Low Income Housing Tax Credits

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Administering Agency: Internal Revenue Service (IRS) of the Department of the Treasury

Year program started: 1986

Number of households served: 36,977 lower income households in 2014, the latest data available

Population targeted: Households with income either less than 60% of area median income (AMI) or 50% AMI

FY17 funding: Joint Committee on Taxation estimates $8.7 billion for 2017

The Low Income Housing Tax Credit program (LIHTC) finances the construction, rehabilitation, and preservation of housing affordable to lower income households. The LIHTC program encourages private investment by providing a tax credit: a dollar-for-dollar reduction in federal taxes owed on other income. Although housing tax credits are federal, each state has an independent agency that decides how to allocate the state's share of federal housing tax credits within a framework formed by the Internal Revenue Code.

HISTORY

LIHTC was created by the Tax Reform Act of 1986 and is codified at Section 42 of the Internal Revenue Code, 26 U.S.C. 42, so tax credit projects are sometimes referred to as Section 42 projects. The IRS provides additional guidance through revenue rulings, technical advice memorandums, notices, private letter rulings, and other means.

PROGRAM SUMMARY

The LIHTC program finances the construction, rehabilitation, and preservation of housing affordable to lower income households. LIHTC can be used to support a variety of projects: multifamily or single-family housing; new construction or rehabilitation; special needs housing for elderly people or people with disabilities; and permanent supportive housing for homeless families and individuals.

LIHTC is designed to encourage corporations and private individuals to invest cash in housing affordable to lower income people, those with income less than 60% of area median income (AMI) or 50% AMI. The LIHTC program provides this encouragement by providing a tax credit to the investor over the course of a 10-year period: a dollar-for-dollar reduction in federal taxes owed on other income. The cash that investors put up, called equity, is used along with other resources such as HOME Investment Partnerships or the national Housing Trust Fund to build new affordable housing or to make substantial repairs to existing affordable housing. Tax credits are not meant to provide 100% financing. The infusion of equity reduces the amount of money a developer has to borrow and pay interest on, thereby reducing the rent level that needs to be charged.

The Furman Center for Real Estate and Urban Policy at New York University released a report in October 2012 using tenant-level data from 15 states representing 30% of all LIHTC units. The report found that LIHTC recipients tend to have higher incomes than households assisted by other federal rental assistance programs. Although 43% of the households had income below 30% AMI—were "extremely low income" (ELI)—approximately 70% of those ELI households also had other forms of rental assistance, such as vouchers. For the 30% of ELI LIHTC households who did not have rental assistance, 86% paid more than 30% of their income for rent and utilities and therefore suffered a "cost burden." Only 8% of ELI households in LIHTC homes were neither cost-burdened, nor in receipt of additional housing assistance.

PROGRAM BENEFICIARIES

Tax Credit Units

When applying to an HFA for tax credits, a developer has two lower income unit set-aside options, and must stick with the chosen option during a required lower income occupancy period. The two lower income unit set-aside choices are:

- Ensuring that at least 20% of the units are rent-restricted and occupied by households with income below 50% of AMI.

- Ensuring that at least 40% of the units are rent-restricted and occupied by households with income below 60% of AMI.

Tax credits are available only for rental units that meet one of the above rent-restricted minimums (20/50 or 40/60). With these minimums it is possible for LIHTC projects to have a mix of units occupied by lower income, moderate and middle income people. These are minimums; projects can have higher percentages of rent-restricted units occupied by lower income people. In fact, the more rent-restricted lower income units in a project the greater the amount of tax credits provided. New developments should balance considerations of the need for more units with concerns about undue concentrations of poverty in certain neighborhoods.

Tax Credit Rents

Rent-restricted units have fixed maximum gross rents, including allowance for utilities, that are less than or equal to the rent charged to a hypothetical tenant paying 30% of either 50% of AMI or 60% of AMI, whichever option the developer has chosen. Tenants may have to pay rent up to that fixed maximum tax credit rent even if it is greater than 30% of their income. In other words, the maximum rent a tenant pays is not based on 30% of the tenant's income; rather it is based on 30% of the fixed AMI level (50% or 60%).

Consequently, lower income residents of tax credit projects might be rent-burdened, meaning they pay more than 30% of their income for rent and utilities. Or, tax credit projects might simply not be financially available to very low and ELI people because rents charged are not affordable to them. HUD's tenant-based or project-based vouchers or U.S. Department of Agriculture Rural Development Section 521 Rental Assistance are often needed to fill the gap between 30% of a resident's actual income and the tax credit rent.

