Low-Income Housing Tax Credit (LIHTC) Program – Overview of Rights of Tenants and Applicants

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I. Resources.

- Federal Statute: 26 U.S.C.A. § 42 (West 2011 & West Supp. 2015).
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- Federal Regulations: 26 C.F.R. § 1.42-1 -- §1.42-18 (2015).
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- IRS Guide: *IRS Guide for Completing Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition (Jan. 2011)* (available on line). IRS also has an *Audit Technique Guide* for audits of LIHTC developments for Section 42 compliance. It was last updated in August 2015. IRS, not HUD, has m
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- State Statute: Each state should have its own state statute governing the LIHTC Program.

- Restrictive Covenant Applicable to the Property: Owners must sign and record a Land Use Restriction Agreement (LURA) in the Real Property Records of the county in which the apartment complex is located. *See* 26 U.S.C.A. § 42(h)(6)(B) (West Supp. 2015).

- The LIHTC LURA is enforceable by qualified applicants and tenants. *See* 26 U.S.C.A. § 42(h)(6)(B)(ii) (West Supp. 2015); *see also Nordbye v. BRCP/GM Ellington*, 266 P.3d 92 (Or. Ct. App. 2011). In a subsequent opinion in the *Nordbye* litigation, the court of appeals, in a 2-1 opinion, held that the named plaintiff had ceased to have standing because she no longer qualified for housing under the LIHTC Program, and, thus, the case should have been dismissed by the trial court. *See Nordbye v. BRCP/GM Ellington,* 349 P.3d 639 (Or. Ct. App. 2015).

- An excellent source for legal information on the LIHTC Program may be found at the Affordable Housing Resource Center at www.novoco.com\low-income-housing All applicable statutes, regulations, and Treasury rulings are available. In addition, another good source of legal information is the LIHTC Property Management Handbook utilized by LIHTC property managers.

II. Determining Whether Property is LIHTC Property.

- The housing agency in the state will likely maintain a list of every LIHTC property in the state. As noted in ¶ I, owners must sign an extended use agreement which is recorded in the state real property records as a restrictive covenant. *See* 26 U.S.C.A. § 42(h)(6)(B)(vi) (West Supp. 2015). Thus, the real property records for the county can be used to determine whether a development is a LIHTC property.

- HUD also maintains a database that provides information on LIHTC properties. It includes property address, number of total units, number of low income units, population served, type of credit provided, and other sources of funding included in each multifamily complex. The list is available at: http://www.huduser.org/portal/datasets/lihtc.html.

- The on-site property manager will know whether a development is a LIHTC property because of the unique paperwork requirements.

- Because LIHTC landlords may use their own leases, the lease does not reveal whether a property is a LIHTC property.

III. Brief Program Overview. *See* 26 U.S.C.A. § 42 (West Supp. 2015).

- Congress allocates a fixed amount of tax credits to each state on an annual basis.
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- States through their housing agency or other designated 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 the state's Qualified Allocation Plan (QAP). *See* 26 C.F.R. § 1.42-17 (2015).
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- Developers submit housing development proposals to the state agency that administers the tax credits.
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- The housing agency grades and ranks the proposals in accordance with the QAP, prioritizing the applications in accordance with federal law and state law requirements.
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- Successful developers are awarded tax credits to build or remodel their housing. Project-based section 8 landlords frequently submit proposals for tax credits to remodel.
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- Investors buy income tax credits in properties that are awarded tax credits. This creates cash equity for the owner that reduces the debt burden. In exchange for the tax credits, the owner agrees to rent a specified number of

units to qualified tenants at specified below-market rents. This is frequently 100% of the units at the complex.

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- Two tax credits are available: one at nine percent of depreciable basis and one at four percent of depreciable basis. Calculation of the credit is beyond the scope of this outline and this session.

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- Litigation challenging award of tax credits as violating Fair Housing Act. *See The Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs,* 747 F.3d 275 (5th Cir. 2014) (reversing favorable ruling for plaintiffs and remanding to district court to apply discriminatory impact standard set forth in HUD regulations, 24 C.F.R. § 100.500(c) (2015), that became effective in March 2013), aff'd., ___ U.S. ___, 135 S. Ct. 2507 (2015) (holding that disparate impact claims are cognizable under Fair Housing Act).

