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4 Compliance Considerations for LIHTC Resyndication

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The Low-Income Housing Tax Credit (LIHTC) program can be used for new construction, acquisition and rehabilitation of a building. Under the acquisition/rehabilitation activity, owners are acquiring existing buildings and rehabilitating them. Often, when a building is acquired, there are existing tenants, and navigating compliantly depends on if the building acquired is already bound by a LIHTC extended-use agreement.

Resyndication occurs if a building acquired is subject to a valid LIHTC extended-use agreement. The resyndication process is a subset of the acquisition/rehabilitation activity. As such, the same rules apply in regard to the 10-year hold and related-party tests. However, the practicality of how to approach the existing tenants at the time of acquisition differs.

The following article outlines four of the primary compliance considerations when resyndicating a LIHTC property.

1. Income Certification

For a low-income unit to be determined compliant for the purposes of LIHTC delivery, the unit must be income- and rent-restricted, a qualified student household and suitable for occupancy. When there are existing households occupying a unit the time of acquisition, establishing income eligibility is the first challenge.

With existing tenants, there is no physical move into the unit, but there still needs to be a date as of when the unit was determined to be income eligible. If the initial tenant income certification is completed within 120 days after the date of acquisition, the effective date of the tenant income certification is the date of acquisition; otherwise, the household is treated as a new move-in, and the tenant income effective date is the date that the last adult household member signs the certification.

Example: A building is acquired Feb. 15, 2022, with an allocation of LIHTCs in 2022. June 15, 2022, is 120 days the from the date of acquisition.

- Unit 101: The existing household in unit 101 moved in July 1, 2019, and was LIHTC certified on May 30, 2022. Because the tenant income certification occurred **within** 120 days of date of acquisition, the LIHTC effective date for unit 101 is Feb. 15, 2022.
- Unit 201: The existing household in unit 201 moved in May 7, 2010, and was LIHTC certified on June 30, 2022. Because the tenant income certification occurred **after** 120 days of date of acquisition, the LIHTC effective date for unit 201 is June 30, 2022.

Note: The provision is specific to the initial income certification. In a resyndication, because the buildings being acquired are already subject to a LIHTC extended-use agreement, the households would have already been required to be income certified at move-in. Chapter 4 of the IRS Guide to Completing Form 8823 states (page 4-27):

> ***Previously Income-Qualified Households***
>
> *Households determined to be income-qualified for purposes of the IRC §42 credit during the 15-year compliance period are concurrently income-qualified households for purposes of the +30-year extended-use agreement. As a result, any household determined to be income qualified at the time of move-in for purpose of the extended-use agreement is a qualified low-income household for any subsequent allocation of IRC §42 credit.*

The logic is that the extended-use agreement for the original LIHTC allocation requires that the owner make a long-term commitment to maintain the building as low income. In doing so, the owner must maintain the building's applicable fraction throughout the term of the agreement. When a new allocation of LIHTCs is then layered on, the existing tenant population is already LIHTC certified. The initial income certification was performed when the household moved in.

Using the same example of a building acquired Feb. 15, 2022 with an allocation of LIHTCs in 2022, let's now view it through the lens of a resyndication in which the building had an allocation of LIHTCs in 2001 with the extended-use agreement for that allocation still in effect. Unit 101 was initial income certified July 1, 2019 (at move in), and unit 201 was initial income certified May 7, 2010 (at move in). That means both units 101 and 201 were LIHTC certified when the building was acquired because of the extended-use agreement in effect for the 2001 LIHTC allocation, and the tenant's income eligibility remains in effect as well.

If there are new move-ins after the date of the resyndication, those applicants must be income eligible under the income limits in effect at the time. With a resyndication, there is a new placed-in-service date generally established by the date of acquisition.

Example: A 2001 LIHTC allocation, in which the resyndication occurs in 2022:

- The income limits to establish eligibility for existing households will be based on the placed-in-service date tied to the 2001 LIHTC allocation.
- The income limits to establish eligibility for new households after the 2022 allocation is made will be based on the placed-in-service date tied to the 2022 LIHTC allocation.

