

Important Compliance Factors

Income eligible and rent restricted

Note: Keep key documents available to everyone involved in keeping your property in compliance.

These include but are not limited to:

*8609s
Regulatory Agreement
Training/Educational
Materials*

The IRS requires all findings of noncompliance must be reported on form 8823, even if it is corrected.

Allocation year

COMPLIANCE ISSUES

2.1 General Compliance

Unlike any other federal housing program, the LIHTC program is administered by the IRS. The key to the entire tax credit program, as well as an owner's ability to claim the full amount of tax credits allocated to the project, is *continuous compliance* with federal and state LIHTC regulations throughout the compliance period.

The two fundamental components of compliance are as follows:

- Tax credit units must be rented to households that are income eligible at move-in;
- Rent must be restricted according to the maximum limits imposed by using the appropriate formula and income limits.

An LIHTC project may have both tax credit units (low-income units) and market (unrestricted rent) units, or it may have 100% tax credit units. The project may also have nonresidential units specified in the LIHTC application and designated in the Declaration of Restrictive Covenants for Low-Income Tax Credits. The income eligibility and restricted rent requirements apply only to the low-income units. These issues will be discussed in more detail later in this manual.

Each Allocating Agency or their Authorized Delegate must monitor owners to ensure properties are in compliance. A leading cause of noncompliance stems from the owner's failure to inform management of the specific regulatory commitments that have been made. Once credits have been allocated for a property, it is imperative that management be given copies of all regulatory and extended use documents to keep on file, including the Tax Credit Application, IRS Form (s) 8609 [Section 10], and Certificates of Occupancy.

Additional key issues are as follows:

- A. **Allocation year** – As previously stated in Section 1, different compliance regulations are in force depending on the year the tax credit allocation was awarded. The most

*Recordkeeping
by building*

*Monitoring begins
when a building
places in service.*

*To be eligible for
credits, a unit must be
rented to an income
eligible tenant. It
must be occupied on
a non-transient basis.*

*For Rehab:
A temporary
Certificate of
Occupancy can be
used as the Placed In
Service Date.*

important compliance issue is that all monitoring/compliance is based on the year of **allocation**. *The first two numbers of the Building Identification Number is the allocation year.* Maintain a record of this date.

B. Compliance by building – All monitoring/compliance is a **building** issue. Records must be kept by building and by unit number, not by project or alphabetical order by tenant. Every LIHTC building receives a separate IRS Form 8609 and is assigned its own BIN (Building Identification Number). Required annual reports must be submitted by BIN.

C. Placed-in-service date (PIS)– For the LIHTC, a building’s **placed-in-service date** initiates the start of compliance monitoring for that building. Each building has only one placed-in-service date for new construction or rehabilitation credits. It is possible to have the same or different dates for different buildings. For new construction, this date is the certificate of occupancy date—“the date on which the building is ready and available for its specifically assigned function, i.e., the date on which the first unit in the building is certified as being suitable for occupancy in accordance with state or local law.” [Section 19] It is the date when the first unit in a building *could* be occupied, not when it *was* occupied. For rehabilitation of an existing building, the owner selects any date within a 24-month period over which rehab expenditures are aggregated. The placed-in-service (PIS) date is recorded on the 8609 form for each building. Be sure you have documentation to back up the PIS date for every building in your project. *It is important to note: If you have Section 8 tenants, as in a HUD project based property, you must certify your tenants income eligible before you can claim the unit as a tax credit unit. You cannot rely on old certifications (previous year) for this purpose. If you will have both acquisition credits and rehab credits, and you have performed a Tenant Certification for the Acquisition PIS date, you may rely on that certification and are not required to complete another certification for the rehabilitation PIS date.*

D. Eligible basis – “Eligible basis consists of

- (1) the cost of new construction,

Eligible basis equals allowable development costs

Note: Market apartments are included in eligible basis. Be sure to include them when completing your end of year reporting.