- The district court had stayed all proceedings on the Fifth Circuit remand, pending a decision by the U.S. Supreme Court on the petition for a writ of certiorari. *See Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, No. 3:08-CV-0546-D, 2014 WL 2815683 (N.D. Tex. June 23, 2014). Since the Supreme Court has ruled, the district court must now apply the disparate impact standard under the HUD regulations to the facts of the case.

- The district court subsequently issued an order stating that because of the "significant developments" in the case on appeal, the court would not only decide "anew" whether ICP's disparate impact claim passes muster "under the burden-shifting regimen adopted by HUD and the Fifth Circuit" but also "whether ICP has established a prima facie case." *See Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, No. 3:08-CV-0546-D, 2015 WL 5916220, at *4 (N.D. Tex. Oct. 8, 2015).

- The Fifth Circuit subsequently held in 2015 in another case that the States have Eleventh Amendment sovereign immunity from suits brought under the Fair Housing Act. *See McCardell v. U.S. Dep't of Housing and Urban Development*, 794 F.3d 510, 521-22 (5th Cir. 2015); *see also Sims v. Tex. Dep't of Housing & Community Affairs*, No. H-07-4511, 2008 WL 4552784, at *1 (S.D. Tex. Oct. 7, 2008) ("[T]he states were not made 'persons' potentially liable for FHA violations.").

- The State of Texas had asserted the Eleventh Amendment immunity defense in the trial court in *The Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 860 F. F.Supp.2d 312, 331-32 (N.D. Tex. 2012). The trial court rejected the argument, finding that TDHCA is not an arm of the state. But the Fifth Circuit's ruling in *McCardell* effectively overrules this part of trial court opinion in *Inclusive Communities. See McCardell*, 794 F.3d at 522 ("We hold that Congress did not make clear

an intent to abrogate States' Eleventh Amendment sovereign immunity from suits brought under the Fair Housing Act, a conclusion reached by other courts considering the issue.") (citing cases).

- Of course, a private party may seek declaratory and injunctive relief against state officials in § 1983 claims based on violations of federal law or the U.S. Constitution. *See Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 71, n.10 (1989) ("Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State'").

- For the trial court opinion on the merits and on a remedial plan, see *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs,* 860 F. Supp. 2d 312 (N.D. Tex. 2012) (finding that TDHCA violated Fair Housing Act in connection with allocation of low income housing tax credits); *Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, No. 3:08-CV-0546-D, 2012 WL 3201401 (N.D. Tex. Aug. 7, 2012), *amended in part,* 2012 WL 5458208 (N.D. Tex. Nov. 8, 2012) (adopting remedial plan).

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- *See Inclusive Communities Project, Inc. v. U.S. Dep't of Treasury*, No. 3:14-CV-3013-D, 2015 WL 4629635 (N.D. Tex. Aug. 4, 2015). In this lawsuit, the plaintiff contends that the Treasury Department is administering the LIHTC Program is such a way that it is perpetuating racial segregation in LIHTC units in Dallas. In granting in part and denying in part the defendants' motion to dismiss, the court declined to dismiss ICP's disparate impact claim based on 42 U.S.C. § 3604(a). *Id.* at * 5. With respect to ICP's claim under 42 U.S.C. § 3608(d) through 5 U.S.C. § 706(2), the court refused to consider the defendants' argument that their actions were unreviewable under the APA, because the defendants had raised the argument for the first time in a reply brief. *Id.* at * 4. But the court stated it was "not deciding at this time whether ICP can state a plausible claim under 42 U.S.C. § 3608(d) via U.S.C. § 706(2)." *Id.* The court dismissed plaintiff's claims under 42 U.S.C. § 1982 and the equal protection component of the Fifth Amendment. *Id.* at * 5.

