceding sentence shall be applied by substituting “170 percent” for “140 percent” and by substituting “any low-income unit in the building is occupied by a new resident whose income exceeds 40 percent of area median gross income” for “any residential unit in the building (of a size comparable to, or smaller than, such unit) is occupied by a new resident whose income exceeds such income limitation”.

(E) Units where federal rental assistance is reduced as tenant's income increases.--If the gross rent with respect to a residential unit exceeds the limitation under subparagraph (A) by reason of the fact that the income of the occupants thereof exceeds the income limitation applicable under paragraph (1), such unit shall, nevertheless, be treated as a rent-restricted unit for purposes of paragraph (1) if--

(i) a Federal rental assistance payment described in subparagraph (B)(i) is made with respect to such unit or its occupants, and

(ii) the sum of such payment and the gross rent with respect to such unit does not exceed the sum of the amount of such payment which would be made and the gross rent which would be payable with respect to such unit if--

(I) the income of the occupants thereof did not exceed the income limitation applicable under paragraph (1), and

(II) such units were rent-restricted within the meaning of subparagraph (A).

The preceding sentence shall apply to any unit only if the result described in clause (ii) is required by Federal statute as of the date of the enactment of this subparagraph and as of the date the Federal rental assistance payment is made.

(3) Date for meeting requirements.--

(A) In general.--Except as otherwise provided in this paragraph, a building shall be treated as a qualified low-income building only if the project (of which such building is a part) meets the requirements of paragraph (1) not later than the close of the 1st year of the credit period for such building.

(B) Buildings which rely on later buildings for qualification.--

(i) In general.--In determining whether a building (hereinafter in this subparagraph referred to as the “prior building”) is a qualified low-income building, the taxpayer may take into account 1 or more additional buildings placed in service during the 12-month period described in subparagraph (A) with respect to the prior building only if the taxpayer elects to apply clause (ii) with respect to each additional building taken into account.

(ii) Treatment of elected buildings.--In the case of a building which the taxpayer elects to take into account under clause (i), the period under subparagraph (A) for such building shall end at the close of the 12-month period applicable to the prior building.

(iii) Date prior building is treated as placed in service.--For purposes of determining the credit period and the compliance period for the prior building, the prior building shall be treated for purposes of this section as placed in service on the most recent date any additional building elected by the taxpayer (with respect to such prior building) was placed in service.

(C) Special rule.--A building--

(i) other than the 1st building placed in service as part of a project, and

(ii) other than a building which is placed in service during the 12-month period described in subparagraph (A) with respect to a prior building which becomes a qualified low-income building,

shall in no event be treated as a qualified low-income building unless the project is a qualified low-income housing project (without regard to such building) on the date such building is placed in service.

(D) Projects with more than 1 building must be identified.--For purposes of this section, a project shall be treated as consisting of only 1 building unless, before the close of the 1st calendar year in the project period (as defined in subsection (h)(1)(F)(ii)), each building which is

(or will be) part of such project is identified in such form and manner as the Secretary may provide.

(4) Certain rules made applicable.--Paragraphs (2) (other than subparagraph (A) thereof), (3), (4), (5), (6), and (7) of section 142(d), and section 6652(j), shall apply for purposes of determining whether any project is a qualified low-income housing project and whether any unit is a low-income unit; except that, in applying such provisions for such purposes, the term "gross rent" shall have the meaning given such term by paragraph (2)(B) of this subsection.

(5) Election to treat building after compliance period as not part of a project.--For purposes of this section, the taxpayer may elect to treat any building as not part of a qualified low-income housing project for any period beginning after the compliance period for such building.

(6) Special rule where de minimis equity contribution.--Property shall not be treated as failing to be residential rental property for purposes of this section merely because the occupant of a residential unit in the project pays (on a voluntary basis) to the lessor a de minimis amount to be held toward the purchase by such occupant of a residential unit in such project if--

(A) all amounts so paid are refunded to the occupant on the cessation of his occupancy of a unit in the project, and

(B) the purchase of the unit is not permitted until after the close of the compliance period with respect to the building in which the unit is located.

Any amount paid to the lessor as described in the preceding sentence shall be included in gross rent under paragraph (2) for purposes of determining whether the unit is rent-restricted.

(7) Scattered site projects.--Buildings which would (but for their lack of proximity) be treated as a project for purposes of this section shall be so treated if all of the dwelling units in each of the buildings are rent-restricted (within the meaning of paragraph (2)) residential rental units.

(8) Waiver of certain de minimis errors and recertifications.--On application by the taxpayer, the Secretary may waive--

(A) any recapture under subsection (j) in the case of any de minimis error in complying with paragraph (1), or

(B) any annual recertification of tenant income for purposes of this subsection, if the entire building is occupied by low-income tenants.

§ 42. Low-income housing credit
Applicable percentage.
26 U.S.C. § 42(b)

(b) Applicable percentage: 70 percent present value credit for certain new buildings; 30 percent present value credit for certain other buildings.--

(1) Determination of applicable percentage.--For purposes of this section, the term "applicable percentage" means, with respect to any building, the appropriate percentage prescribed by the Secretary for the earlier of--

(i)[1] the month in which such building is placed in service, or

(ii) at the election of the taxpayer--

(I) the month in which the taxpayer and the housing credit agency enter into an agreement with respect to such building (which is binding on such agency, the taxpayer, and all successors in interest) as to the housing credit dollar amount to be allocated to such building, or

(II) in the case of any building to which subsection (h)(4)(B) applies, the month in which the tax-exempt obligations are issued.

A month may be elected under clause (ii) only if the election is made not later than the 5th day after the close of such month. Such an election, once made, shall be irrevocable.

(B) [1] **Method of prescribing percentages.**--The percentages prescribed by the Secretary for any month shall be percentages which will yield over a 10-year period amounts of credit under subsection (a) which have a present value equal to--

(i) 70 percent of the qualified basis of a new building which is not federally subsidized for the taxable year, and

(ii) 30 percent of the qualified basis of a building not described in clause (i).

(C) Method of discounting.--The present value under subparagraph (B) shall be determined--

(i) as of the last day of the 1st year of the 10-year period referred to in subparagraph (B),

(ii) by using a discount rate equal to 72 percent of the average of the annual Federal mid-term rate and the annual Federal long-term rate applicable under section 1274(d)(1) to the month applicable under clause (i) or (ii) of subparagraph (A) and compounded annually, and

(iii) by assuming that the credit allowable under this section for any year is received on the last day of such year.

(2) Temporary minimum credit rate for non-federally subsidized new buildings.--In the case of any new building--

(A) which is placed in service by the taxpayer after the date of the enactment of this paragraph with respect to housing credit dollar amount allocations made before January 1, 2014, and

(B) which is not federally subsidized for the taxable year,

the applicable percentage shall not be less than 9 percent.

(3) Cross references.--

(A) For treatment of certain rehabilitation expenditures as separate new buildings, see subsection (e).

(B) For determination of applicable percentage for increases in qualified basis after the 1st year of the credit period, see subsection (f)(3).

(C) For authority of housing credit agency to limit applicable percentage and qualified basis which may be taken into account under this section with respect to any building, see subsection (h)(7).

Chapter 26 -- Tenant Good Cause Eviction and Rent Increase Protection

Definition

Under IRC §42(h)(6), buildings are eligible for the low-income housing credit only if the owner has entered into an extended low-income housing commitment. The commitment is commonly known as the "extended use agreement." The extended use agreement must be recorded pursuant to state law as a restrictive covenant. See Chapter 16 for additional detail.

3-Year Good Cause Eviction and Rent Increase Protection for Tenants

The term of the agreement is at least 30 years, beginning on the first day of the compliance period and ends on the later of the date specified by the state agency or 15 years after the close of the 15-year compliance period under IRC §42(i)(1). IRC §42(h)(6)(E)(i) describes two circumstances by which the extended use agreement can be terminated:

1. the building is acquired through foreclosure, or
2. the state agency fails to present a qualified contract for the acquisition of the LIHC building (or part thereof) by a party who will continue to operate the building (or part thereof) as low-income housing.

In the event that the extended use agreement is terminated, IRC §42(h)(6)(E)(ii) provides existing low-income tenants protection against two events for three years following the termination. These events are:

1. the eviction or the termination of tenancy[1] (other than for good cause) of an existing tenant of any low-income unit, or
2. any increase in the gross rent with respect to such unit no otherwise permitted under IRC §42.

Revenue Ruling 2004-82: Prohibitions Under IRC §42(h)(6)(B)(i) Apply throughout Extend Use Period Under section C of Rev. Rul. 2004-82[2], Q&A #5 provides further guidance regarding extended use agreements. Question 5 asks, "Must the extended low-income housing commitment prohibit the actions described in subclauses (I) and (II) of IRC §42(h)(6)(E)(ii); i.e., eviction or the termination of tenancy (other than for good cause) only for the 3-year period described in IRC §42(h)(6)(E)(ii)?"

The answer is "no". IRC §42(h)(6)(B)(i) requires that an extended low-income housing commitment include a prohibition during the entire extended use period against: (1) the eviction or the termination of tenancy (other than for good cause) of an existing tenant of any low-income unit (no-cause eviction protection) and (2) any increase in the gross rent with respect to the unit not otherwise permitted under IRC §42.

The revenue ruling includes the following explanation. When Congress amended IRC §42(h)(6)(B)(i) to add the requirement that the extended use agreement must prohibit the actions described in subclauses (I) and (II) of subparagraph (E)(ii), IRC §42(h)(6)(E)(ii) was already part of §42. As a result, Congress must have intended the amendment to §42(h)(6)(B)(i) to add an additional requirement beyond what was contained in §42(h)(6)(E)(ii), which already prohibited the actions described in that section for the 3 years following the termination of the extended use period. Because the requirements of §42(h)(6)(B)(i) otherwise apply for the extended use period, Congress must have intended the addition of the prohibition against the actions described in subclauses (I) and (II) of §42(h)(6)(E)(ii) to apply throughout the extended use period.

The revenue ruling also provided guidance for updating extended use agreements to explicitly provide tenants with protection against evictions without good cause and increases in rent not

allowable under IRC §42. The revenue ruling provided that if it is determined by the end of a taxable year that a taxpayer's extended use agreement does not meet the requirements for an extended use agreement under IRC §42(h)(6)(B) (for example, it does not provide no-cause eviction protection for tenants of low-income units throughout the extended use period), the low-income housing credit is not allowable with respect to the building for the taxable year, or any prior taxable year. However, if the failure to have a valid extended use agreement is in effect is corrected within 1 year of the date of the determination, the determination will not apply to the current year of the credit period or any prior year.

The revenue ruling also requires the state agencies to review its extended low-income housing commitments for compliance with the interpretation of §42(h)(6)(B)(i) by December 31, 2004. If, during the review period, the housing credit agency determines that an extended low-income housing commitment is not in compliance with the interpretation of §42(h)(6)(B)(i) provided in Revenue Ruling 2004-82, the 1-year period described under §42(h)(6)(J) will commence on the date of that determination.

Revenue Procedure 2005-37

Effective June 21, 2005, the IRS issued Rev. Proc. 2005-37[3] to provide the state agencies guidance for satisfying the review requirements under Rev. Rul. 2004-82, Q&A #5.