Compliance period begins when credits are claimed

Minimum number of LIHTC units required

(2) the cost of rehabilitation, or

(3) the cost of acquisition of existing buildings acquired by purchase... . Only the adjusted basis of the depreciable property may be included in the eligible basis. The cost of land is not included in adjusted basis.” [General Explanation of the Tax Reform Act]

Eligible basis includes the cost of low-income units, facilities for use by the tenants (e.g., common areas, elevators, corridors, roofs) and other facilities reasonably required by the project. The allocable costs of tenant facilities such as swimming pools, other recreational facilities, and parking areas may be included provided there *is no separate fee* for the use of these facilities and they are made available on a comparable basis to all tenants in the project. Costs of the residential rental units in a building which are not low-income units may be included in eligible basis only if such units are not above the average quality standard of the low-income units. Rehabilitation costs may not be included in eligible basis if such expenditures improve any unit beyond comparability with the low-income units. **Eligible basis does not include commercial space.**

Any change in the eligible basis that results in a decrease in the *qualified basis* of the project is noncompliance that must be reported to the IRS. See Section 2.4.

- E. **Initial credit period** – Owners may initially claim credits for the year that the building is placed in service or may defer claiming credits until the close of the following year. It is important for management to know when the credits were or will be claimed for the first time because the compliance period runs fifteen (15) years starting with the first year credits are claimed. The owner makes the election for the initial credit period on each building’s Form 8609. Once made, the election is irrevocable. Credits may not be claimed until the minimum set-aside is met.
- F. **Minimum set-aside (MSA)** – Also an irrevocable election, the minimum set-aside establishes both the minimum number of low-income units to be maintained in a project and the applicable income limit for households to qualify for all tax credit units. See discussion in Section 2.2.

*Criteria for
tax credit unit**Keep first year
records for 21 years***Minimum
Set-Aside***20/50 or 40/60
to qualify for credit*

G. Qualified LIHTC unit – A low-income unit qualifies for the tax credit when the following conditions are met:

- Tenant eligibility verified and certified
- Restricted rent
- Nontransient residency
- Unit suitable for occupancy
- Unit recorded as LIHTC unit
- Tenant eligibility re-certified annually
- Available to the public on a non-discriminatory basis

Units meeting these requirements may be counted in the **qualified basis** for tax credit purposes (See Section 2.4).

H. Record keeping requirements – IRS regulations list the LIHTC record keeping and record retention requirements for owners to follow to maintain compliance. Project owners and managers should be familiar with this list and understand that required records could be subject to monitoring at any time. In addition, the first year records must be kept for 21 years. It is strongly recommended that these original documents be stored in a secure fireproof and waterproof location.

2.2 Minimum Set-Aside Election

The most critical compliance issue for a low-income housing tax credit project is the minimum set-aside (MSA) requirement. In order for an owner to claim tax credits, a project must have a minimum number of qualified tax credit units. The owner must select one of two minimum set-asides, which establishes both the minimum percentage of tax credit units at the project and the income limit used to determine tenant eligibility. The IRS requires the selection and adherence to a minimum set-aside as follows:

“A residential rental project providing low-income housing qualifies for the credit only if

- (1) 20 percent or more of the aggregate residential rental units in the project are occupied by individuals with incomes of 50 percent or less of the area median gross income, as adjusted for family size, or
- (2) 40 percent or more of the aggregate residential rental units in the project are occupied by individuals with incomes of 60

*Multiple building vs.
building-by-building*

*Allocation year
affects MSA*

Note: Remember, Owners can choose to begin the credit period either the year the building/project places in service or the year after. If the building/project does not meet the MSA, no credits can be claimed.

percent or less of the area median gross income, as adjusted for family size.”

The owner specifies the MSA when applying for a tax credit allocation and makes the MSA election on the Form 8609 for each building. This election is irrevocable and sets the applicable income limit for *all* LIHTC units in the project. The minimum set-aside must be met within the initial credit period or the property will not be eligible for tax credits. In addition, the MSA must be maintained for the entire 15-year compliance period or recapture of the credit for all units will result.

If a building is identified as part of a **multiple building project** on Line 8b of the Form 8609, the minimum set-aside may be met across all so noted buildings in the project. If the building is not identified as part of a multiple building project, the MSA must be met **within that building**. Properties with several buildings may have buildings noted differently on the form 8609, so management must be aware of the status of **each building**.