  See also Asylum Hill Problem Solving Revitalization Association v. King, 890 A.2d 522 (Conn. 2006) (holding that 42 U.S.C. § 3608(d), which is directed at executive departments and agencies over their administration of the Fair Housing Act did not confer an unambiguous individual right enforceable under 42 U.S.C. § 1983, and thus 26 C.F.R. § 1.42-9, incorporating the Fair Housing Act requirements of § 3608(d), did not provide a separate basis for a § 1983 claim).

IV. Use Restrictions. *See* 26 U.S.C.A. § 42(g) (West Supp. 2015). Under federal law the owner must agree either to lease at least 20% of the units to tenants earning no

more than 50% of adjusted median income **or** to lease at least 40% of the units to tenants earning no more than 60% of adjusted median family income.

- Units are rent-restricted, such that the gross rent, which includes the utility allowance, may not exceed 30% of the imputed income limitation applicable to the unit. *Id.* at § 42(g)(2). Rents **are 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. Thus, if the two-bedroom rental rate is $750, any family qualifying for a two-bedroom apartment must pay $750 regardless of income.
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- Owners may not refuse to rent to voucher holders because of their status as voucher holders. 26 U.S.C.A. § 42(h)(6)(B)(iv) (West Supp. 2015); 26 C.F.R. § 1.42-5(c)(1)(xi) (2015).

V. Ownership. LIHTC apartment complexes are privately owned, usually by limited partnerships. Nonprofit organizations also own and manage LIHTC apartments. Thus an owner's action does not constitute government action under 42 U.S.C. § 1983.

VI. Tenant Selection.

- Owners set tenant selection policies and may screen for credit history, tenancy history, and criminal history. Other than income eligibility requirements, some limitations on certain student eligibility, and a prohibition on denying persons on the basis of their status as a holder of a Section 8 housing voucher, Congress and the Internal Revenue Service have not promulgated any statutes or regulations on tenant selection.

- No Notice of Denial Requirements by IRS. The IRS regulations do not require that owners provide rejected applicants notice of the grounds for denial or any opportunity for review of the denial decision. State law may, however, mandate notice of the grounds for rejection. *See e.g.*, 10 Tex. Admin. Code § 10.610(d)(1)(2) (2015) (Tex. Dep't of Hous. & Comm. Affairs) (Texas state regulation requiring that LIHTC owners send written notice to rejected applicants stating grounds for denial).

- Notice When Rejection of Application Based on Consumer Report. Of course, when an owner denies an applicant based on information provided by a tenant-tracking or consumer reporting service, 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(m)(a) (West Supp. 2015).

- No Right To Informal Review or Administrative Appeal. 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. State law may provide a complaint procedure that applicants may utilize.

- Fair Housing Act Claims. 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.
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- No Citizenship Requirement. 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 (2015) 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.
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- Section 8 Voucher Holders. LIHTC owners may not refuse to rent to applicants with a § housing voucher because of their status as voucher holders. 26 U.S.C.A. § 42(h)(6)(B)(iv) (West Supp. 2015); 26 C.F.R. § 1.42-5(c)(1)(xi) (2015);
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- Student Eligibility. Special rules apply to students. *See* 26 U.S.C.A. § 42 (i)(3)(D) (West Supp. 2015). 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 their children 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.

Id. It is not unusual for LIHTC owners to erroneously deny students who actually qualify under one of the student exceptions. Thus, denials should be carefully scrutinized. IRS has defined "student" as an individual who during each of five calendar months during the calendar year is a full-time student at an educational institution. *See* 26 C.F.R. § 1.151-3(b) (2015). It has defined "educational institution" to exclude "noneducational institutions, on-the-job training, correspondence schools, night schools, and so forth." *See id.* at § 1.151-3(c) (defining "educational institution"). Thus, for example, an individual enrolled in an on-line school or university should qualify for LIHTC housing on basis that such a school is a correspondence school.

- 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 2013).
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- IRS has not published regulations mandating that tax credit owners establish reasonable criminal history look-back periods in screening voucher holders.

- If the LURA imposes an obligation on the owner to comply with all applicable federal laws (as is the case in Texas), applicants with section 8 vouchers may assert a claim that unreasonable criminal history look-back periods violate the obligation of the LIHTC owner set forth in the Land Use Restriction Agreement (LURA) to comply with all applicable federal laws. Applicants are named in the LURA as beneficiaries who may enforce the owner's obligations.