Lower Income Occupancy Period

The law requires units to be rent-restricted and occupied by income-eligible households for at least 15 years, called the "compliance period," with an "extended use period" of at least another 15 years, for a total of 30 years. Some states require low income housing commitments greater than 30 years or provide incentives for projects that voluntarily agree to longer commitments. Where states do not mandate longer restricted-use periods, an owner may submit a request to the HFA to sell a project or convert it to market rate during year 14 of the 15-year compliance period. The HFA then has one year to find a buyer willing to maintain the rent restrictions for the balance of the 30-year period. If the property cannot be sold to such a "preservation purchaser," then the owner's obligation to maintain rent-restricted units is removed and lower income tenants receive enhanced vouchers enabling them to remain in their units for three years.

HFAs must monitor projects for compliance with the income and rent restriction requirements. The IRS can recapture tax credits if a project fails to comply, or if there are housing code or fair housing violations.

PROGRAM STRUCTURE

Although housing tax credits are federal, each state has an independent agency, generally a housing finance agency (HFA), which decides how to allocate the state's share of federal housing tax credits. Tax credits are allocated to states based on population. In 2017, each state will receive $2.35 per capita, with small states receiving a minimum of $2.71 million.

Each HFA must have a qualified allocation plan (QAP), which sets out the state's priorities and eligibility criteria for awarding federal tax credits, as well as tax-exempt bonds and any state-level tax credits. More about QAPs is presented later in this article. Developers apply to an HFA and compete for tax credit allocations. The law requires that a minimum of 10% of an HFA's total tax credits be set aside for nonprofits.

Limited Partnerships

Once awarded tax credits, a developer then sells them to investors, usually to a group of investors pulled together by someone called a syndicator. Syndicators sometimes pool several tax credit projects together and sell investors shares in the pool. The equity that the investors provide, along with other resources such as conventional mortgages, state loans, and funds from the HOME program, is used by the developer to construct or substantially rehabilitate affordable housing.

The developer and investors form a "limited partnership" in which the developer is the "general partner" and the investors are "limited partners." The general partner owns very little of the project (maybe as little as 1%) yet has a very active role in construction or rehab and day-to-day operation of the completed project. The limited partners own most of the project (maybe up to 99%) but play a passive role; they are involved only to take advantage of the reduction in their annual federal tax obligations.

9% and 4% Credits

There are two levels of tax credit, 9% and 4%, formally known as the "applicable percentages." Projects can combine 9% and 4% tax credits. For example, buildings can be bought with 4% tax credits and then substantially rehabilitated with 9% tax credits. Instead of 9% and 4%, tax credits are sometimes referred to by the net present value they are intended to yield, either 70% or 30%. That is, in the case of a 9% credit, the stream of tax credits over the 10-year credit period has a value today equal to 70% of the eligible development costs.

The 9% tax credit is available for new construction and substantial rehabilitation projects that do not have other federal funds. Federal funds include loans and bonds with below market-rate interest. Rehabilitation is substantial if the greater of an average of $3,000 is spent on each rent-restricted lower income unit or 10% is spent on the "eligible basis" (described below) during a 24-month period.

The 4% tax credit is available for three types of activities:

- Acquisition of existing buildings for substantial rehabilitation.
- New construction or substantial rehabilitation subsidized with other federal funds.
- Projects financed with tax-exempt bonds. (Every year, states are allowed to issue a set amount, known as the volume cap, of tax-exempt bonds for a variety of economic development purposes.)

In recent years, the figures 9% and 4% were only approximate rates. IRS computed actual rates monthly based on Treasury Department interest rates, or "appropriate percentage." For any given project, the real tax credit rate was set the month a binding commitment was made between an HFA and developer, or the month a finished project was first occupied, or "placed in service." This applicable percentage is applied to the "qualified basis" (described below) to determine the investors' tax credit each year for 10 years (the "credit period").

For 9% projects, the Housing and Economic Recovery Act of 2008 (HERA) established a fixed 9% value for projects placed in service between July 30, 2008, and January 1, 2014. The American Taxpayer Relief Act of 2012 allowed any project receiving a LIHTC allocation before January 1, 2014 to qualify for the fixed 9% credit. There was no Congressional action in FY13 and FY14 renewing a fixed the 9% value. Although the FY15 Appropriations Act provided a fixed 9% minimum, it only extended the rate through December 31, 2014, providing virtually no benefit because most HFAs had already made their 2014 allocations and the vast majority of projects had closed using the floating rate. Therefore, the applicable percentage continued to float. For example, the 9% applicable percentage was 7.49% in December 2015.