Allocation Year	Three-Person 60% income limit
2001	$32,000
2022	$27,500

This means if a three-person household applies after the 2022 allocation is placed in service, then the applicable income limit is $27,500 and, going forward, also represents the period for which the project's income limits are held harmless.

This concept is specific to the income of existing tenants. In other words, for a unit to be compliant, there are additional considerations.

Although there is federal guidance to support the concept that households that exist at the time of the resyndication can be concurrently income qualified, relying on past work to support current eligibility can be scary. As such, there are several state allocating agencies and investors that required a certification of eligibility be performed at some point after the new (resyndicated) credits are allocated. This would require treating the existing tenants as new move-ins by screening under current circumstances, verifying disclosed income/assets, an executing a tenant income certification supporting that the current household income is less than the applicable income limits tied to the new allocation. All verifications must be dated within 120 days before the effective date of the certification. What happens if the household exceeds the applicable income limit at the time of the current income certification?

Example: An initial allocation of LIHTC in 2001 and resyndication in 2022, where the state agency required a current certification to support income eligibility in 2022:

- Unit 101 was initial income certified July 1, 2019 (at move in); when the current certification was performed in 2022, the household was found to be income eligible. No further action is needed to support income eligibility.
- Unit 201 initial income certified May 7, 2010 (at move in); when the current certification was performed in 2022, the household was found to exceed the applicable income limit based on current circumstance. In this scenario, most state agencies and investors would then allow the owner to use the initial income certification from May 7, 2010 (at move in) to treat this household as concurrently income eligible.

Do NOT assume that just because someone lived at the property, that they were correctly income certified. Remember, a resyndication involves a new owner acquiring an existing LIHTC project. There must be a robust strategy for a detailed review of each income certification to support due diligence. If the original income certification is not available or sufficient to prove income eligibility at under the existing LIHTC extended-use agreement, then the owner must complete a current income certification to support income eligibility for the new LIHTC allocation.

2. Rent

The next consideration for a unit to be LIHTC worthy is that the unit must be rent restricted. This can be tricky when you have a building under a LIHTC extended-use agreement, especially in areas where income limits are decreasing. (Remember: Rent limits are a calculation of income limits.)

For all households, regardless if they are existing at the time of the resyndication or new move-ins after the resyndication is placed in service, for the new allocation to support credit delivery, the gross rent of all units must be restricted at the rent limit tied to the resyndication. The three-person income limit facilitates the calculation of the two-bedroom rent limit:

Allocation Year	Three-Person 60% Income Limit	Two-Bedroom 60% Rent Limit
2001	$32,000	$800
2022	$27,500	$687

This would mean that, for the 2022 allocation to deliver credits, the gross rent for all two-bedroom units cannot exceed $687 per month. It would be noncompliant to continue operating with the $800 rent limit tied to the 2001 LIHTC allocation, as it would result in units being overcharged rent.

3. Students

Another key component to compliance in a resyndication is ensuring that a LIHTC household is not entirely occupied with non-qualified full-time students. Chapter 17 of the IRS Guide to Completing Form 8823 (page 17-3) discusses what it is to be out of compliance with this event:

> *A unit is out of compliance when it is occupied entirely by full-time students at qualifying educational organizations for five or more months during a calendar year in which the taxable year of the taxpayer begins and who do not meet one of the exceptions identified in IRC §42 (i)(3)(D).*
>
> *A unit is also considered out of compliance if the owner fails to verify the household's student status at the time of move in, or an annual student status verification was performed late and after notification of a state agency review.*

Concurrent eligibility only applies to income for existing households; student status still must be tested. That means each existing household considered concurrently eligible for income purposes must be screened for current student status. The purpose is to support that, for the resyndication, all households meet this provision.