Example 2-1: The owner of a 10-building, 100-unit tax credit project has elected the 40/60 minimum set-aside to be met as a “multiple-building” project, meaning that 40% of 100, or **40 units project-wide**, must be rented by the end of the initial credit period to tenants who are eligible at the 60% area median gross income limit or no tax credits are available.

Example 2-2: In this case, the owner of the same 10-building, 100-unit tax credit project has elected the 40/60 MSA to be met on a *building-by-building* basis. If the project were comprised of 6 buildings with 12 units each and 4 buildings with 7 units each, 40% of a 12 unit building = 4.8 or 5 units and 40% of a 7 unit building = 2.8 or 3 units. Thus the MSA = (6 buildings x 5) plus (4 buildings x 3) = 30 plus 12 = 42 units. In this example, the MSA must be met by the end of the initial credit period for each building or the building will not be eligible for tax credits. *Management must be aware of the distinction between per building and project-wide MSA.*

The MSA must be met prior to any credits being claimed, thus if an owner wanted to claim credits at the end of year one, the MSA would have to be met as needed, by building or project, by 12/31 of the first year. If the owner has deferred the first credit year to the year after placing in service, the MSA must be met by 12/31 of the second year after placing in service.

MSA not to be confused with state set-asides

Note: Multiple layers of financing mean multiple layers of rules. Keep Track!

Income Limits

Use new income limits within 45 days

The tax credit MSA should not be confused with other set-asides such as state set-asides that earned extra points in the allocation process and are recorded in the project's Tax Credit Regulatory Agreement. States may impose set-asides that require certain units to be rented to the elderly or to large families, or may impose lower income limits than the LIHTC would require. In addition, the MSA should not be confused with HOME fund requirements or subsidy programs such as HUD Section 8 or Rural Development. Always determine the tax credit MSA first and review allocation documents to identify any additional set-asides. Implement a tracking system for all set-asides to ensure compliance with these requirements. Follow the most restrictive set-asides so that the project will remain in compliance with all set-asides.

2.3 Income Limits

Each year, the Department of Housing and Urban Development (HUD) publishes the *Multifamily Tax Subsidy Projects (MTSP)* income limits for all states (www.huduser.org/datasets/mtsp.html). The IRS requires these income limits, as adjusted for family size, to be used when determining eligibility of LIHTC tenants at move-in. The minimum set-aside election establishes whether the 50% or 60% area median gross income (AMGI) limit applies to the project's tax credit units.

Where State set-asides at lower income percentages are in place, these limits would also need to be calculated. Most Allocating Agencies provide the income limits for any additional set-asides. *When HUD publishes new income limits, owners are required to implement the new income limits no later than 45 days after the effective date.* Be aware that any fluctuations up or down in the income limits may have a corresponding impact on maximum gross rent amounts.

2.4 Qualified Basis & Low Income Occupancy

The amount of tax credits an owner can claim depends on the number of rent-restricted, qualified LIHTC units in each building of the project. The percentage of TC units (applicable fraction) in the building multiplied against the allowable development costs (eligible basis) establishes the amount for the building's qualified basis. The qualified basis multiplied by the project's particular tax credit percentage (9% or 4%) determines

Qualified Basis

Determines the amount of tax credits the owner can claim each year

Applicable fraction is lesser of unit fraction and floor space fraction

Note: Managers need to know which fraction applies in order to maintain compliance with the Next Available Unit Rule and the Vacant Unit Rule. Do not just assume it is the same fraction every year.

the amount of credit an owner can claim each year for the 10-year credit period.

The **applicable fraction** is calculated for each building and is the lesser of:

- (a) the unit fraction—the proportion of low income units to all residential rental units in the building, or
- (b) the floor space fraction—the proportion of floor space of the low-income units to the floor space of all residential rental units in the building.

Owners have until the end of the initial credit period to establish the project's original low-income occupancy—the applicable fraction for each building. The low-income occupancy achieved by the end of the initial credit period establishes the project's original qualified basis (QB). Once the QB has been initially established and credits are claimed, the QB is locked in and must be maintained for the entire 15-year compliance period or recapture will result. Only low-income units in the original qualified basis are eligible to receive the full tax credit value during the accelerated 10-year credit period. The qualified basis of a building may be increased subsequent to the initial determination only by reason of an increase in the number of low-income units or in the floor space of the low-income units. Credits claimed on such additional qualified basis are determined using 2/3 of the value of the credit which is now “de-accelerated” through year 15.