Finally, on December 18, 2015, the president signed into law a broad tax extenders bill, the "Protecting Americans from Tax Hikes Act of 2015," which, among many other tax provisions, made the fixed 9% applicable percentage permanent and retroactive to January 1, 2015. However, the statute did not establish a fixed 4% applicable percentage rate. The Joint Committee on Taxation estimates that permanently setting the 9% rate will cost $19 million over a 10-year period. The 4% credit continues to float, with an applicable percentage rate of 3.23% in January 2017.

Determining the Amount of Tax Credits

The amount of tax credit a project can receive, and therefore how much equity it can attract, depends on several factors. First, the "**eligible basis**" must be determined by considering costs such as building acquisition, construction, soil tests, engineering costs, and utility hookups. Land acquisition and permanent financing costs are not counted toward the eligible basis. The eligible basis is usually reduced by the amount of any federal funds.

The eligible basis of a project can get a 30% increase, or "**basis boost**," if the project is located in a census tract designated by HUD as a low income tract (a Qualified Census Tract, or QCT) or a high-cost area (a Difficult to Develop Area, or DDA). QCTs are census tracts with a poverty rate of 25% or in which 50% of the households have income below 60% of the AMI. LIHTC projects in QCTs must contribute to a concerted community revitalization plan. The aggregate population in census tracts designated as QCTs cannot exceed 20% of the metropolitan area's population. DDAs are areas in which construction, land, and utility costs are high relative to incomes. HERA expanded the use of the 30% basis boost to projects not located in QCTs or DDAs if an HFA determines that an increase in the credit amount is necessary for the project to be financially feasible.

Next, the "**applicable fraction**" must be determined. This is a measure of rent-restricted lower income units in a project. There are two possible percentages: the ratio of lower income units to all units (the "unit fraction"), or the ratio of square feet in the lower income units to the project's total square feet (the "floor space fraction"). The lowest percentage is the applicable fraction. The applicable fraction agreed to by the developer and IRS at the time a building is first occupied ("**placed in service**") is the minimum that must be maintained during the entire affordability period ("**compliance period**").

The "**qualified basis**" is the eligible basis multiplied by the applicable fraction. The amount of annual tax credits a project can get is the qualified basis multiplied by the tax credit rate (9% or 4%). The amount of tax credits available to a project is divided among the limited partners based on each limited partner's share of the equity investment. Investors receive their share of the tax credit each year for ten years (the "**credit period**").

A Simple Example

HUD's HOME Program web site has a simple example that brings it all together:

Total development costs	**$5,000,000**
Land acquisition	$1,000,000
Construction	$3,400,000
Site Improvements	$535,000
Engineering	$40,000
Eligible Soft Costs	$25,000
Eligible Basis: Total Development Cost – Land Acquisition = $4,000,000	
Qualified Basis: Eligible Basis x Applicable Fraction ($4,000,000 x .40) = $1,600,000	
Annual Tax Credit: Qualified Basis x Tax Credit Rate ($1,600,000 x .09) = $144,000	
Total Amount of Tax Credits: $144,000 x 10 years = $1,440,000	

- Project will construct 70 units, 40% of them are income and rent restricted.
- There are no other federal funds.
- The example continues, noting that a limited partnership will buy the tax credits at $0.75 for every dollar of future tax benefit (the tax credit "price"). Thus the limited partnership will invest $1,080,000 ($1,440,000 x .75) in the project today for a ten-year stream of future tax benefits amounting to $1,440,000.

QUALIFIED ALLOCATION PLAN (QAP)

The statute authorizing the LIHTC program requires each agency that allocates federal LIHTCs, (generally a housing finance agency, HFA), to have a Qualified Allocation Plan (QAP). Each state has an HFA and a few states also have local HFAs. The QAP sets out the state's eligibility priorities and criteria for awarding federal LIHTCs to housing properties. In some states, the QAP also sets out threshold criteria for non-competitive 4% tax credits and any state LIHTC.

The QAP is a tool advocates can use to influence how their state's share of annual federal LIHTCs is allocated to affordable housing properties. Advocates can use the public hearing and comment requirements to convince their housing finance agency to better target tax credits to properties that house people with extremely low incomes, locate projects in priority areas, and preserve the existing stock of affordable housing.