Extended Use Agreements Entered into Before January 1, 2006,

If the extended use agreement contain general language requiring building owners to comply with the requirements of' IRC §42 (catch-all language), the requirements of Rev. Ruling 2004-82, Q&A #5, are satisfied if:

1. Agencies notify building owners in writing on or before December 31, 2005, that consistent with the interpretation in Q&A #5, the catch-all language prohibits the owner from evicting or terminating the tenancy of an existing tenant of any low-income unit (other than for good cause) throughout the entire commitment period. Further, state agencies must notify building owners that the catch-all language prohibits the owner from making an increase in the gross rent with respect to a low-income unit not otherwise permitted by IRC §42 throughout the entire commitment period;
2. The owner must, as part of its certification under Treas. Reg. §1.42-5(c)(1)(xi), certify annually that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42;

Finally, if the extended use agreement is amended for any reason after December 31, 2005, it must also be amended to clearly provide for the prohibition against the eviction or termination of tenancy other than for good cause and any increase in the gross rent not otherwise permitted under IRC §42.

Commitments entered into before January 1, 2006, that do not contain specific language on the IRC §42(h)(6)(B)(i) prohibitions or catch-all language do not satisfy the requirements of Rev. Rul. 2004-82, Q&A #5 and must be amended by December 31, 2005 to clearly provide for the IRC §42(h)(6)(B)(i) prohibitions against the eviction or termination of tenancy of an existing tenant of any low-income unit (other than for good cause) and the increase in the gross rent with respect to a low-income unit not otherwise permitted by IRC §42.

Extended Use Agreements Entered into After December 31, 2005

1. Extended use agreements executed after December 31, 2005, must clearly provide for the prohibition against the eviction or termination of tenancy other than for good cause and any increase in the gross rent not otherwise permitted under IRC §42.

2. The owner must also, as part of its certifications under Treas. Reg. §1.42-5(c)(1)(xi), certify annually that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42.

Eviction or "Termination of Tenancy"

Eviction is the act or process of legally dispossessing a person of land or rental property. An owner who wishes to evict a tenant must comply with applicable state and/or local laws governing evictions.

Good Cause

The owner of an IRC §42 property must be able to demonstrate if challenged in state court that good cause existed to support the eviction or termination of a tenant from a low-income unit. For purposes of IRC §42(h)(6)(E)(ii)(I), good cause is determined by the state and local law applicable to the location in which the IRC §42 property is located.

State or local law examples of good cause evictions may include nonpayment of rent, violations of the lease or rental agreement, destruction or damage to the property, interference with other tenants or creating a nuisance, or using the property for an unlawful purpose.

Owner Fails to Renew Lease

A lease to rent low-income housing is a contract. A lease contract expires at the end of the time period specified in the lease. At that time, the tenant surrenders the low-income housing unit to the owner and the owner accepts it back. The owner and tenant may renew the contract (or enter into a new contract), thereby allowing the tenant to continue occupying the low-income unit, but the owner is not obligated to renew a lease or enter into a new one, and failure to do so does not, per se, constitute an eviction without good cause. However, the owner must be prepared to demonstrate if challenged in state court that the nonrenewal of a lease is not a "termination of tenancy" for other than good cause under IRC §42.

The owner must provide the tenant with timely notice that the lease will not be renewed as required under state law.

In Compliance

Owners are in compliance with the prohibitions against evictions or terminations of tenancy for other than good cause and increases in the gross rent not permitted under IRC §42 when all of the following four requirements are met.

1. The extended use agreement includes the prohibitions.
    1. For agreements entered into before January 1, 2006, the agreement must contain general language requiring building owners to comply with the requirements of' IRC §42 (catch-all language) and the state agency must notify the owner in writing on or before December 31, 2005, that the catch-all language prohibits the owner from evicting or terminating the tenancy of an existing tenant of any low-income unit (other than for good cause) or increases the gross rent not otherwise permitted by IRC §42 throughout the entire commitment period.
    2. For extended use agreements executed after December 31, 2005, the agreement must clearly provide for the prohibition against the eviction or termination of tenancy other than for good cause and any increase in the gross rent not otherwise permitted under IRC §42.
2. The owner must, as part of its annual certification under Treas. Reg. §1.42-5(c)(1)(xi), certify annually that for the preceding 12-month period no tenants in low-income units were evicted or had their

tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42.

3. The owner must not evict or terminate the tenancy of, an existing tenant of any low-income unit for other than for good cause.
4. The owner must not increase the gross rent unless permitted by IRC §42.

Out of Compliance

Owners are out of compliance with the prohibitions against evictions or terminations of tenancy for other than good cause and increases in the gross rent not permitted under IRC §42 if any of the following three requirements is not met.

Extended Use Agreement

Generally, no credit is allowable for a building in a year unless an extended use agreement is in effect at the end of the year. The extended use agreement is not in effect and the owner is out of compliance if (1) the extended use agreement does not include the prohibitions, or (2) does not contain the general catch-all language requiring compliance with IRC §42 if the agreement was entered into before January 1, 2006.

Noncompliance is reported under category 11k, Owner Failed to Execute and Record Extended Use Agreement Within Time Prescribed by Section 42(h)(6)(J). See Chapter 16 for additional discussion.

Annual Certification

Owners are out of compliance if they fail to certify annually, or certify incompletely or inaccurately, under the penalty of perjury, that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42.

Noncompliance is reported under category 11d, Owner Failed to Provide Annual Certifications or Provided Incomplete or Inaccurate Certification. See Chapter 7 for additional discussion.

Increased Gross Rent

The owner is out of compliance if the gross rent is increased in a manner not permitted by IRC §42. A unit qualifies as an LIHC unit when the gross rent does not exceed 30 percent of the imputed income limitation applicable to such unit under IRC §42(g)(2)(C). The income limit for a low-income housing unit is based on the minimum set-aside election made by the owner under IRC §42(g)(1).

Noncompliance is reported under category 11g, Gross Rent(s) Exceed Tax Credit Limits. See Chapter 11 for additional discussion.

Back in Compliance

Owners are back in compliance with the prohibitions against evictions or terminations of tenancy for other than good cause and increases in the gross rent not permitted under IRC §42 if:

Extended Use Agreement

The extended use agreement is in effect and the owner is back in compliance when the extended use agreement is amended to clearly provide for the prohibition against the eviction or

termination of tenancy other than for good cause and any increase in the gross rent not otherwise permitted under IRC §42.

Corrected noncompliance is reported under category 11k, Owner Failed to Execute and Record Extended Use Agreement Within Time Prescribed by Section 42(h)(6)(J). See Chapter 16 for additional discussion.

Annual Certification

The noncompliance is corrected when the owner certifies that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42. In the event that tenant(s) in low-income units were evicted or had their tenancies terminated other than for good cause, or that tenant(s) had an increase in the gross rent with respect to a low-income unit not otherwise permitted under IRC §42, the annual certification must disclose the violations.

Corrected noncompliance is reported under category 11k, Owner Failed to Provide Annual Certifications or Provided Incomplete or Inaccurate Certification. See Chapter 7 for additional discussion.

Increased Gross Rent

A unit is back in compliance when the rent charged does not exceed the limit. An owner cannot avoid the disallowance of the LIHC by rebating excess rent to the affected tenants. Corrected noncompliance is reported under category 11g, Gross Rent(s) Exceed Tax Credit Limits. See Chapter 11 for additional discussion.

Reference

1. IRC §42(h)(6)
2. Rev. Rul. 2004-82, 2004-35, I.R.B. 1
3. Rev. Proc. 2005-27, 2005-28 I.R.B. 1

Footnotes:

[1]*The term "termination of tenancy" has no legal definition. It was first introduced as a term of art specific to IRC §42 in the Omnibus Budget Reconciliation Act of 1990. The bill clarifies that the extended low-income housing commitment must prohibit the eviction or termination of tenancy (other than for good cause) of an existing tenant of a low-income unit or any increase in the gross rent inconsistent with the rent restrictions on the unit. See Committee Reports on P.L. 101-508 (Omnibus Budget Reconciliation Act of 1990) COM-RPT, 94 FED ¶4380.27.*

[2]*Rev. Rul. 2004-82, 2004-2 C.B. 350*

[3]Rev. Proc. 2005-37, 2005-28 I.R.B. 79

Appendix 2

Good Cause Eviction

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Comment

GOOD CAUSE EVICTION AND THE LOW INCOME HOUSING TAX CREDIT

Marc Jolin[d1]

Since its inception in 1986, the **Low Income Housing Tax Credit** ("LIHTC")[1] has emerged as the federal government's largest affordable **housing** development program.[2] The LIHTC was enacted as part of the shift toward localized and privatized federal social programs that occurred during the Reagan Administration.[3] In some respects the LIHTC's design reflects these trends. The program is written into the **tax** code, rather than into the United States **Housing** Act of 1937.[4] Primary administrative responsibility is assigned to state **housing** finance agencies, rather than to the U.S. Department of **Housing** and Urban Development ("HUD"), and the program offers an income **tax credit** that can be sold by developers to investors in exchange for needed construction capital, rather than a direct subsidy to **low-income housing** developers.[5] Given these elements, one might have expected the LIHTC to embody another common feature of privatization, the reduction of federal regulation. This Comment argues, however, that this expectation is unsupported, at least with respect to federally mandated **good cause eviction** protection.

Good cause eviction protection is a well-established feature of federal **low-income housing** programs created under the United States ***522Housing** Act and administered by HUD. **Good cause eviction** requires a landlord to renew a tenant's lease unless she can demonstrate a legally adequate reason why the tenant should be **evicted**.[6] State landlord tenant laws, in contrast to federal **housing** programs, do not generally afford tenants this protection.[7] Proponents of **Good cause eviction** view it as a critical line of defense against discriminatory treatment, life-disruptions, and homelessness for **low-income** households.[8] Critics, on the other hand, see the limit on landlords' ability to **evict** tenants as a significant cause of the "failure" of federal **housing** programs and as a barrier to expanding private market **low-income housing** construction.[9]

Whether the LIHTC requires **Good cause eviction** is thus far unsettled. With the exception of one unpublished state appellate court decision, appellate courts have not weighed in on the issue.[10] Instead, the debate has occurred primarily in local **housing** courts and between tenant advocates and the state **housing** finance agencies responsible for administering the LIHTC program. In a survey of these agencies, twenty-seven of the thirty-eight agencies that responded indicated that they do not believe that the federal LIHTC statute guarantees tenants of LIHTC subsidized units **Good cause eviction** protection.[11]***523** Tenant advocates generally have not disputed this statutory interpretation. Instead, they tend to argue that the LIHTC program involves state action and that tenants are entitled to **Good cause eviction** as a matter of constitutional due process.[12] While there may be a due process argument for **Good cause eviction** protection, this Comment argues that, contrary to dominant state agency practice, the LIHTC statute does

require that tenants receive **Good cause eviction** protection. A careful reading of Internal Revenue Code (IRC) Section 42 demonstrates that since 1990, in order to receive a **tax credit**, a landlord is required to place a restrictive covenant on her property that guarantees that tenants in her LIHTC subsidized units will not be **evicted** except for **good cause**.

Part I of this Comment provides a brief introduction to the LIHTC program through a discussion of the scope of the country's affordable **housing** crisis, the LIHTC's basic structure, and the extent of the program's success to date. Part II introduces the concept of **Good cause eviction**, the doctrinal evolution of **Good cause eviction** protection in federal **housing** programs, and the debate over the merits of the protection. Part III analyzes the LIHTC, arguing that the best reading of the statute's plain language, coupled with the limited available legislative history, leads to the conclusion that the LIHTC provides tenants with **Good cause eviction** protection.