A decrease in a project's applicable fraction reduces its qualified basis. If a project's qualified basis for a given tax year decreases from the previous year, this results in noncompliance and recapture by the IRS of some or all of the accelerated portion of the project's credits claimed in prior years.

2.5 Maximum Gross Rent

Units qualifying for tax credits are subject to a rent restriction formula that sets the maximum gross rent that may be charged. The maximum gross rent may not exceed 30% of the applicable qualifying income limit. Gross rent equals the tenant portion of rent plus the cost of tenant-paid utilities (except telephone and cable) and any other non-optional charges. If low-income tenants are charged more than the allowable rent, the unit is in noncompliance and recapture of

Maximum Gross Rent

credits may result. Whenever utility costs are paid directly by the tenant, gross rent must include an allowance for utilities. Section 2.6 provides more information regarding utility allowances.

The maximum gross monthly rent is calculated by this formula:

$$\text{Maximum Gross Rent (including Utilities)} = (\text{Applicable Income Limit divided by 12}) \times 30\%$$

If the rent calculation ends with a decimal point, always round the amount down since you may never charge more than the maximum. Rounding up would charge more than the maximum allowable rent, resulting in noncompliance.

Restricted Rents

Example 2-4: If the applicable income limit = \$17,500, then divide by 12 to get **\$1458.33** then multiply by .30 , to get **\$437.49**. Round down to **\$437** so as not to exceed the maximum. The maximum gross rent including utilities cannot exceed this figure.

A. 1990+ Projects

For 1990 and later allocations, rent is based on unit size, not the number of people in the household. The rent formula uses an imputed family size of 1.5 persons per bedroom to determine the applicable income limit upon which to base rent calculations. For efficiency or studio units which do not have separate bedrooms, the 1 person income limit is used.

Example 2.5:

# Bedrooms	0	1	2
Rent Limit calculation based on	=1 person	=1.5 person	3 person

For the 1.5 person income limit, take the 1 person limit, add to the 2 person limit and divide the answer by 2. Consider the following limits:

# Persons	1	2	3
Income Limit	50% 13,600	14,575	17,500

Using the limits provided in Example 2-5 on the previous page, the resultant maximum gross rents for the bedroom size formula would be

# Bedrooms	0	1	2	
Income Limit	50%	340	352.	437

The maximum LIHTC rent is based on 30% of the maximum LIHTC income divided by twelve months.

So to determine the three bedroom apartment rent limit you would use the following formulas:

Step one determine income limit to use

3 bdrm x 1.5 persons per bedroom = 4.5 person income limit

Step two Calculate income limit

4.5 person income limit = 4 person limit + 5 person limit ÷ 2.

Step three, calculate rent based on income limit

4.5 person income limit x .30 (30%) ÷ 12 = three bedroom monthly rent limit.

Note: When completing End of Year Reporting. Do not include subsidies when listing tenant rent.

B. Rent Subsidies

Gross rent does not include any housing assistance payments made to an owner to subsidize a tenant's rent, such as from Section 8 or any comparable federal or state rental assistance program to a unit or its occupants. Only the actual rent paid by the tenant, including tenant-paid utilities, is counted toward the maximum gross rent allowable. For example, if the LIHTC maximum gross rent was \$350 and the total tenant payment was \$250 with Rental Assistance paying an additional \$150 subsidy to reach the Basic or Contract Rent of \$400, there is no problem. The rent meets tax credit guidelines because the total tenant payment inclusive of utilities does not exceed \$350.

Note: If a tenant is not directly informed a service/amenity is not required as a condition of occupancy, it is presumed to be required and must be included in the gross rent calculations.

Utility Allowances

Mandatory amenities or services in gross rent

C. Section 8 Rent

The HUD Section 8 program protects subsidized tenants from ever paying more than 30% of their adjusted gross income for rent. For this reason, in 1989 the IRS ruled that if the tenant portion of rent increases above the LIHTC maximum gross rent, thereby reducing the Section 8 subsidy, the higher rent may be charged.