- In addition, applicants may be able to state a claim that unreasonable criminal history look-back periods violate state laws on deceptive trade practices. Of course, this will depend on the state law.

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VII. Leases. Tax Credit Owners may use their own leases.

- Federal Requirements: With the exception of the requirements of § 601 of the Violence Against Women Reauthorization Act of 2013 ("VAWA"), neither Congress nor IRS has mandated or prohibited any lease terms.

- Good Cause Requirement:

    - Although federal law does not impose a requirement that the lease include language requiring good cause for termination, state law may impose such a requirement.

    - For example, in Texas, those LIHTC owners who use the Texas Apartment Association lease include the good cause requirement by having tenants sign a lease addendum titled *Lease Contract Addendum*

for Units Participating in Government Regulated Affordable Housing Programs.

- If a state does not require that LIHTC owners use a lease addendum that includes the good cause requirement, advocacy with the state housing agency may achieve such a result.

VIII. Rents. *See* 26 U.S.C.A. § 42(g)(1), (2) (West Supp. 2015).

- Rents are not income-based rents. Rents are flat rents based on adjusted median income. Thus, tenant rents do not change as family income changes. If, however, the family has a section 8 housing voucher or resides in an apartment with project-based section 8 rental assistance, the tenant's share will change as adjusted by the local public housing authority or the owner in accordance with the Section 8 regulations.
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- 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.

- **Calculation of Maximum Rent a Tax Credit Complex May Charg**e:

- *See* 26 U.S.C. § 42(g) (West Supp. 2015).

- Maximum Rents: *See* 26 U.S.C. § 42(g)(2)(C) (West Supp. 2015) on imputing income limitations in calculating the maximum rent.

A. Rents set based on Adjusted Median Income as follows:

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

B. Calculation of Maximum Rent Example: Assume the following facts:

1. Complex is leasing to individuals whose income is 60% or less of area median family income
2. 60 % of MFI is as follows:
   - 2-person Household -- $34,140
   - 3-person Household -- $38,400
3. Family moves into 2-bedroom unit.
4. 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 3 persons --1.5 persons per bedroom.)
5. That calculates to $960 maximum rent per month ($38,400 ÷ 12 = $3,200 x.30 = $960) if the family is paying no utilities.
6. 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, unless they have a Section 8 housing voucher or live in a project-based Section 8 apartment.
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- Section 8 housing voucher tenants and project-based Section 8 tenants will pay rent in accordance with the regulations for the Section 8 Program.

IX. Utility Allowances. *See* 26 C.F.R. § 1.42-10 (2015).

Proposed Regulations: *See* 77 Fed. Reg. 46987-46990 (Aug. 7, 2012). IRS issued proposed regulations on utility allowances submetering on August 7, 2012. Comments were due on October 9, 2012.

- Rents must be adjusted for any utilities paid by the tenant. *See* 26 C.F.R. § 1.42-10, § 1.42-12 (2015).

- Owners must comply with the regulations at 26 C.F.R. § 1.42-10 (2015) in setting utility allowances. Those regulations provide as follows:

- Buildings with Rural Housing Service (RHS) assisted tenants. If any tenant in a building receives Rural Housing Service rental assistance, the applicable utility allowance for all rent-restricted units in the building (including any units occupied by tenants receiving Section 8 assistance from HUD) is the applicable Rural Housing Service allowance. *Id.* at § 1.42-10(b)(1), (2).

- Buildings with HUD Project-Based Section 8 Contract. If neither a building nor any tenant in the building receives Rural Housing Service rental assistance, and the rents and utility allowances are reviewed by HUD on an annual basis, the applicable utility allowance for all rent-restricted units in the building is the applicable HUD utility allowance. *Id.* at § 1.42-10(b)(3).

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

- Tenants receiving HUD rental assistance. The applicable utility allowance for any rent-restricted units occupied by tenants receiving Section 8 rental assistance is the applicable public housing utility allowance established for the Section 8 Housing Voucher program by the PHA.