*524 I. LIHTC: A Public-Private Response to a Growing Affordable Housing Crisis

At least since the mid-1980s, the supply of **housing** affordable to **low-income** households has increasingly fallen behind demand. While this **housing** crisis is not the result of any single cause, one important factor is the dramatic reduction in financial support for traditional federal **low-income housing** programs. The LIHTC program was created, in part, to make it financially feasible for private developers to build and maintain **low-income housing** and to help fill the void left by cuts in public **housing** and Section 8 rental subsidy programs.[13] Through the allocation of **tax credits** to private developers--both for-profit and not-for-profit--the LIHTC has registered some significant successes. At the same time, the program has been subjected to substantial criticism from both liberals and conservatives. This Part addresses some of these important background issues in more depth.

A. The Ongoing Rental Housing Crisis and Fading Federal Support

The term "crisis" is an appropriate characterization of the circumstances facing **low-income** individuals in the rental **housing** market. According to the Center on Budget and Policy Priorities, between 1970 and 1993 the total number of low-cost rental units decreased from 7.4 million to 6.5 million, while the number of **low-income** renters demanding those units increased from 6.5 million to 11.2 million.[14] The Department of **Housing** and Urban Development estimated that by 1995, over 5.3 million households (12.5 million people) faced "worst case" **housing** needs, meaning they lived in seriously substandard **housing** (lacking basic systems such as plumbing and electricity) or paid over 50 percent of their income in rent.[15] Despite persistent economic growth since the early 1990s, conditions have continued to worsen. Between 1993 and 1995, 900,000 units affordable to "very **low-income**" renters were lost. And between 1996 and 1998, the stock of rental **housing** affordable to "**low-income**" households declined by an additional 900,000 units.[16]

***525** Throughout this **housing** crisis, the federal government has steadily reduced its overall financial commitment to **low-income housing** development and affordability. In 1981, the federal **housing** budget was $32.2 billion. By 1989, it amounted to only $7.9 billion (less than 0.6 percent of the federal budget).[17] During that same period, HUD reduced the number of new affordable units it helped construct annually from 144,000 to 22,000.[18] The total number of additional households annually supported by HUD dropped by nearly half starting in 1984, and in 1995 no new rental **housing** vouchers were issued.[19] Between 1994 and 1998, the total number of HUD supported households actually dropped by an estimated 65,000.[20] Since its creation in 1986, the LIHTC program has offset some of this dramatic imbalance between availability and need by encouraging private actors to construct and manage new **low-income** units.

B. LIHTC: A Supply-Side Subsidy Response to the Crisis

In the 1980s, privatization became a popular policy prescription at all levels of government and for all sorts of government tasks.[21] The Reagan Administration's President's Commission on Privatization identified **low-income housing** construction as a government service that ought to be privatized.[22] Under President Reagan, the "federal government reduced direct federal **housing** spending while manifesting a view that the private sector, rather than the public sector, was better able to provide **low-income housing**."[23] The LIHTC embraces ***526** some of the principles of privatization, but without giving up either federal or state regulatory control of the **housing**.

C. The Technical Basics of the LIHTC Program

Today, the LIHTC is the largest federal program that funds the construction and rehabilitation of **low-income** rental **housing**.[24] Although the LIHTC imposes federal and state regulations on property owners similar to those that govern traditional United States **Housing** Act programs, it is structured very differently than other federal **housing** programs. The LIHTC is a federal **low-income housing** program that "attempts to employ market efficiencies while allowing states to impose local policy goals."[25]

The LIHTC offers private entities, both for-profit and not-for-profit, a dollar-for-dollar **tax credit** for their investment in qualified **low-income** rental **housing**.[26] The federal government annually allocates to each state a $1.25 **housing tax credit** per citizen of the state.[27] Each state designates an agency responsible for distributing the **credits** among applicants (a "**housing credit**" or "**tax credit** allocation" agency).[28] Successful applicants receive **credits** based on the percentage of "the owner's basis in the rental units that are set aside for **low-income** tenants."[29] The **credit** recipient is entitled to write off a fraction of the **credit** from her personal or, as is more often the case, corporate income taxes each year for ten years, provided the units for which the **credits** were received remain in compliance with statutory and regulatory requirements.[30] In order to receive **tax credits**, the building owner ***527** must agree to maintain the **low-income** units during a fifteen-year "compliance period" and must agree to an "extended use agreement" which typically requires that the units' **low-income** affordability be maintained for at least an additional fifteen years.[31] In order to turn the **tax credits** into development capital, most developers sell the **credits** to investors at a substantial discount.[32] These and other features of the program will be discussed in more detail in Part III.

While not sufficient to meet the growing demand for affordable rental **housing**, the LIHTC has achieved some noteworthy successes.[33] A recent General Accounting Office study of the LIHTC found that between 1992 and 1994 state allocation agencies annually awarded **tax credits** with a value of $2 billion over their ten-year duration.[34] Although no exact count is available, estimates of the number of units placed in service between 1987 and 1996 range from 500,000 to 600,000, and estimates through 1998 reach as high as 900,000.[35] Assuming that the figures for units put in service between 1994 to 1996 are representative, approximately three quarters of the households in these **tax-credit** supported units have incomes below 50 percent of area median income, and therefore qualify as "very **low-income**" by HUD's standards.[36]

***528 D. A Politically and Academically Contentious Program**

Despite its successes, the value of the LIHTC is contested among politicians, academics, and advocates. As recently as 1996, the Republican-controlled Congress sent a budget bill to President Clinton that would have eliminated the LIHTC. President Clinton, whose administration has strongly supported the program, vetoed the bill, citing the LIHTC as one reason.[37] While the program is generally supported by moderates and progressives in the academic community, many of the LIHTC's most vocal critics are on the left. Some object to the heavy emphasis on a program they say is economically inefficient and cannot begin to

meet the growing need for **low-income housing**.[38] And most importantly for purposes of this Comment, tenant advocates complain that the LIHTC appears to have abandoned the right to **Good cause eviction** enjoyed by tenants of traditional federal **housing** programs. Although not previously documented systematically, tenant advocates know from firsthand experience that many state **housing credit** agencies do not condition receipt of a **tax credit** on landlords providing LIHTC tenants with **Good cause eviction** protection.[39]

The argument that state **housing credit** agencies' failure to provide **Good cause eviction** protection is inconsistent with the statutory language of the LIHTC is the subject of Part III. But before commencing an analysis of the statute, we must be clear on what **Good cause eviction** is and why it matters whether the LIHTC provides it. ***529** To this end, Part II provides a brief history of **Good cause eviction**, its evolution in federal **housing** programs, and a survey of the current debate over the merits of **Good cause eviction** protection.

II. Good cause eviction: From Common Law to Federal Regulation

At common law, there were three types of landlord-tenant estates: an estate for years, a periodic tenancy (year to year, month to month) and a tenancy at will.[40] While they differed in terms of duration and notice requirements prior to lease termination, all three estates had in common that once the lease term expired either party could terminate the tenancy "for any reason or for no reason."[41]

It is no longer the law in any state that either party can terminate a lease upon its expiration for any reason or no reason at all. The federal Fair **Housing** Act[42] and the virtually universal state law prohibitions against retaliatory **evictions** place limits on the reasons a landlord may use to terminate or refuse to renew a lease.[43]**Good cause eviction** is a similar, though much less common, restraint on a landlord's ability to **evict** at will.[44]

A. The Due Process Origin of Good cause eviction in Federal Housing Programs

Under a **Good cause eviction** regime, a tenant may terminate tenancy at the end of a lease term for any reason, but the landlord must renew the lease unless she can demonstrate to the court a **good cause** for not doing so.[45] Such causes typically include nonpayment of rent, ***530** causing substantial physical damage to a unit, **housing** subtenants in violation of the lease, and similar infractions.[46] In federally subsidized **housing** programs, what constitutes **good cause** is defined in part by regulation, but is ultimately a "case by case determination by the (local landlord-tenant) courts."[47]

When local public **housing** authorities ("PHAs") were created in response to the United States **Housing** Act of 1937[48] (to provide local administration for public **housing** programs[49]), they were subject only to state landlord-tenant laws. Until the 1960s, therefore, PHAs "enjoyed almost unchecked power to **evict** tenants."[50] During this period, courts upheld no cause **evictions**,[51] as well as **evictions** based on such infractions as out-of-wedlock births,[52] adultery,[53] the misbehavior of children,[54] and other PHA-determined forms of "undesirability."[55]***531** PHAs were also able to use the threat of **eviction** to gain compliance with a host of often intrusive behavioral rules.[56]

The era of unchecked PHA discretion came to an abrupt end with the Supreme Court's ruling in Goldberg v Kelly.[57] In Goldberg, the Court ruled that terminating a recipient's welfare benefits without providing the recipient with a pre-termination eligibility hearing constituted a violation of that person's due process rights.[58] The innovation in Goldberg was to treat a government benefit as property that the government could not deprive a person of without due process of law under the Fifth and Fourteenth Amendments.[59]

Within a year, circuit courts extended the reasoning of Goldberg to the public **housing** context. In Escalera v New York City **Housing** Authority,[60] the Second Circuit held that "(t)he government cannot deprive a private citizen of his continued tenancy (in a public **housing** unit), without affording him adequate procedural safeguards even if public **housing** could be deemed to be a privilege."[61] In 1973, the Fourth Circuit took the final step and held that due process required not only just procedures, but also a legitimate reason for terminating a tenancy. In Joy v Daniels,[62] the court held that for procedural protections to have meaning, **good cause** must be shown to justify the termination of tenancy, irrespective of the terms of the lease.[63]

Unlike under the common law regime, therefore, the landlord had to provide a reason to justify non-renewal of the lease, and the tenant had a right to challenge the stated grounds for termination. Courts expanded the constitutional due process requirements to other federal **housing** programs, including Section 8 and a variety of construction ***532** and rental subsidy programs; and once the due process underpinnings of the protection were judicially established, **Good cause eviction** language was incorporated into the regulations of all the major federal **housing** programs.[64]

Although both HUD and the courts have continued to adjust the scope of the **Good cause eviction** protection, the fundamental premise that tenants cannot be **evicted** without **good cause** has remained intact. By the time the LIHTC was enacted in 1986, however, privatization and deregulation were popular policy prescriptions and some scholars were blaming tenant **eviction** protections for the ills of federally subsidized **housing** projects. The following section outlines the debate over **Good cause eviction** and demonstrates why it is of such concern whether the LIHTC provides for it.

B. The Debate over Good cause eviction Protection

Critics of **Good cause eviction** protection attack it on several grounds. Some argue that tenant protections, like **Good cause eviction**, raise the cost of **low-income housing**, reducing the units that can be built and maintained by a private entity with a given level of subsidy, thus hurting **low-income** individuals as a class.[65] In the public **housing** context, **Good cause eviction** protection is also blamed for the concentration ***533** of poor people in public **housing**,[66] the physical deterioration of publicly subsidized **housing**, and the physical dangers faced by law-abiding tenants.[67] Granting tenants **Good cause eviction** protection is said to be yet another example of "overvaluing the rights of individual tenants as compared to the rights of other tenants and the needs of their communities."[68]

In recent years, these criticisms have led to federal legislative efforts to define what will constitute **good cause** and to streamline the public **housing eviction** process. There have also been efforts to significantly limit the availability of the protection. In 1988 Congress amended the United States **Housing** Act to require that public **housing** leases contain provisions stating that criminal activity affecting the health and safety of public **housing** residents committed by any tenant, member of a tenant's household, or guest "shall be cause for termination of tenancy."[69] HUD interprets the statute as imposing strict liability on tenants for the actions of their household members and guests.[70] In 1996 the Clinton Administration put public **housing** tenants on notice that PHAs will employ a "one strike and you're out policy" with respect to **evicting** tenants under the criminal activity provision.[71] While these efforts to define legislatively what constitutes **good cause** for **eviction** have succeeded, legislative initiatives to limit the availability of the protection itself have failed so far. The "Public **Housing** Reform and Empowerment Act of 1995," for example, would have amended the Section 8 program to require **good cause** for **eviction** only during the term of the lease.[72] The proposal was not adopted. A similar, but more far reaching, proposal in the **Housing** Opportunity and Responsibility Act of 1997[73] also failed to pass.