Each QAP must spell out an HFA's priorities and specify the criteria it will use to select projects competing for tax credits. The priorities must be appropriate to local conditions. The QAP must also give preference to projects:

- Serving residents with the lowest income.
- Serving income-eligible residents for the longest period of time.
- Located in HUD-designated qualified census tracts (QCTs) or difficult development areas (DDAs), as long as the project contributes to a "concerted community revitalization plan."
- QCTs are census tracts with a poverty rate of 25% or in which 50% of the households have income less than 60% of AMI. DDAs are areas in which construction, land, and utility costs are high relative to incomes.

In December, 2016, the Internal Revenue Service (IRS) issued Notice 2016-77 stating that QAPs may only give preference to projects in QCTs if there is a "concerted community revitalization plan" and only if that plan contains more components than just the LIHTC project. That Notice observed that in some cases HFAs have given preference to projects located QCTs without regard to whether the projects would contribute to a concerted community revitalization plan. In other cases, because development of new multifamily housing benefits a neighborhood, a LIHTC project without other types of community improvements has been treated as if it alone constituted a concerted community revitalization plan. The IRS declared that simply placing a LIHTC project in a QCT risks exacerbating concentrations of poverty. Therefore, a QCT preference should only occur when there is an added benefit to the neighborhood in the form of the project's contribution to a concerted community revitalization plan. The Notice requested public input to define "concerted community revitalization plan" because the IRS Code does not have a definition.

The QAP selection criteria must address 10 items: (1) location; (2) housing needs; (3) public housing waiting lists; (4) individuals with children; (5) special needs populations; (6) whether a project includes the use of existing housing as part of a community revitalization plan; (7) project sponsor characteristics; (8) projects intended for eventual tenant ownership; (9) energy efficiency; and (10) historic nature. These requirements are minimums; states may adopt more rigorous criteria that target advocates' priority populations and locations. Most states establish detailed QAP selection criteria and set-asides based on the characteristics of their state's needs.

HFAs may target tax credits in several ways:

- The QAP selection process may give preferences, in the form of extra points, to encourage developers to submit projects more likely to serve particular populations or locations; for example, by awarding 10 points to projects that set aside 10% of the units for special needs populations.
- The QAP may establish a set-aside, reserving a specific percentage or dollar amount of any given year's tax credit allocation for projects more likely to serve particular populations or locations; for example, a $5 million set-aside for rural projects.
- The QAP may establish thresholds, minimum requirements that projects must meet simply to get in the game, thus improving targeting to particular populations or locations; for example, requiring a 50-year income-eligible compliance period.

TIPS FOR LOCAL SUCCESS

Because each state receives a new allocation of LIHTCs each year, QAPs are usually drafted annually. This gives advocates regularly scheduled opportunities to influence QAP priorities. LIHTCs are often in high demand among developers; therefore, developers propose projects that address the priorities set forth in the QAP to give themselves an advantage in the selection process.

Advocates should assess the QAP. If it only has a general statement of goals, advocates can work to get very specific set-asides or preference points for their priorities. If the QAP has too many priorities, this will render individual priorities less meaningful. Advocates should work to narrow the number of priorities or work to establish relative priorities so their priorities can compete more effectively.

If there are types of assisted housing that should be at the top of the priority list, advocates should work to ensure that they are positioned to better compete. For example, if there is a great need for units with more than two bedrooms, advocates might promote a QAP policy offering bonus points for projects providing units with two or more bedrooms for at least 10% of all low income units. To facilitate rural projects, advocates might try to secure QAP policies that give points to projects with fewer than 50 units in rural areas.

Advocates can also argue for features that protect tenants, for example a QAP policy precluding tax credit assistance for projects that do not provide one-for-one replacement of units lost through redevelopment. Advocates should review the QAP to find out how long targeted units must serve people with lower incomes. If the QAP only requires the basic 15 years, plus the extended use period of another 15 years, advocates should try to get the compliance period lengthened as a threshold issue, or try to get point preferences or set-asides for projects that voluntarily agree to a longer compliance period.

All states are required to have a public hearing about their proposed QAP before it is approved by the unit of government overseeing the HFA, but there are no specific requirements for the public hearing. Although not required, most states also provide for a public review and comment period for a proposed QAP.

Advocates should contact the HFA early to learn about its annual QAP process and build this into their work plan for the year. In addition, advocates should be sure to get on any notification list the HFA might have about the QAP and public hearing. Advocates should also develop relationships with the HFA's governing board and communicate the advocate's priorities throughout the year. Not all communication has to take place in the context of the formal QAP process. Informal contacts can be used effectively to advance an advocate's priorities. In fact, the most effective means of advocating for any particular priority is to be in contact with the HFA long before a draft QAP is publicly released.