- Other Tenants. If none of the foregoing rules apply, the appropriate utility allowance for the units is the applicable PHA utility allowance. But if a local utility company estimate is obtained for any unit in the building, that estimate becomes the appropriate utility allowance for all rent-restricted units of similar sized and construction in the building. But if (1) a local utility company estimate is obtained for any unit in the building, (2) a State or local housing credit agency provides a building owner with an estimate for any unit in a building, (3) a cost estimate is calculated using the HUD Utility Schedule Model, or (4) a cost estimate is calculated by an energy consumption model, then the estimate becomes the applicable utility allowance for all rent-restricted unites of similar size and construction in the building.

- IRS provides detailed guidance on (1) the Utility company estimate, (2) the Agency estimate, (3) the HUD Utility Schedule Model, and (4) the Energy consumption model in the regulations. *See* 26 C.F.R. § 1.42-10(b)(4) (ii) (B), (C), (D) and (E) (2015).

- Changes in the Utility Allowance. *See id.* at § 1.42-10(c)(1). If the applicable utility allowance changes, the new utility allowance must be used to compute gross rents due 90 days after the change. For example, if rent must be reduced because of a higher utility allowance, the lower rent must be in effect for rent due at the end of the 90-day period.

- Annual Review. *See id.* at § 1.42-10(c)(2). The owner must review the utility allowances at least once a year and must update it.

- Record Retention. *See id.* at § 1.42-10(d). The owner must retain the utility consumption estimates and supporting data as part of its records.

- Example of Effect of Utility Allowance. The utility allowance has the following effect: Example: Assume the maximum gross rent the owner may charge for a two-bedroom apartment is $950. In other words, this is the amount the owner may charge if the owner were furnishing all utilities. If the tenant must pay any utility (electric, water, gas, wastewater, trash) usage for the apartment, the maximum rent the owner may charge must be reduced by the amount of the utility allowance. Thus, in this example if the applicable utility allowance is $150 per month, the maximum tenant rent the owner may charge is $800 ($950 - $150).

X. Recertification Reviews of Income and Family Composition.

- Annual recertification reviews are required. *See* 26 C.F.R. § 1.42-5(b) (1) (vi) (2015), § 1.42-5(c) (1) (iii) (2015).

- 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 Supp. 2015).

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- 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) (2015). If the tenant has a Section 8 voucher, the documentation requirement is satisfied if the PHA provides a statement to the owner declaring that the tenant's income does not exceed the applicable income limit under section 42(g). *Id.*

- In determining tenant income, income is calculated under the regulations for the Section 8 Housing Choice Voucher Program. *Id.* ("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. ..").

- 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. 5. 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.

- Tenants have a right to continued occupancy and cannot be evicted without good cause, but if the household's income exceeds 140% of the highest income tier established for the complex, it must be redesignated as over-income. *See* 26 U.S.C.A. § 42(g)(D) (West Supp. 2015).

XI. Grievance Procedures. None established by statute or regulations.

XII Evictions, including Lease Non-Renewal at end of Lease Term.

- Tax credit landlords may evict tenants and refuse to renew the lease at the end of the lease term only for good cause. 26 U.S.C. A. § 42 (h)(6)(E)(ii)(I) (West Supp. 2015); Rev. Rul. 2004-82, at A-5, 2004-35 I.R.B.350; Rev. Procedure 2005-37 (June 21, 2005); *see generally* Marc Jolin, *Good Cause Eviction and the Low-Income Housing Tax Credit*, 67 Univ. Chicago L. Rev. 521 (2000).

- IRS, the federal enforcement agency for the tax credit program, first issued a revenue ruling in July 2004, notifying state tax credit agencies that tax credit landlords may evict tenants only for good cause, both during the lease term and at the end of the lease term. Rev. Rul. 2004-82, at A-5, 2004-35 I.R.B. 350; Rev. Procedure 2005-37 (June 21, 2005); *see generally* National Housing Law Project, *IRS Finally Clarifies Good Cause Eviction Protection for Tax Credit Tenants*, 34 Housing. L. Bull. 208 (Oct. 2004); *Update on Good Cause Eviction Protections for Tax Credit Tenants*, 35 Housing L. Bull. 117 (April 2005).