***534** The failure of efforts to eliminate **Good cause eviction** protection altogether from federal **housing** programs may only be a grudging acknowledgment of the constitutional origins of this protection. On the other hand, Congress' failure to attempt to do away with the protection may be an acknowledgment of arguments made by proponents of **Good cause eviction** that any costs are minimal and are significantly outweighed by the benefits of **Good cause eviction** protection to **low-income** tenants.

To the economic incentive arguments, for example, proponents dispute the impact of the protection on **low-income housing** investment and construction, or at least the significance of that impact.[74] Advocates of **Good cause eviction** argue that any costs incurred are warranted by the reductions in improper and costly (in human and financial terms) **evictions**.[75] The blame assigned to **Good cause eviction** protection for the problems in federally subsidized **housing**--whether the insufficient supply, the concentration of poverty, or the deterioration of safety--is viewed as a cynical effort to distract attention from the real sources of such problems: long-standing policies concentrating public **housing** in impoverished areas, racism, dramatic cuts in all kinds of federal **housing** and welfare programs, poor quality public schools, a low-wage economy, and the like.[76]

Proponents also point out the critical benefits of for cause **eviction** protection. They argue that a no cause **eviction** regime is an invitation to improper discrimination, especially in a tight market for **low-income housing** where there are many applicants for every unit. Arguing to protect the **Good cause eviction** provision in the Section 8 statute, David Bryson of the National **Housing** Law Project testified before Congress that the provision "serves to protect tenants against ***535** retaliatory and other arbitrary **evictions** from their home(s)."[77] Similarly, in requiring landlord recipients of federal subsidies to show **good cause** for an **eviction**, the court in Green v Copperstone Ltd[78] explained that "(t)o allow a quasi public landlord to **evict** upon expiration of a fixed term is to enable secret and silent discrimination."[79]

Because of the tightness of the **low-income housing** market, and the general vulnerability of **low-income** households, proponents of **Good cause eviction** argue that any **eviction** has devastating consequences. For households living on the financial margins, **eviction** often means homelessness.[80] To the extent that a no cause **eviction** regime allows "secret and silent discrimination," landlords can also exploit **low-income** tenants' vulnerability, forcing them to endure substandard **housing** conditions and other indignities, under the threat of **eviction**.

Many of the competing claims for and against **Good cause eviction** turn on empirical issues that are beyond the scope of this Comment. What is clear is that all sides, including the current tenants of LIHTC units, have a lot at stake in whether the nation's largest **low-income housing** construction subsidy program includes **Good cause eviction** protection.

Given the criticism that **Good cause eviction** has received in the literature, the emphasis by federal lawmakers on local control and federal deregulation at the time the LIHTC program was created, and the relative obscurity of the **Good cause eviction** provision in the LIHTC statute,[81] it is perhaps not surprising that large numbers of state **housing credit** agencies believe no such protection exists. These factors may also explain why tenant advocates have largely looked past the LIHTC statute and have relied instead on due process arguments to establish a **Good cause eviction** right for LIHTC tenants. Nonetheless, as Part III demonstrates, a close reading of IRC Section 42 leaves little doubt that a **Good cause eviction** right was created under the LIHTC statute in 1990.

*536 III. The Statutory Interpretation Case for Good cause eviction Protection in the LIHTC

Whether or not the LIHTC guarantees **Good cause eviction** protection to tenants is a question with ramifications for nearly a million **low-income** households, and the number is growing every year. A large percentage of state **tax credit** allocation agencies currently do not require landlords who receive **low-income housing tax credits** to put **Good cause eviction** provisions in their tenant leases.[82] More specifically, the agencies do not believe that IRC Section 42 requires them to include a **Good cause eviction** provision in the "extended use agreements" that the agencies must enter into with each **tax credit** recipient.[83] This Comment contends that these agencies are mistaken in their interpretation of the statute. Read properly, the federal statute governing the LIHTC requires state **housing credit** agencies to obligate **tax credit** recipients, as a condition of receiving the **credit**, to guarantee their tenants **Good cause eviction** protection.

This Part analyzes the relevant language of IRC Section 42 as it evolved through amendment over time. In addition to its plain language, the statute's legislative history and recent congressional committee analysis support the conclusion that the LIHTC requires **Good cause eviction** protection. The argument in this Part is made largely without the benefit of case law. To date, only one state appellate court opinion has considered the statutory construction question raised here, and while the court's analysis is entirely consistent with this Comment's argument, the opinion is unpublished.[84]

A. The Tax credit as Originally Codified

The **Low Income housing tax credit** is codified at Section 42 of the Internal Revenue Code. Since its enactment in 1986, the statute has undergone numerous amendments. There was no reference of any kind to the conditions for tenant **eviction** in the initial version of Section 42. There is also no evidence in the legislative history of the Omnibus Budget Reconciliation Act of 1986 that the issue was ever considered. A reference to **Good cause eviction** first appears in a comprehensive 1989 amendment of the statute.

*537 B. The 1989 Omnibus Budget Reconciliation Act[85]

In 1989, following an exhaustive review of the program by the Mitchell-Danforth Task Force on the **Low Income housing tax credit**,[86] the LIHTC underwent substantial amendment. Among the additions to the statute enacted by the Omnibus Budget Reconciliation Act of 1989 were the Extended **Low-Income housing** Commitment[87] ("ELIHC") and an unrelated requirement setting conditions for tenant **eviction** should an LIHTC property be foreclosed upon or otherwise removed from the LIHTC program prematurely.

The ELIHC was apparently a response to the Task Force's finding that the original fifteen-year "compliance period" did not sufficiently secure the long-term affordability of LIHTC units.[88] As enacted, the ELIHC conditioned receipt of a **tax credit** for any year after 1989 upon the **credit** recipient placing a restrictive covenant on the **credited** property. That covenant-- referred to as the "extended use agreement"--was required to contain, among other things, a commitment that the fraction of **low-income** units in the property will not decrease for at least fifteen years after the original fifteen-year "compliance period" has ended.[89] The ELIHC also provided that the commitments made in the extended use agreement could be enforced by prospective, current, or past tenants of LIHTC units in state court. The ELIHC requirements were codified at IRC Section 42(h)(6)(B).[90]

In a separate subsection of the statute, the 1989 amendment created two exceptions to the minimum thirty-year extended use period: (1) transfer after fifteen years to another owner who will maintain the **low-income** units and (2) foreclosure.[91] Under the foreclosure provision, the extended use period would terminate upon foreclosure.[92]

***538** It was in relation to the potential early termination of an extended use period that the 1989 amendment introduced the concept of **Good cause eviction** protection. IRC Section 42(h)(6)(E)(ii) was added and provides that:
(ii) The termination of an extended use period . . . shall not be construed to permit before the close of the 3-year period following such termination--
(I) the **eviction** or the termination of tenancy (other than for **good cause**) of an existing tenant of any **low-income** unit, or

(II) any increase in the gross rent with respect to such unit not otherwise permitted under this section.
This provision extended, through the use of **Good cause eviction** protection, the period of **low-income** occupancy following premature termination of an ELIHC.
Following the 1989 amendments, therefore, two relevant provisions were in place. First, under IRC Section 42(h)(6)(B), all LIHTC projects now required a restrictive covenant running with the property containing provisions that were to remain in force for no less than thirty years, some of which could be enforced by interested **low-income** individuals in state court. Second, an exception was created under IRC Section 42(h)(6)(E), which allowed for early termination of an extended use period, subject to a three-year ban on **eviction** of **low-income** tenants in the absence of **good cause**. At that time, there was no express statutory connection between the contents of the covenant and the post-termination **Good cause eviction** protection. This changed in 1990.

C. The Omnibus Budget Reconciliation Act of 1990[93]

The 1990 Budget Reconciliation Act made primarily "technical corrections" to the LIHTC.[94] One of those technical amendments is particularly critical to this Comment's analysis. It states, simply: "Clause (i) of section 42 (h)(6)(B) is amended by inserting before the comma 'and which prohibits the actions described in subclauses (I) and (II) of subparagraph (E)(ii)'."[95] This apparently innocuous cross-reference creates a significant change in the statute. Clause (i) of Section 42 (h)(6)(B) is the provision that spells out what commitments are contained in the restrictive covenant required by the Extended ***539Low Income housing** Commitment. That clause, as amended, now defines the ELIHC covenant as that covenant which requires that the applicable fraction (of **low-income** units) for the building for each taxable year in the extended use period will not be less than the applicable fraction specified in such agreements, and which prohibits the actions described in subclauses (I) and (II) of subparagraph (E)(ii).[96]
The subclauses (I) and (II) of clause (E)(ii) cross-referenced by this provision are those originally introduced as part of the foreclosure exception added by the 1989 amendment. The critical subclause, subclause (I), forbids "the **eviction** or the termination of tenancy (other than for **good cause**) of an existing tenant of any **low-income** unit."[97]

There are two possible readings of IRC Section 42 following this 1990 amendment. First, it may be that the amendment to clause (6)(B)(i) was intended to incorporate clause (E)(ii) in its entirety into the ELIHC.[98] If so, the **Good cause eviction** language in subclause (E)(ii)(I) would remain confined to circumstances of foreclosure and early termination of an extended use agreement.[99] On this reading, after 1990, an ELIHC covenant, or extended use agreement, should contain a statement such as "In the event of the early termination of the ***540** extended use period, current **low-income** tenants shall not be **evicted** for three years except for **good cause**."

The alternative and more appropriate reading of the amended statute is that clause (6)(B)(i) now incorporates into the restrictive covenant only the actions specifically spelled out in subclauses (6)(E)(ii)(I) and (II). In addition to providing for no reduction in the fraction of **low-income** units during

the extended use period, the ELIHC covenant must now prohibit "the **eviction** or the termination (other than for **good cause**) of an existing tenant of any **low-income** unit." As a matter of statutory construction and legislative history, this reading is the superior one.
1. Plain language and statutory construction.

When interpreting a federal statute, the paramount objective is to determine the intent of Congress, and that intent is to be derived from the language and structure of the statute whenever possible.[100] Thus, the starting point for interpreting the statute is the language itself, and unless there is clearly stated legislative intent to the contrary, the plain meaning of the language is determinative.[101] In this case, our reading of the statutory language must also be guided by the rules of construction Congress has provided for the Internal Revenue Code.[102]

The plain language of the relevant statutory provisions, as amended, suggests that only the **Good cause eviction** language of subclause (E)(ii)(i) is to be incorporated into the extended use agreement. The new language in (6)(B)(I) calls for an ELIHC covenant "which prohibits the actions described in subclauses (I) and (II) of subparagraph (E)(ii)." It is not a natural reading of this statement that the covenant is to include all of subparagraph (E)(ii). Nor would a literal reading incorporating all of (E)(ii) make sense. If the "action" which is to be prohibited is that which is described in (E)(ii), the covenant would prohibit "(t)he termination of an extended use period" following foreclosure, from "not be(ing) construed to permit" the actions under subclauses (I) and (II). The covenant would thus impose an affirmative duty to construe foreclosure as permitting no cause **eviction**. Such an outcome would be absurd.