D. Rural Development Overage

In RD 515 projects, overage rents may result when 30% of the tenant income minus the utility allowance exceeds the RD program's Basic Rent. If this overage rent exceeds the maximum LIHTC rent, then the overage cannot always be charged. For 1991 and later year projects, the overage can be charged for amounts that are turned over to RD. In 1987-1990 projects, the overage cannot be charged to the tenant since this provision is not retroactive.

2.6 Utility Allowances

The maximum gross rent includes the amount of tenant paid utilities inclusive of costs for heat, lights, air conditioning, water, sewer, oil, and gas, where applicable. Utilities do not include telephone or cable television. Whenever the tenant directly pays utility costs, a utility allowance must be used to determine the maximum unit rent that may be charged. The utility allowance must be subtracted from the maximum gross rent to calculate the maximum tenant portion of rent.

In addition, any *mandatory* supportive service or amenity charge must be counted as part of the gross rent for these units. Such costs may include parking fees, housekeeping, trash removal, meal service, or other required costs. Charges for *optional* services other than housing do not have to be included in gross rent, but such services must truly be optional. *NOTE: Fees may not be charged for any item that is part of the eligible basis (See Section 2-1).*

Example 2-6: If the maximum gross rent on a unit is \$525 and the tenant pays utilities with a utility allowance of \$75, the maximum tenant portion of rent allowable is \$450 (\$525 – \$75).

Update utility allowances annually and submit with annual reports

Example 2-7: If the same tenant pays an additional mandatory parking fee of \$25 per month, the maximum tenant portion of rent allowable is \$425 (\$525 – \$75 – \$25).

Treasury Regulation 1.42-10 clarifies utility allowances in LIHTC projects. Utility allowances should be calculated as follows:

- (1) Rural Housing Services (RHS) - If a building receives assistance from the RHS the applicable utility allowance (UA) for all rent-restricted unit in the building is the RHS UA. Additionally, if any tenant in the building receives RHS rental assistance the applicable UA for ALL units in the building (including those occupied by tenants receiving HUD assistance) is the applicable RHS allowance.
- (2) HUD buildings – If neither a building nor any tenant receives RHS assistance and the rents and utility allowances are reviewed by HUD on an annual basis, the applicable UA for all units in the building is the HUD UA.
- (3) Other buildings – If a building is not subject to either 1 or 2 above, the applicable UA is determined under the following methods:
 - A. Local utility company estimate.
 - B. Local PHA utility allowances.
 - C. HUD Utility Schedule Model available at www.huduser.org/datasets/lihtc.html .
 - D. Energy Consumption Model whereas the project obtains a qualified professional approved by DHCD to calculate the UA.

The applicable UA for any unit occupied by tenants receiving HUD rental assistance payments (vouchers) is the applicable Public Housing Authority allowance established for the Section 8 program.

Utility allowances must be updated at least annually since they are included in the maximum allowable rent calculations. Copies of utility allowance documentation must be submitted with DHCD's required annual year-end reports. Realize that any changes in utility allowances have a direct impact on the net chargeable rent to the tenant. *Any new allowance must be implemented within 90 days of the change.*

Additional LIHTC Regulations

Recapture may result from renting comparable size units in the BIN to ineligibles while a TC unit is vacant

Note: Keep records of your marketing efforts. Be sure to note when your advertisements, open houses, etc. took place. Store these records with your annual records similar to your utility allowance.

Available Unit/140% Rule

2.7 Additional LIHTC Regulations

The following is a list of additional LIHTC regulations.

A. Vacant unit rule

If a low-income unit becomes vacant during the year, the unit remains LIHTC compliant and eligible for the tax credit for purposes of the set-aside requirement and determining the qualified basis provided reasonable attempts are made to rent the unit or the next available comparable or smaller size unit to an eligible household and no other comparable or smaller size units in the project are rented to non-qualifying individuals. See Section 25 for IRS explanation of this rule.

“Reasonable attempts” indicates that efforts toward marketing and renting a unit that is suitable for occupancy must be made. *Under no circumstances can you claim credit on the unit if you violate this rule.* Concurrently, if an owner of three vacant units violates this rule by renting to a non-eligible applicant, credit on all three vacant units will be lost and the units cannot be counted toward the minimum set-aside.