Once an HFA decides to award tax credits to a building, it must notify the chief executive officer of the local jurisdiction where the building is located, such as the mayor or county executive. That official must have a reasonable opportunity to comment on the project. Advocates should ask the executive's office and any relevant housing department at the locality to notify them as soon as the HFA contacts the executive about a proposed project. Even better, advocates should seek a local policy requiring public notice and comment, along with public hearings, about a proposed project.

In December of 2016, The Internal Revenue Service (IRS) issued Revenue Ruling 2016-29 holding that the IRS Code does not require or encourage state agencies allocating LIHTCs to reject proposals that do not obtain the approval of the locality where a project is proposed to be developed. IRS added that QAP policies that require local officials to approve a proposed project could have a discriminatory effect based on race and therefore be contrary to the Fair Housing Act of 1968.

Before tax credits are allocated, there must be a comprehensive market study of the housing needs of low income people in the area a project is to serve. The project developer must hire a disinterested third party approved by the HFA to conduct the market study.

If a building that does not fit the QAP's priorities is to get tax credits, the HFA must provide a written explanation and make it available to the public.

Most states post a list of properties that have won tax credits after each round of competition. These lists can often be found on an HFA's website.

FUNDING

The LIHTC is a tax expenditure, which does not require an appropriation. The Joint Committee on Taxation estimated that the program would cost $8.1 billion in tax expenditures in 2016, rising to $8.7 billion in FY17, $9.0 billion in FY18, and $9.6 billion in FY19, with a total of $43 billion between FY15 and FY19.

FORECAST FOR 2017

In March 2017, Senators Maria Cantwell (D-WA) and Orin Hatch (R-UT) reintroduced the *Affordable Housing Credit Improvement Act of 2017* to both expand LIHTC by 50% over 5 years, as well as improve the program. Reforms include:

- Incentives to Serve Homeless and Extremely Low-Income Families. The Cantwell/Hatch bill provides a 50% basis boost—thereby increasing the investment of LIHTC—for developments that set aside at least 20% of units for households with extremely low incomes or that are living in poverty. With this much-needed financial incentive, the bill will help housing developments remain financially sustainable while serving families with limited means.
- Encourage Development in Native American Communities. The Cantwell/Hatch bill designates Native American communities as "Difficult To Develop Areas," making housing developments automatically eligible for a 30% basis boost to increase the investment of Housing Credits. The bill also requires states to consider the needs of Native Americans when allocating Housing Credits. Together, these improvements will encourage much-needed development in Native American communities.
- Allow Mixed-Income Housing Developments. In order to provide greater flexibility and possibly deeper income targeting, the Cantwell/Hatch bill would apply this income ceiling to the average of all apartments within a property, rather than to every individual apartment. The legislation

would also allow Housing Credit developments that use income-averaging to serve renters with incomes up to 80% of AMI. In doing so, higher rents could potentially offset lower rents for households below 40 or 30 percent of AMI. This could encourage developments to provide a deeper level of affordability, while maintaining financial feasibility.

With the change of administrations in 2017, there is great uncertainty about the LIHTC program because both the House of Representatives and President Trump have proposed reducing the nominal top corporate tax from 35% to 20% or 15%, respectively. In order to do so, nearly all tax expenditures would have to be eliminated. Even if the LIHTC is retained in tax reform, if the nominal top corporate tax rate is lowered to 20% or 15%, the need for corporations to seek tax credits to reduce their tax liability would be greatly reduced, lowering the demand for, and consequently the value of, LIHTCs.

WHAT TO SAY TO LEGISLATORS

LIHTC is an important source of funding for affordable housing. Congress should act to protect the program during comprehensive tax reform. Congress should also pursue opportunities to expand and reform LIHTC to ensure that this vital resource can better serve our nation's most vulnerable families. For that reason, NLIHC urges Congress to enact the *Affordable Housing Credit Improvement Act*, reintroduced by Senators Maria Cantwell (D-WA) and Orrin Hatch (R-UT).

FOR MORE INFORMATION

NLIHC, 202-662-1530, www.nlihc.org

Affordable Rental Housing A.C.T.I.O.N. Campaign, http://rentalhousingaction.org

HUD's database of LIHTC projects, updated through 2014, www.huduser.org/datasets/lihtc.html

List of QCTs and DDAs, www.huduser.org/datasets/qct.html

Lists of HFAs, https://lihtc.huduser.gov/agency_list.htm

Novogradac, a consulting firm, also lists the HFAs in all states and provides links to their QAPs, http://bit.ly/XoOL2b