***541** By contrast, the proposed reading seamlessly integrates the text of (6)(B)(i) with the text of (E)(ii)(I) and (II). First, subclauses (I) and (II) each clearly contain "actions" which it makes sense to prohibit. Integrating the actual words, the ELIHC covenant shall be one "which prohibits" "(I) the **eviction** or the termination of tenancy (other than for **good cause**)" and "(II) any increase in the gross rent . . . ." The integration makes perfect sense without reference to the preceding language in (E)(ii). Based simply on a natural reading of the plain language, one can infer that Congress intended with its 1990 amendment to create **Good cause eviction** protection for existing tenants.

This conclusion is reinforced by an application of the rules of construction that Congress has directed us to apply to the Internal Revenue Code. As the Minnesota court of appeals stated in Cimarron Village Townhomes, Ltd v Washington,[103] reading the post-1990 LIHTC statute as incorporating only subclauses (E)(ii)(I) and (II) into the extended use agreement is consistent with the IRC rule of construction that states "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title."[104]

This rule suggests that it would be inappropriate to assume that Congress intended to include, via cross-reference to a specific subclause, the terms of an entire clause. "The language of Section 42(h)(6)(B)(i) . . . does not state 'which prohibits the actions described in subparagraph (E)(ii).' We must, therefore, . . . read subclauses (I) and (II) alone without any of the prefatory language of subparagraph (E)(ii)."[105]

Thus, under both general canons of statutory construction and the Internal Revenue Code's own rules of interpretation one must conclude that Congress intended to provide **Good cause eviction** protection, unless there is a clear statement of legislative intent to the contrary. There is no such legislative statement. What little legislative history exists, supports the reading proposed here.
2. Legislative history.

The legislative history of the 1990 amendment is sparse. However, one specific reference to the relevant provision supports the reading proposed here. The crucial amendment was originally introduced as ***542** part of the Technical Corrections Act of 1990.[106] The Congressional Record explains the (6)(B)(i) amendment as follows:

> The bill clarifies that the extended **low-income housing** commitment must prohibit the **eviction** or termination of tenancy (other than for **good cause**) of an existing tenant of a **low-income** unit or any increase in the gross rent inconsistent with the rent restrictions on the unit.[107]

There is nothing in this language or elsewhere in the bill report suggesting that the prohibition on no cause **eviction** applies only to situations in which the extended use period is prematurely terminated through foreclosure. Instead, this paragraph seems clearly to state that Congress's intent in amending IRC Section 42(h)(6)(B)(i) was to extend **Good cause eviction** protection to all tenants in LIHTC subsidized units.

The conclusion that **Good cause eviction** protection is required by the LIHTC is reinforced by the most recent available congressional interpretation of the statute. In a 1997 report prepared by the staff of the Joint Committee on Taxation, the following statement was made with respect to what must be included in an Extended **Low Income housing** Commitment pursuant to the statute:

> The agreement must be recorded, pursuant to State law, as a restrictive covenant against the property. . . . It must allow any prospective, present, or former tenant the right to enforce the agreement in any State court. It also must provide that no existing **low-income** tenant may be **evicted** other than for **good cause**, and prohibit increases in gross rent above that which is otherwise allowable under Code section 42.[108]

This summary of what must be included in an extended use agreement is entirely consistent with the reading of the statute proposed here. There are no qualifying statements surrounding this quote that would suggest that **Good cause eviction** protection is limited to the early termination of extended use periods.
3. Potential objections.

As clear as the text of the statute and the limited legislative history are, there remain objections that might be raised. The first is an argument about plausibility. Is it likely that an issue as politically salient ***543** as **Good cause eviction** protection would be established in a "technical amendment," apparently without public debate, and through a relatively cryptic cross-reference?

The doctrinal answer to this objection is that, likely or not, the text is unambiguous and there is no clear statement of legislative intent to the contrary.[109] Moreover, the evolution of the statute suggests that Congress may have taken for granted that **Good cause eviction** protection would apply to a federal **housing** subsidy program like the LIHTC.

As discussed in Part II above, **Good cause eviction** protection continues to be a virtually universal regulatory requirement of federal **housing** programs. Had Congress intended to abandon the protection completely, some statement to that effect would surely have been made when the program was first created. Instead, the issue was never addressed. It was not until after the 1989 amendment to the statute that Congress was forced to make its intent with respect to **Good cause eviction** explicit. The 1989 amendment's explicit provision for **Good cause eviction** protection in the event of foreclosure created the plausible argument that Congress's failure to provide expressly for the protection in other circumstances signaled Congress's intention not to do so. To avoid this conclusion, Congress passed a "technical amendment" to the statute in 1990 which clarified its original assumption that **Good cause eviction**

protection would be provided under the LIHTC. By relying on the simple cross-reference and not attempting to define the scope of that protection legislatively, Congress may have intentionally sought to avoid the political difficulties that would have resulted from a more expansive statement of this tenant protection in the statute. As written, Congress has simply left the task of defining the scope of the **good cause** protection under the LIHTC up to the IRS and the courts. This is admittedly only a plausible interpretation of the sequence of events that produced the current statutory language, but the lack of more extensive legislative history makes it impossible to do more than offer plausible speculations as to Congress's decision making process.

The second objection that one might raise against the plain text reading of IRC Section 42 offered here is that when viewed in light of other federal statutory statements of **Good cause eviction** protection, the apparently plain language of IRC Section 42 becomes ambiguous. Why, if Congress intended to create the right, did it not use the language common in other federal **housing** program statutes? As it happens, ***544** an amendment to IRC Section 42 was introduced in 1993 that would have allowed Congress to do just that, but it was never adopted.[110] Furthermore, a report by the Joint Committee on Taxation explaining the proposed amendment concluded the "(Internal Revenue) Code (currently) do(es) not include any specific provisions concerning the grounds . . . for termination of a tenancy."[111] If one accepts upon this evidence that the plain text of the statute is, in fact, ambiguous, it might further be argued that the state **tax credit** allocation agencies' interpretation of the statute as not providing **Good cause eviction** protection is entitled to deference by the courts.

While this argument cannot be dismissed out of hand, it is sufficiently weak that it poses no real danger to the statutory interpretation offered above. There are several reasons discussed above in this Part for why Congress might have chosen not to be more detailed in its statement of the **Good cause eviction** protection. Perhaps Congress took the existence of the right for granted and sought only to make the assumption explicit. Or perhaps, as it often does, Congress chose to leave it to the IRS or the courts to provide a more detailed and context-specific definition of the right.[112]

Although in some cases Congress has provided more exhaustive statutory statements of the **Good cause eviction** protection, it is not the case that the LIHTC is unique in its relatively terse articulation of the right. For example, HUD's Section 1490m grant program to replace and maintain affordable rural **housing** states: "(1) Assistance under this section may be provided . . . only if--. . . (D) the owner agrees to enter into and abide by written leases with the tenants, which leases shall provide that tenants may be **evicted** only for **good cause**."[113] The statute provides no further elaboration of the right. Furthermore, the ***545** simple fact that the language chosen by Congress leaves the boundaries of the right undefined does not make the statutory language ambiguous. A statute is ambiguous when "(i)t leaves the reader with at least two, apparently inconsistent, alternatives each of which, taken alone, seems free of ambiguity and appears to be meaningful."[114] There is no plausible way to read the phrase "prohibits the **eviction** or the termination of tenancy (other than for **good cause**)" as allowing for no cause **eviction**. And as Part III.C.1 demonstrated, given the common meaning of the words used, the need for proper syntax, and the IRC's rules of interpretation, there is no plausible alternative to reading Section 42(h)(6)(B)(i) as prohibiting only the specific actions in subclauses (I) and (II) of Section 42(h)(6)(E)(ii).

It is true that courts have held that "even where the language of a statute is superficially clear, legislative history may call such apparent clarity into question."[115] The two pieces of legislative history potentially in conflict with the reading offered here, however, do not have this effect. First, the most, if not only, relevant piece of legislative history for purposes of statutory interpretation is that written at the time the relevant

language was enacted.[116] In this case, that legislative history, cited in full above, is entirely consistent with the proposed plain language reading.[117]

Second, the fact that an amendment was introduced and defeated that would have provided expansive **good cause** language in the LIHTC does not clearly signal congressional intent not to provide the protection. This action is equally consistent with a congressional determination to leave the definition of the provision to the IRS or the courts. There is simply no legislative history on the proposed amendment that would allow us to determine which interpretation is more accurate.

The language in the Joint Committee on Taxation report that accompanied the amendment is a legislative interpretation of an existing statute and is of limited significance at best in determining Congress's intent in enacting the relevant statutory provision.[118] Furthermore, as quoted earlier, the most recent Joint Committee on Taxation interpretation of the identical LIHTC statutory language concluded that **tax*546credit** recipients must provide **good cause** protection for all existing **low-income** tenants.[119]

It is worth noting in conclusion that even if a court were to agree that the statutory language is ambiguous, current state agency interpretations of the federal statute would most likely not be entitled to the kind of deference given federal agencies under Chevron.[120] This issue ought never to arise, however, since there is no basis for rejecting the plain language reading of the statute offered here.

Conclusion

While reading IRC Section 42(h)(6)(B)(ii) to require **Good cause eviction** protection during the extended use period may not be popular with some, and while it will require a significant change in practice by many state **tax credit** allocation agencies, it is clearly the best reading of the statute. The reading is supported by the limited legislative history of the statute and the one judicial opinion available on the issue. While there is evidence against the reading, that evidence is inconclusive, at best, and cannot overcome the plain language of the statute. That language requires all **low-income housing tax credit** recipients to place a restrictive covenant on the **tax credit** property, and that covenant must contain a provision guaranteeing tenants a **Good cause eviction** right enforceable in state court.

Footnotes

d1 B.A. 1992, Swarthmore College; M.A. (Sociology) 1996, The University of Chicago; J.D. Candidate **2000**, The University of Chicago.

1 The LIHTC was enacted as part of the **Tax** Reform Act of 1986 and was made permanent by the Omnibus Budget Reconciliation Act of 1993. See **Tax** Reform Act of 1986, Pub L No 99-514, 100 Stat 2085, codified at IRC § 42 (1998); Omnibus Budget Reconciliation Act of 1993, Pub L No 103-66, 107 Stat 312.

2 See U.S. General Accounting Office (GAO), **Tax credits**: Opportunities to Improve Oversight of the **Low-Income housing** Program 2 (Mar 1997) (reporting that up to three billion dollars are made available annually through the program).

3 For a general discussion, see Shelby D. Green, The Public **Housing** Tenancy: Variations on the Common Law that Give Security of Tenure and Control, 43 Cath U L **Rev** 681, 683-84 (1994) (noting that "(t)he privatization movement achieved perhaps its greatest momentum during the (Reagan and Bush administrations)" and explaining how this movement affected **low-income**

housing policy). See also Michael H. Schill, Privatizing Federal **Low Income housing** Assistance: The Case of Public **Housing**, 75 Cornell L **Rev** 878, 878-88 (1990) (discussing the academic debates surrounding privatization in the 1980s and the implications of these debates for **low-income housing** policy). See also Part I.B.