Units that have never been occupied are termed “empty” rather than vacant, and cannot be counted as low-income units. However, they must be included in the building’s total unit count for purposes of calculating the applicable fraction.

Owners are required to keep records for each qualified low-income building in the project showing for each year of the compliance period the low-income unit vacancies and data for when, and to whom, the next available units were rented.

B. Available unit rule / 140% rule

If the household income for residents in a qualified unit increases to more than 140% of the current applicable income limit, the unit is considered an “over-income unit” but may continue to be counted as a low-income unit as long as two conditions are met. The unit must continue to be rent restricted and the next comparable size unit in the

Remember: The “Reasonable Attempts” wording is *not* a part of the Next Available Unit Rule.

Relocating tenants

Note: If it is the same building, owners can choose to:

- 1) *Transfer the certification effective date (and all related paperwork) to the new unit and include a narrative in the file.*
OR
- 2) *Treat the transfer as a move-out of the old unit and a new move-in, complete with a new certification and supporting documentation.*

building must be rented to a qualified low-income tenant. The owner of a low-income building must rent to qualified residents *all* comparable units that are available or that subsequently become available in the same building until the applicable fraction (excluding the over-income units) is restored to the percentage on which the credit is based.

IRS Regulation 1.42-15, effective September 26, 1997, allows over-income tenants who were previously LIHTC eligible to move to a new unit within the same building, because when a current resident moves to a different unit within the building, the newly occupied unit adopts the status of the vacated unit [Section 21].

Violating this rule means losing the credits on all 140% units. These units would no longer count toward the MSA.

C. Relocating existing tenants

When an existing tenant moves to another unit within the same building, the status of the two units swaps. Thus, if a qualified tenant moves to an ‘empty’ unit, the new unit ceases to be ‘empty’ and becomes a qualified unit. The original unit will then be deemed ‘empty’.

When the transfer occurs between different buildings in the same project, a similar rule applies as long as the tenant’s income did not exceed 140% of AMI at the most recent certification *and* the tenant moves into a unit already considered LIHTC qualified. Please note that for purposes of this test, if on the 8609 the owner elected so say ‘No’ to line 8b, then the owner has chosen to treat each BIN as a separate project. In this case, a transfer would require a new certification and the tenant would have to be qualified at the time of move-in.

During the initial credit period, existing tenants cannot be relocated for purposes of qualifying more than one LIHTC unit to count toward the minimum set-aside or applicable fraction. *Under no circumstances can one household be used to initially qualify more than one tax credit unit in the project.*

D. Staff units

Revenue Ruling 92-61 [Section 13], effective September 9, 1997 allows a unit for a *full-time* staff member to be

*Units occupied
by staff*

considered part of a project's "common area." Such units are not classified as residential rental units and thus are not included in either the numerator or denominator of the applicable fraction under section 42(c)(1)(B) for purposes of determining the building's qualified basis.

Revenue Ruling 2004-82 [Section 25] further expanded staff units to include a unit occupied by a full-time security officer for the building if the building owner requires the security officer to live in the unit.

Two options apply:

(1) If the staff unit is a rental unit and is to be counted as part of the qualified basis, then the staff must be income eligible, be certified, and sign a lease the same as any low-income tenant. In this case, if the staff member receives free rent or a rental discount, the imputed value of the rent or discount must be included as income.

(2) If the unit is not a residential rental unit but used as common area by full-time staff, then the staff does not have to be income eligible, certified, leased, or considered a tenant.

The owner's LIHTC application and the allocation documents should stipulate the number of common area units set-aside for staff. If not, the owner should work with DHCD on amending or clarifying the language in the Declaration. This revenue ruling does not apply to any building placed in service prior to September 9, 1992 or to any building receiving an allocation of credit prior to that date unless the owner filed a tax return that is consistent with this ruling.

*6-month
minimum initial
lease term required
except for SROs or
transitional housing
for the homeless*

E. Nontransient occupancy

"Residential rental units must be for use by the general public and all of the units in a project must be used on a nontransient basis....Generally, a unit is considered to be used on a nontransient basis if the initial lease term is six months or greater."