- Prior to this ruling by the IRS, several state appellate courts had held that tax credit landlords must have good cause to terminate the tenancy of a tenant in a tax credit unit. *See Carter v. Maryland Management Co.*, 835 A.2d 158 (Md. Ct. App. 2003); *Cimarron Village v. Washington*, 659 N.W.2d 811 (Minn. Ct. App. 2003); *Land Lease Apartment Management, LLC v. Stribling*, No. HWA30495, 2004 Conn. Super. LEXIS 2988 (Conn. Super. Ct. Sept. 8, 2004); Bowling *Green Manor Limited Partnership v. Kirk*, No. WD-94-125, 1995 Ohio App. LEXIS, at **6-14 (Ohio Ct. App. June 30, 1995) (finding tenant had property interest in her tax credit apartment and owner's actions constituted government action); *Bowling Green Manor Limited Partnership v. LaChance*, No. WD-94-117, 1995 Ohio App. LEXIS 2767, at *9-15 (Ohio Ct. App. June 30, 1995) (finding tenant had property interest in her tax credit apartment and owner's actions constituted government action).

- *See also Virgin Islands Community Housing Limited Partnership v. Rivera,* No. ST-07-CV-655, 2008 V.I. LEXIS 16, *12-13 (Super. Ct. Dec. 24, 2008) (noting that the tenant had presented a "colorable claim that under the LIHTC regulations, she ... should not be evicted at the expiration of her lease, absent good cause").

- In its most recent guide for state agencies monitoring tax credits complexes for compliance, IRS gave the following guidance:

> "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."**

See IRS *Guide for Completing Form 8823*, at chp. 26 "Tenant Good Cause Eviction and Rent Increase Protection" (updated March 22, 2011) (emphasis added).

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

- Notwithstanding the less than perfectly clear language of the paragraph quoted above, the critical sentence emphasized above does clearly state that an owner must prove good cause "if challenged in state court."

- The IRS has not required, however, that tax credit landlords include good cause language in their lease agreements with tenants. *See* Rev. Procedure 2005-37 (June 21, 2005).

- As a result, if the lease does not include the good cause requirement, tenants will have no idea that the landlord can refuse to renew the lease only for good cause. Thus, advocates must be especially vigilant to identify tenants facing non-renewal evictions from tax credit complexes to ensure that their tenancy is terminated only for good cause.

- Since good cause is required, it is implicit that the notice of lease termination state specific grounds for the termination or lease non-renewal. The lease and state law will determine the required notice period, because neither the tax credit statute nor IRS regulations address this issue. If the owner has not incorporated the good cause requirement into the lease or a lease addendum, advocates must be prepared to prove up that the owner is a tax credit owner. It is a good idea to introduce into evidence the Land Use Restriction Agreement (LURA) recorded in the county real property records. It will show the annual dollar amount of tax credits the owner is receiving and can be helpful to the good cause argument, because it illustrates the tremendous tax benefits the owner is receiving.

XIII. Violence Against Women Act (VAWA) Housing Protections. Congress extended the VAWA protections to applicants and tenants in LIHTC housing with the enactment of the Violence Against Women Reauthorization Act of 2013. *See* Pub. L. No. 113-4, § 601, 127 Stat. 54 (March 7, 2013); 42 U.S.C.A. § 14043e-11(a)(3) (West Supp. 2015) (defining covered housing programs).

Prior to the 2013 statutory amendments, LIHTC landlords were required to comply with the VAWA protections only with respect to applicants and tenants with section 8 housing vouchers. *See* 24 C.F.R. § 982.310(h) (4) (2015) ("The owner's termination of tenancy actions must be consistent with … the provisions for protection of victims of domestic violence, dating violence, or stalking in 24 C.F.R. part 5, subpart L.").

HUD published proposed rules in April 2015 that would amend its regulations to fully implement the statutory changes in all HUD housing programs. *See* 80 Fed. Reg. 17548-17584 (April 1, 2015).

END