4 Pub L No 93-383, 50 Stat 888 (1937), codified as amended at 42 USC §§ 1437 et seq (1994 & Supp 1996). This statute is the traditional source for federal **low-income housing** programs.

5 See Part I.C for a description of the structure of the LIHTC program.

6 Throughout this Comment, "for cause" and "**good cause**" **eviction** are used interchange-ably.

7 All but a few state landlord-tenant statutes allow no cause **eviction**; the landlord can terminate a tenancy at the end of a lease without explanation, so long as she gives the statutorily appropriate amount of notice. See notes 50-56 and accompanying text.

8 See, for example, Section 8 **Housing** Assistance Payments Program, Hearing before the Subcommittee on **Housing** and Community Development of the **House** Committee on Banking, Finance, and Urban Affairs ("Section 8 Hearing"), 103d Cong, 1st Sess 46 (GPO 1994) (statement of David B. Bryson, National **Housing** Law Project, Washington, D.C. on Nov 3, 1993) ("(**Good cause eviction** protection) serves to protect tenants against retaliatory and other arbitrary **evictions** from their home (sic). For many tenants, it is an important safeguard against ( ) becoming homeless.").

9 See, for example, Robyn Minter Smyers, High Noon in Public **Housing**: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime, 30 Urban Law 573, 576, 607-12 (1998) ("By the late 1980s, consensus was developing among (Public **Housing** Authority) and HUD officials, federal and state lawmakers, and tenants themselves that the procedural and structural changes wrought by the due process revolution were complicating efforts to make public **housing** a safe and decent place to live.").

10 Cimarron Village Townhomes, Ltd v Washington, 1999 Minn App LEXIS 890 (holding that **Good cause eviction** protection is provided for under the LIHTC statute).

11 The author conducted a telephone survey of all fifty state **housing** finance agencies charged with administering the LIHTC Programs. In each of the thirty-eight successful interviews, the author spoke to the official agency contact person for the program or to a person designated by that individual. Each interviewee was asked whether the agency requires that the extended use agreement (see note 30 and accompanying text) concluded with **tax credit** recipients include a provision that the current tenants of any units receiving an LIHTC subsidy will not have their tenancy terminated other than for **good cause**. In many cases, the author was able to review sample copies of the states' extended use agreements (sometimes called "sample land use restriction agreement").
Of the thirty-eight agencies successfully interviewed, twenty-seven reported not having such a provision: Alabama, Alaska, Arkansas, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maryland, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont, Washington, and West Virginia. By contrast, Arizona, California, Delaware, Kansas, Massachusetts, Minnesota,

Missouri, Nebraska, North Carolina, Virginia, and Wisconsin do include language guaranteeing current tenants **Good cause eviction** protection. **Jolin** Telephone Survey (1999) (on file with author).
Because the question in this Comment has to do with how IRC Section 42 is interpreted by the state agencies, the author was not concerned with whether or not state landlord-tenant laws also provided **Good cause eviction** protection, or with the fact that when LIHTC funds are combined with other federal **housing** program dollars (which often occurs) tenants typically receive **Good cause eviction** protection. The author did not consider a global statement in an extended use agreement that the recipient must, for example, "comply with all requirements of IRC Section 42" to constitute inclusion of the **Good cause eviction** protection. In addition to not satisfying what this Comment argues is a requirement that the protection be expressly stated in the extended use agreement, a global statement requiring compliance with Section 42 only begs the question in this Comment: What is the requirement of Section 42 with respect to **Good cause eviction**?

12 The author has spoken to legal services **housing** attorneys in several states, as well as with **low-income housing** advocacy organizations familiar with the LIHTC. There was general agreement in these conversations that the LIHTC statute does not provide for **Good cause eviction** protection and that constitutional due process arguments are the best alternative.

13 For an explanation of the Section 8 subsidy program, see note 49.

14 Figures cited in John Atlas and Ellen Shoshkes, Saving Affordable **Housing**: What Community Groups Can Do & What Government Should Do 78 (National **Housing** Institute 1997) (describing dire situation in public **housing** and noting that the "4.7 million fewer low-cost rental units than **low-income** renters is the largest shortfall on record").

15 Department of **Housing** and Urban Development, Waiting in Vain: An Update on America's Rental **Housing** Crisis 1 (Mar 1999) ("HUD Rental **Housing** Report"). It is worth noting that the demographic group experiencing the greatest increase in worst case **housing** needs is working families. Between 1991 and 1995, the worst case **housing** need rose 24 percent among households with at least one full time minimum wage worker. Id at 2.

16 Id at 1, 15. A "**low-income** family" is a family whose income does not exceed 80 percent of the median income for the area, and a "very **low-income** family" is a family whose income does not exceed 50 percent of the median income for the area. 42 USC § 1437a(b)(2).

17 See Jonathan Klein and Lynne Wehrli, The **Low-Income housing tax credit**: Federal Help for **Low-Income housing**, 34 Boston Bar J 22, 22 (1990).

18 Id.

19 Between 1937, when the federal government first became involved in providing affordable rental **housing**, and 1996, the total number of HUD supported households--including those in public **housing**, those in Section 8 units, and those with Section 8 vouchers--grew to 4.3 million. HUD Rental **Housing** Report at 2-3 (cited in note 15).

20 Id at 16. Congress did appropriate 50,000 new Section 8 vouchers in 1998. Id at 4-5.

[21] See Ronald A. Cass, Privatization: Politics, Law, and Theory, 71 Marq L **Rev** 449, 450-52 (1988) (noting that "'(p)rivatization,' a term rarely heard a few years ago, is now common around the world" and that "there frequently is consensus at an abstract level that it is good for private enterprise to do certain things and bad for government to do them"). For a discussion of the limits of municipal privatization efforts, see Rowan A. Miranda, Contracting Out: A Solution With Limits, in Terry N. Clark, ed, Urban Innovations: Creative Strategies for Turbulent Times 197, 208-10 (Sage 1994) (concluding, from an empirical study, that contrary to the dominant theories provided by property rights theory and public choice theory, the greatest cost efficiencies (for cities contracting out services) were produced by contracts with non-profits and not by contracts with private, for-profit firms).

[22] Green, 43 Cath U L **Rev** at 684 n 12 (cited in note 3).

[23] David Philip Cohen, Improving the Supply of Affordable **Housing**: The Role of the **Low-Income housing tax credit**, 6 J L & Pol 537, 538 (1998) (noting the increasing trend toward privatization in **low-income housing** since the 1960s).

[24] GAO, **Tax credits** at 2 (cited in note 2).

[25] Jean L. Cummings and Denise DiPasquale, Building Affordable Rental **Housing**: An Analysis of the **Low-Income housing tax credit** 4 (City Research Feb 1998), available online at <http://www.cityresearch.com/lihtc/cr_lihtc.pdf> (visited Dec 26, 1999) (describing the basic nature and underlying purpose of the LIHTC program and introducing a detailed empirical study of LIHTC's effects over the past ten years).

[26] IRC Section 42(g)(1)(A)-(B) provides that an eligible **low-income housing** project may either be one in which 20 percent of the units are rent restricted (to 30 percent of income) for tenants earning 50 percent or less of area median gross income, or one where 40 percent of the units are rent restricted (to 30 percent of income) and occupied by tenants earning 60 percent or less of area median gross income. See also IRC § 42(g)(2)(A) (defining rent restricted units).

[27] IRC § 42(h)(3)(C)(i).

[28] IRC § 42(h)(3)(B). The statute's term "**housing credit** agency" will be used interchangeably with "**tax credit** allocation agency" throughout this Comment.

[29] Cohen, 6 J L & Pol at 543 (cited in note 23). For the purposes of this Comment, it is not important to understand precisely how the **credit** amount is calculated. As the quote suggests, the **credit** amount depends in part on the number of units set aside for **low-income housing**. Other relevant factors include the amount invested in the building, whether the **credit** is for the purchase or rehabilitation of an existing building or for the construction of a new building, and whether another federal subsidy was used for the project. See Thomas R. Wechter and Daniel L. Kraus, The Internal Revenue Code's **Housing** Program: Section 42, 44 **Tax** Law 375, 376-77 (1991) (describing the criteria used to determine how the **tax credit** is computed).

[30] "Although the **credit** is taken over a 10-year period, it is 'earned' over a 15-year 'compliance period.' If a **low-income** building is disposed of or converted to fair market use during the 15-year compliance period, the taxpayer is required to 'recapture' the unearned portion of the **credit** taken."

Wechter and Kraus, 44 **Tax** Law at 399 (cited in note 29).

31 Id at 401-02 (explaining that "(f)or **credits** granted after 1989, a property will qualify for the **low-income housing tax credit** only if the taxpayer enters into an extended use commitment" that extends the **low-income** occupancy of the project for a minimum of fifteen additional years beyond the close of the fifteen-year **low-income** compliance period). See also IRC § 42(h)(6)(A)-(B) for a definition and the requirements of an extended use agreement.

32 See note 38.

33 See Cummings and DiPasquale, Building Affordable Rental **Housing** at 36 (cited in note 25) (describing the increase in participation by private investors, state and local officials, and non-profit organizations in projects to provide **low-income housing** and highlighting the flexible nature of the LIHTC program).

34 GAO, **Tax credits** at 2, 4 (cited in note 2). It is worth noting that the mortgage interest deduction, a homeowner **tax credit**, cost the federal government an estimated $58 billion in 1995. Of that amount, an estimated $29 billion went to households with incomes over $100,000. See Peter Dreier, The GOP's Cynical Attack on Public **Housing** 3 (National **Housing** Institute 1996), available online at <http://www.nhi.org/policy/gopatt.html> (visited Jan 27, **2000**).

35 Cummings and DiPasquale, Building Affordable Rental **Housing** at 8 (cited in note 25) (describing the volume of the LIHTC program in the 1990s and summarizing past estimates of the program's growth before offering new data on this issue). See also **Low Income housing tax credit**, 105th Cong, 2d Sess, in 144 Cong Rec § 12577 (Oct 14, 1998) (statement of Senator Alfonse D'Amato) ("The **credit** has been responsible for almost 900,000 units of **housing** in the past decade. Nearly all new affordable **housing** today (98%) is constructed with the help of the **credit**.").

36 GAO, **Tax credits** at 6 (cited in note 2).

37 In his veto of the 1995 Budget Reconciliation Bill, President Clinton cited the elimination of the **tax credit** as one reason for his veto: "Moreover, the bill would eliminate the **low-income housing tax credit** and the community development corporation **tax credit**, which address critical **housing** needs and help rebuild communities." Seven-Year Balanced Budget Reconciliation Act of 1995--Veto Message from the President of the United States, 141 Cong Rec H 14136, 14137 (Dec 6, 1995).

38 Analysts argue that the LIHTC program is less productive than reported because it displaces units that the market would otherwise produce. The program has produced far fewer units than needed to meet the needs of even very **low-income** families, and it is not clear that it has produced the kinds of units most needed by **low-income** families (for example, providing an appropriate number of bedrooms). Cohen, 6 J L & Pol at 550-51 (cited in note 23). Because of the manner in which affordability is calculated in the program, most units are also unlikely to be affordable to the neediest households. Id at 552-54. The inefficiency of the **credit** stems, in part, from the overhead costs of administering the program and the substantial transaction costs associated with the distribution of the **credits**. Id at 557-58. In addition, developers typically sell their allocated **tax credits** to syndicates or large corporate investors at a discount. The buyer will pay considerably less than a dollar for each dollar write-off because only a fixed percentage of the total **credit** can be

written off during each of ten years, and there is a risk that if the units cease to comply with affordability restrictions during the thirty year compliance and extended use period, a portion of the **credit** will have to be returned. As a result, for each dollar in federal **tax** subsidy, developers receive substantially less than a dollar in up front equity. Id at 557.