[General Explanation of the Tax Reform Act of 1986]

"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."

[Section 42(i)(3)(B)(i)]

To be in compliance, a six-month minimum lease term is required at initial occupancy of low-income units. A six-month lease addendum should be signed with in-place tenants who do not have six months left on an existing lease when the building is placed in service. The only exceptions to this requirement would be SRO housing rented on a month-by-month (30-day lease) basis or transitional housing for the homeless as specified below.

*LIHTC
ineligible facilities*

F. General public / fair housing

All residential rental units in the project must be available for use by the general public. LIHTC properties are subject to Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act, prohibiting discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, national origin, familial status, and disability. The State of Massachusetts also prohibits discrimination against marital status and age.

Tax credit units may not be provided only for members of a social organization or provided by an employer for its employees. In addition, any residential rental unit that is part of a hospital, nursing home, sanitarium, life-care facility, dormitory, trailer park, retirement home providing significant services other than housing, or intermediate care facility for the mentally and physically handicapped is not for use by the general public and is not eligible for credit under Section 42.

*Know accessibility
requirements*

The Fair Housing Act also mandates specific design and construction requirements for multifamily housing built after March 13, 1991, to provide accessible housing for individuals with disabilities. Owners are expected to be familiar with accessibility requirements applicable to their projects.

*Discrimination
prohibited*

The IRS 8823 Report of Noncompliance form states:

“The failure of low-income housing credit properties to comply with the requirements of the Fair Housing Act will result in the denial of the low-income housing tax credit on a per-unit basis.”

*Student status
determined on a
tax-year basis*

*No grandfathering
due to student status*

“Available to the general public” applies to all residential rental units, market and tax credit.

G. Students

Many students are considered to be transient and thus are not LIHTC eligible. The issue with students is only a concern when *everyone* in the household is a full-time student, defined by the IRS as taking 12 credit hours a semester or attending school full-time 5 months per year at an educational institution with regular facilities, other than a correspondence or night school. The IRS has made it clear that student status is to be monitored on a tax-year basis, thus an applicant would not be eligible if the person had been a full-time student for 5 months of the tax year, even if they had graduated prior to applying for an LIHTC unit. Owners and managers should adjust tenant certification procedures to consider student status according to this interpretation. In addition, there is no grandfathering of eligibility because the tenant was not a student when they moved in and later became one. For this reason, tenant student status must be re-verified at annual certifications to confirm continuing eligibility of the household. Failure to verify student status is noncompliance.

Exceptions: A unit would not be disqualified for tax credits if it is occupied as specified in Section 42(i)(3)(D)—

(i) by an individual who is—

1. a student and receiving assistance under title IV of the Social Security Act, or
2. enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar Federal, State, or local laws, or
 - entirely by full-time students if such students are—
3. single parents and their children and such parents are not dependents (as defined in section 152) and the children are not dependents of another individual other than the parents, or
4. married and files a joint return.
5. Student was previously a ward of the Foster Care

Program.

The single parent exception was changed as noted above in December 2007.

H. Section 8 certificates / vouchers

Section 42 states that LIHTC properties may not refuse Section 8 certificate or voucher holders simply on the basis of their Section 8 status. However, this does not assure tenant selection, because applicants eligible for Section 8 may have incomes exceeding LIHTC income limits, may have negative references, may not be able to afford the rent with vouchers in some situations, or the unit rent may exclude certificate holders due to a conflict with the local Fair Market Rent.

I. Suitability of unit

A unit must be continuously suitable for occupancy in accordance with state or local codes in order for credits to be claimed. If the unit is not habitable, no credits can be claimed. In a related situation, the IRS has ruled that should a unit be destroyed due to casualty loss (i.e., fire, flood, or any other disaster) for which credits cannot be claimed while the unit is being replaced, if the unit is restored within a reasonable time within a taxable year, credits can again be claimed and no recapture would occur. Tax credit units that are vacant must be made ready in a timely manner. Otherwise, they would not be considered suitable for occupancy and would not be eligible for credit.

Note: Do not leave vacant units dirty, in disrepair or otherwise uninhabitable because you have other units ready for rent. The unit you leave uninhabitable is not credit worthy!