39 The author worked for the **housing** section of Legal Services in Portland, Oregon during 1997. Attorneys in that office related that they and their colleagues in offices around the country were defending a growing number of LIHTC tenants against no cause **evictions** brought under state landlord-tenant laws.

40 Ralph E. Boyer, Herbert Hovenkamp, and Sheldon F. Kurtz, The Law of Property: An Introductory Survey § 9.1 at 245-47 (West 4th ed 1991) (describing the basic features of the three types of landlord-tenant estates).

41 Edward H. Rabin, The Revolution in Residential Landlord-Tenant Law: Causes and Consequences, 69 Cornell L **Rev** 517, 534 (1984) (contrasting the traditional rule on **eviction** under the common law with the modern federal and state statutes limiting the reasons for which landlords might **evict** tenants).

42 The Fair **Housing** Act, Pub L No 90-284, 82 Stat 83 (1968), codified at 42 USC § 3604 (1994), prohibits adverse **housing** actions based upon race, religion, national origin, or sex.

43 Rabin, 69 Cornell L **Rev** at 534 (cited in note 41) (stating that the landlord's traditional common law right to **evict** tenants without explanation "has been limited in every state by the federal Fair **Housing** Act, which prohibits discrimination . . . and in most states by the doctrine prohibiting retaliatory **eviction**"). Retaliatory **eviction** protection is guaranteed in most states, either by statute or court decision. Id. In a typical retaliatory **eviction** case, a landlord seeks to **evict** a tenant who complained to a local **housing** code authority about the landlord's maintenance of the unit. See, for example, Edwards v Habib, 397 F2d 687, 690 (DC Cir 1968).

44 Rabin, 69 Cornell L **Rev** at 535 (cited in note 41). "Just cause" **eviction** protection has been extended to tenants who "(1) are protected by a rent control ordinance that has a just cause **eviction** provision, (2) live in government owned or subsidized **housing**, or (3) are subsidized tenants in privately owned **housing**." Id.

45 Id.

46 See, for example, NJ Stat Ann § 2A:18-61.1 (West 1999) (providing a long list of potential **eviction** reasons that satisfy the **good cause** requirement, for instance: failing to pay rent, disturbing the peace of other residents despite previous written notice, causing damage or injury to the property willfully or "by reason of gross negligence"). See also 24 CFR § 966.4(l)(2)(i) (1999).

47 Federal **Housing** Commissioner (HUD), Explanation of **Good cause** Regulation, § 882.215(c)(2), 49 Fed Reg 12215, 12233 (1984). For an example of a Section 8 lease provision conforming to federal **good cause** regulations, see S.B. Partnership v Gogue, 1997 SD 41, 562 NW2d 754, 755 (1997).

48 Pub L No 93-383, 50 Stat 888 (1937), codified as amended at 42 USC § 1437a(b)(6) (1994 & Supp

1996) (defining the term "public **housing** agency").

49 For purposes of this Comment, "public **housing** programs" are those in which the **housing** units involved are publicly owned and ultimately under the direct control of locally chartered public **housing** authorities. "Section 8" is a program named for its location in the U.S. **Housing** Act of 1937, 42 USC § 1437f (1994 & Supp 1996). Section 8 units are privately owned. A Section 8 subsidy can either be attached to the unit itself through a contract between the owner and the local public **housing** authority, or it can be brought to the unit by a **low-income** tenant who has a Section 8 voucher. In both cases, the tenant pays rent up to 30 percent of her income and the federal government pays the remainder, up to a pre-established "fair market rent" for the unit. For a general description of these and other HUD programs, see Department of **Housing** and Urban Development, Programs of HUD (1993).

50 Smyers, 30 Urban Law at 581 (cited in note 9).

51 See, for example, Walton v City of Phoenix, 69 Ariz 26, 208 P2d 309, 310-11 (1949) (holding that the local **housing** authority maintained the same rights and remedies as any other landlord in **eviction** matters); Columbus Metropolitan **Housing** Authority v Simpson, 85 Ohio App 73, 85 NE2d 560, 561-62 (1949) (rejecting tenants' argument that they "cannot be **evicted** without some cause being shown other than the termination of the lease").

52 McDougal v Tamsberg, 308 F Supp 1212, 1216 (D SC 1970) (holding that "a large number of illegitimate children, each by different men, is a factor which may be considered by the **Housing** Authority").

53 Johnson v New Rochelle Municipal **Housing** Authority, 39 Misc 2d 138, 253 NYS2d 39, 40 (Sup Ct 1964) (holding that a landlord need not promulgate a regulation banning adultery in order to use "illicit relations" as a basis for **eviction**).

54 Smalls v White Plains **Housing** Authority, 34 Misc 2d 949, 230 NYS2d 106, 108 (Sup Ct 1962) (upholding tenant **eviction** without a hearing based on misconduct of children).

55 New York City **Housing** Authority v Watson, 27 Misc 2d 618, 207 NYS2d 920, 922-23 (Sup Ct 1960) (Hofstadter dissenting) (objecting to the court's finding that a tenant may not challenge PHA's reason for **eviction** and upholding **eviction** of wife and four children on grounds that husband's incarceration made them "undesirable" tenants).

56 Smyers, 30 Urban Law at 583-84 (cited in note 9) (citing original HUD sources detailing the use of **eviction** threats and other punishments to achieve compliance with monthly unit inspection rules, as well as rules regulating the activities of children and the maintenance of fences and lawns).

57 397 US 254 (1970).

58 Id at 262-63.

59 Smyers, 30 Urban Law at 587-88 n 72 (cited in note 9) ("Beginning with the landmark case of Goldberg v Kelly . . . the Supreme Court signaled its willingness to extend due process protection beyond traditional notions of property to cover public benefits such as welfare."). See also

Goldberg, 397 US at 262-64 & n 8 (noting that welfare benefits were a matter of "statutory entitlement" and that "(i)t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity'").

60 425 F2d 853 (2d Cir 1970).

61 Id at 861, citing Goldberg, 397 US at 262-63. In Caulder v Durham **Housing** Authority, 433 F2d 998 (4th Cir 1970), the court affirmed that "(t)he 'privilege' or 'right' to occupy publicly subsidized low-rent **housing** seems to us to be no less entitled to due process protection than entitlement to welfare benefits which were the subject of decision in Goldberg." Caulder, 433 F2d at 1002-03.

62 479 F2d 1236 (4th Cir 1973).

63 Id at 1240-42 (finding that due process clause requires for cause **eviction** protection because recent **housing** legislation recognizes an "entitlement to continue occupancy until there exists a cause to **evict** other than the mere expiration of the lease").

64 The judicial expansion of **Good cause eviction** protection beyond public **housing** included Jeffries v Georgia Residential Finance Authority, 678 F2d 919, 925 (11th Cir 1982) (requiring **Good cause eviction** where tenant receives a rental subsidy under the Section 8 Existing **Housing** Assistance Payment program); Joy, 479 F2d at 1243 (holding that tenants of privately owned units receiving federal subsidies under Section 221(d)(3) of the National **Housing** Act, 12 USC § 1715***l***(d)(3) (1971), are entitled to due process protections); Green v Copperstone, Ltd, 28 Md App 498, 346 A2d 686, 697 (1975) (holding that tenant of unit that received construction and financing subsidy under Section 236 of the National **Housing** Act, 12 USC §§ 1715z-1 et seq (1968), is entitled to **Good cause eviction** protection); Christian v Silver Maples Ltd Dividend **Housing** Association, 1986 US Dist Lexis 27154 (E D Mich 1986) (finding state action under the Section 8 New Construction program, despite lack of direct government involvement in the **eviction** decision). A typical example of how **Good cause eviction** protection has been incorporated into federal **housing** programs as a result of these decisions is found at 24 CFR § 966.4(l)(2)(i). This particular provision applies to Section 8, Section 202, and a variety of other National **Housing** Act programs: (2) Grounds for termination. (i) The PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease such as failure to make payments due under the lease . . . or for other **good cause**.

65 See, for example, Lawrence Kolodney, **Eviction** Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement, 18 Fordham Urban L J 507, 520-21 n 52, 55 (1991) (compiling law and economics critiques of government-imposed tenant protections and explaining why such protections are considered detrimental to **low-income** individuals as a class). See also Steven Gunn, Note, **Eviction** Defense for Poor Tenants: Costly Compassion or Justice Served?, 13 Yale L & Pol **Rev** 385, 386 (1995) (explaining the reasoning of those who argue that through tenant protections like **Good cause eviction** "poor tenants as a class may ultimately suffer a reduction in the supply of decent, affordable **housing**").

66 Michael H. Schill and Susan M. Wachter, The Spatial Bias of Federal **Housing** Law and Policy: Concentrated Poverty in Urban America, 143 U Pa L **Rev** 1285, 1299 (1995) (asserting that the loss of PHA "freedom to select and **evict** tenants has contributed to the concentration of poverty within public **housing**").

[67] Vince Lane, former Chair of the Chicago **Housing** Authority, articulated what might be considered a "communitarian" critique of tenants' rights: "The time (has come) where the ACLU and everyone else is going to have to recognize that the majority of residents in public **housing** have rights, as well as the wrongdoers." Quoted in Smyers, 30 Urban Law at 608 (cited in note 9).

[68] Smyers, 30 Urban Law at 608 (cited in note 9).

[69] 42 USC § 1437d(l)(6) (1999). This statutory requirement was incorporated into federal regulations at 24 CFR § 966.4(f)(12)(i) (1999).

[70] Robert Hornstein, Mean Things Happening in This Land: Defending Third Party Criminal Activity Public **Housinge victions**, 23 § U L **Rev** 257, 263-65 (1996) (noting that the courts are divided on whether **evicting** tenants on a strict liability theory is consistent with due process).

[71] Remarks Announcing the "One Strike and You're Out" Initiative in Public **Housing**, 32 Weekly Comp Pres Doc 582 (Mar 28, 1996).

[72] § 1260, 104th Cong, 1st Sess (Sept 19, 1995), in 142 Cong Rec § 136, 147-48 (Jan 10, 1996) (proposing an amendment to Section 8 **housing** assistance in Title II Section 201(o)(7)(E)).

[73] HR 2, 105th Cong, 1st Sess (Jan 7, 1997) (proposing to replace current public **housing** lease requirements without including any provision for **Good cause eviction** protection in Title II Section 226).

[74] For example, Nancy Bernstine of the National **Housing** Law Project testified before Congress that "(t)he contention that **good cause** inhibits participation by landlords in Section 8 needs to be kept in perspective. Some form of **good cause** has been included in law since 1982. Even with the **good cause** requirement, many thousands of landlords have participated successfully in the Section 8 program." Public **Housing** Reform and Empowerment Act of 1995, Hearing on § 1260 before the Senate Committee on Banking, **Housing**, and Urban Affairs, 104th Cong, 1st Sess 56 (1995) (opening statement of Nancy Bernstine).

[75] Gunn, Note, 13 Yale L & Pol **Rev** at 419-20 (cited in note 65) (concluding, based on an analysis of represented versus unrepresented tenants in **housing** court, that "the landlords who suffered the greatest amount of **eviction**-related losses were those least entitled to collect rent").

[76] See, for example, Florence Wagman Roisman, Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter, 143 U Pa L **Rev** 1351, 1364-69 (1995) (rejecting the claim that **Good cause eviction** policies have contributed to concentration of poverty in public **housing** and the physical deterioration of neighborhoods; pointing instead to federal, state, and local policies that segregated poor minorities into impoverished areas, and the effects of economic transformations on the opportunities of the urban poor).

[77] See Section 8 Hearing (cited in note 8).

[78] 28 Md App 498, 346 A2d 686 (1975).

79 Id at 694, citing Caulder v Durham **Housing** Authority, 433 F2d 998 (4th Cir 1970). See also Joy v Daniels, 479 F2d 1236, 1242 (4th Cir 1973) (finding that to allow such a "silent and secret discrimination" would "emasculate" procedural safeguards owed to tenants under the Fourteenth Amendment and detailed in Caulder).

80 Nelson H. Mock, Note, Punishing the Innocent: No-Fault **Eviction** of Public **Housing** Tenants for the Actions of Third Parties, 76 Tex L **Rev** 1495, 1499 (1998) ("Many serious consequences flow from the **eviction** of a public **housing** tenant, including great difficulty in finding alternative **housing**. **Evicted** families are forced into homelessness or temporary **housing** in a shelter.").

81 See Part III.

82 See note 11.

83 The "extended use agreement" is a restrictive covenant that is placed on the LIHTC recipient property that spells out what the property owner must do in order to remain in compliance with the LIHTC program and continue to receive the **credit**. These provisions are discussed in detail in the text accompanying note 89.

84 Cimarron Village Townhomes, Ltd v Washington, 1999 Minn App LEXIS 890, *8 (holding that LIHTC provides tenants in **low-income housing** with for cause **eviction** protections not only on a limited basis, as claimed by landlord-defendants, but throughout the thirty-year period for which a developer must commit itself to comply with statutory conditions).

85 Pub L No 101-239, 103 Stat 2106 (1989).

86 Report of Mitchell-Danforth Task Force on the **Low-Income housing tax credit**, January 1989 (on file with U **Chi** L **Rev**).

87 IRC § 42(h)(6)(A) (requiring that "no **credit** shall be allowed by reason of this section with respect to any building for the taxable year unless an extended **low-income housing** commitment is in effect").

88 Report of Mitchell-Danforth Task Force at 3-4 (cited in note 86).

89 IRC § 42(h)(6)(B)(vi) (classifying the extended use agreement between the taxpayer and the **housing credit** agency as being a "restrictive covenant").

90 After the 1989 amendment, Section 42(h)(6)(B)(i) of the IRC specifically stated that the ELIHC restrictive covenant must "require( ) that the applicable fraction (of **Low Income** units) for the building for each taxable year in the extended use period will not be less than the applicable fraction specified in such agreement." The ELIHC also required that the restrictive covenant include an affirmative statement "allow(ing) . . . prospective, present, or former (**low-income**) occupants of (an LIHTC) building . . . the right to enforce in any State court the requirement and prohibitions of clause (i)." IRC § 42(h)(6)(B)(ii).

91 IRC § 42(h)(6)(E)(i)-(ii).

92 IRC § 42(h)(6)(E)(i)(I).

93 Pub L No 101-508, 104 Stat 1388 (1990).

94 The amendments to the LIHTC were originally part of the Technical Corrections Act of 1990, HR 5454, 101st Cong, 2d Sess, in 136 Cong Rec H 7138 (Aug 3, 1990).

95 Pub L No 101-508, 104 Stat at 1388-506.

96 IRC § 42(h)(6)(B)(i) (emphasis added).

97 IRC § 42(h)(6)(E)(ii)(I).

98 This appears to be the interpretation offered by the defendant landlords, and rejected by the court, in the only available opinion construing the relevant language of Section 42, Cimarron Village Townhomes, Ltd v Washington, 1999 Minn App LEXIS 890 at *4-7.

99 By reference, the amendment would incorporate both clauses (E)(i) and (E)(ii). The provisions are as follows:
(E) Exceptions if foreclosure or if no buyer willing to maintain **low-income** status.
(i) In general. The extended use period for any building shall terminate
(I) on the date the building is acquired by foreclosure (or instrument in lieu of foreclosure) unless the Secretary determines that such acquisition is part of an arrangement with the taxpayer a purpose of which is to terminate such period, or
(II) on the last day of the period specified in subparagraph (I) if the **housing credit** agency is unable to present during such period a qualified contract for the acquisition of the **low-income** portion of the building by any person who will continue to operate such portion as a qualified **low-income** building.
Subclause (II) shall not apply to the extent more stringent requirements are provided in the agreement or in State law.
(ii) **Eviction**, etc. of existing **low-income** tenants not permitted. The termination of an extended use period under clause (i) shall not be construed to permit before the close of the 3-year period following such termination
(I) the **eviction** or the termination of tenancy (other than for **good cause**) of an existing tenant of any **low-income** unit, or
(II) any increase in the gross rent with respect to such unit not otherwise permitted under this section.

100 United States v Lanier, 520 US 259, 267-68 n 6 (1997) (noting that the plain meaning of a statute is derived first and foremost from its language and not from "the assertions of codifiers directly at odds with clear statutory language").

101 Albernaz v United States, 450 US 333, 338, 343-44 (1981) (relying on the plain language of a statute to conclude that the government may, without offending principles of double jeopardy, impose separate and consecutive penalties on offenders who violate two different statutes while engaged in a single conspiracy).

[102] IRC § 7806(b) (1999).

[103] 1999 Minn App LEXIS 890, *5-6.

[104] IRC § 7806(b).

[105] Cimarron, 1999 Minn App LEXIS 890 at *5-6.

[106] HR 5454, 101st Cong, 2d Sess, in 136 Cong Rec H 7138 (Aug 3, 1990).

[107] Id at H 7143. See also, Cimarron, 1999 Minn App LEXIS 890 at *7 (citing the same language from a report of the Joint Committee on Taxation).

[108] Joint Committee on Taxation, Present Law and Legislative Background Relating to the **Low-Income housing tax credit** (JCX-13-97R) 11 (Apr 30, 1997) (emphasis added).

[109] Compare Cimarron, 1999 Minn App LEXIS 890 at *6 ("Because we find that the meaning of the statute at issue is unambiguous, we need not consider the legislative history of the statute.").

[110] The proposed amendment would have added the following language to IRC Section 42:
(1) an applicant may not be denied admission to a **low-income housing tax credit** project because the applicant holds a voucher . . . under Section 8 of the **Housing** Act of 1937; (2) no owner of a **low-income housing tax credit** project shall terminate a tenancy or refuse to renew a lease of a tenant except for serious or repeated violations of the terms of the lease, for violations of the law or for other **good cause**.
Joint Committee on Taxation, Description of Miscellaneous **Tax** Proposals Scheduled for Hearings Before the Subcommittee on Select Revenue Measures of the **House** Committee on Ways and Means, JCS-8-93, 103d Cong, 1st Sess 131 (June 16, 1993) (emphasis added).

[111] Id.

[112] Dombrowski v Swiftships, Inc, 864 F Supp 1242, 1247 (S D Fla 1994) (explaining that when Congress uses terms that are vague, it is often true that "the boundaries of the standard are deliberately unclear to provide judicial flexibility").

[113] 42 USC § 1490m(e)(1)(D) (1994). See also 12 USC § 4108, which provides that HUD may only allow federally subsidized building owners to escape their obligations to maintain **low-income** units through a mortgage buyout if HUD makes a written finding that the buyout will not "involuntarily displace current tenants (except for **good cause**). . . ." 12 USC § 4108(a)(1)(B) (1994).

[114] Dombrowski, 864 F Supp at 1247 (citing the Oxford English Dictionary).

[115] American Scholastic TV Programming Foundation v FCC, 46 F3d 1173, 1180 (DC Cir 1995) (internal quotations omitted), citing Tataranowicz v Sullivan, 959 F2d 268, 277 (DC Cir 1992).

[116] Sullivan v Finkelstein, 496 US 617, 631-32 (1990) (Scalia concurring in part) (rejecting credence given by the majority opinion to respondent's argument based on post-enactment legislative committee interpretation of a disputed statutory provision).

[117] See text accompanying note 107.

[118] Sullivan, 496 US at 632 (Scalia concurring in part).

[119] See text accompanying note 108.

[120] Chevron, USA, Inc v Natural Resources Defense Council, Inc, 467 US 837 (1984) (holding that where Congress's intent is not unambiguously expressed in a statute in light of common canons of construction, courts should give deference to a reasonable interpretation of the statute by the federal agency in charge of administrating the statute at issue). Several circuits have held either that state agency interpretations are not entitled to Chevron deference, or that they are only entitled to Chevron deference if the interpretation is expressly approved by a federal agency. Orthopaedic Hospital v Belshe, 103 F3d 1491, 1495 (9th Cir 1997) ("A state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes under Chevron."); Amisub (PSL), Inc v Colorado Department of Social Services, 879 F2d 789, 795-96 (10th Cir 1989) (subjecting state Medicaid plan to de novo review because "(t)he state agency's determination of procedural and substantive compliance with federal law is not entitled to the deference afforded a federal agency"); Turner v Perales, 869 F2d 140, 141 (2d Cir 1989) (holding that state regulations implementing federal statute are subject to de novo review and are not entitled to Chevron deference); Perry v Dowling, 95 F3d 231, 236-37 (2d Cir 1996) (distinguishing Turner and holding that where "the state has received prior federal-agency approval to implement its plan, the federal agency expressly concurs in the state's interpretation of the statute, and the interpretation is a permissible construction of the statute, that interpretation warrants deference"). It should be noted that the Internal Revenue Service has not so far issued any interpretation of the statutory provisions under consideration in this Comment.

Biographies

Natalie Ann Knott is a Staff Attorney working on Housing and Public Benefits at Legal Assistance of Western New York. She is beginning her second year of practice and focusing on developing a specialty in subsidized housing. Her favorite aspect of her practice is working with other service providers at the Department of Social Services and housing authorities to achieve good outcomes for clients.

Robert R. Romaker is a Managing Attorney at the Legal Aid Society of Northeastern New York (LASNNY) in the Albany office. Mr. Romaker graduated with a B.A. from The Ohio State University in 1987. He obtained his J.D. from the University of Toledo College of Law in 1990. Mr. Romaker has been a legal aid attorney his entire career. He was a staff attorney for Southeastern Ohio Legal Services (SEOLS) from 1990 to 1997, during which time his primary focus was housing representation in all types of private and public housing. Mr. Romaker became a managing attorney at SEOLS in 1997, and continued in that position until 2009. During that time, he handled and supervised multiple attorneys handling housing cases, including federally subsidized housing and LIHTC cases. In 2009, Mr. Romaker moved to New York and started with LASNNY as a staff attorney in the Amsterdam office in 2009. As a staff attorney, he exclusively handled all types of housing cases in 3 largely rural counties. He became a supervising attorney with LASNNY in April 2012, supervising several foreclosure attorneys and a housing/consumer attorney in Albany, while continuing as a housing attorney in Amsterdam. Mr. Romaker became a Managing Attorney in the Albany office on December 3, 2012. In his current position, he supervises numerous housing and foreclosure attorneys, who all handle cases throughout the Capital District.