Example: A building acquired Feb. 15, 2022, with an allocation of LIHTCs in 2022, through the lens of a resyndication:

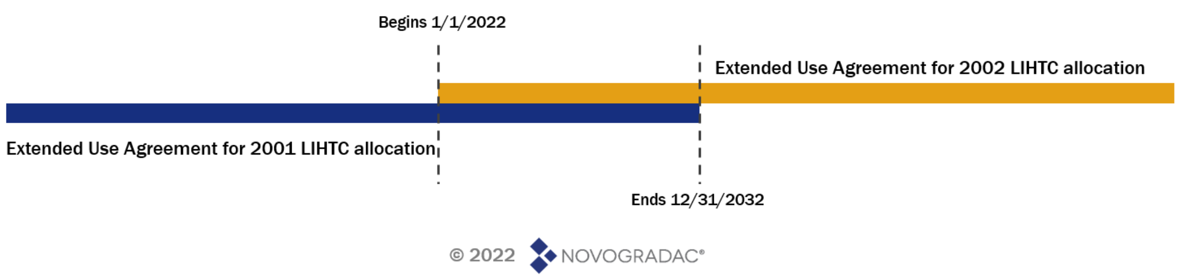
- Unit 101 was initial income certified July 1, 2019 (at move in), and unit 201 initial income certified May 7, 2010 (at move in).
- Both units have income eligible households; but until the households are screened for student status in 2022 for the resyndication, it is unknown if the units are compliant with the student rule.
- If this screening determines that unit 101 is a nonqualified student household in 2022, even though it is considered concurrently eligible for income, unit 101 would not support credit delivery.

4. Extended-Use Agreements

The ability to consider an existing tenant concurrently eligible based on income is contingent on having an extended-use agreement in effect. The existing extended-use agreement has a minimum federal affordability period of 30 years that commences with the first year of the compliance period.

For the 2001 LIHTC allocation, assume the building is placed in service 2003 and chose to start the credit period in 2003. The extended-use period for the 2001 LIHTC allocation starts Jan. 1, 2003, and ends Dec. 31, 2032.

For the 2022 LIHTC allocation, assume the rehab is placed in service 2022 and chose to start the credit period in 2022. The extended-use period for the 2022 LIHTC allocation starts Jan. 1, 2022, and ends Dec. 31, 2051.



For the period of Jan. 1, 2022 — when the extended-use agreement for the 2022 resyndication commences — and Dec. 31, 2032 — when the 2001 extended-use agreement terminates — the owner must comply with both extended-use agreements. The challenge is that the covenants in each can conflict.

Example: The extended-use agreement for the 2001 LIHTC allocation requires a 20-50 minimum set-aside and 100% low-income occupancy. The extended-use agreement for the 2022 LIHTC allocation requires a 40-60 minimum set-aside and 80% low-income occupancy.

For Jan. 1, 2022, through Dec. 31, 2032, the owner must abide by the covenants of the extended-use agreement for the 2001 LIHTC allocation. When that extended-use agreement terminates Dec. 31, 2032, the owner can apply the 40-60 minimum set-aside and adjust occupancy to only 80% low-income starting Jan. 1, 2033. If the owner takes such action before Dec. 31, 2032, they would be out of compliance with that extended-use agreement.

Conclusion

"We do not fear the unknown. We fear what we think we know about the unknown"- Teal Swan

In a resyndication, we tend to fear the idea of considering existing tenants concurrently income eligible because we think that there is something nefarious with using the initial income certifications. Instead of approaching the compliance for a resyndication with the assumptions that the initial income certifications are bad because of the fear associated with failure to comply, employ better and strategic strategies. Remember: The goal of the LIHTC program is to create barrier-free affordable housing.

Stephanie Naquin, Director of Multifamily Property Compliance, is a multifamily compliance consultant with Novogradac. She is based in Austin, Texas, and works nationally. Her work includes consulting with state agencies, equity providers, lenders, attorneys, developers and onsite staff on topics related to multifamily compliance of IRC §42, IRC §142, the HOME program, National Housing Trust Fund, HUD Multifamily programs, and other locally administrated affordable housing programs, with a focus on holistic compliance. In addition, her team is responsible for reviewing thousands of tenant files annually for compliance across the country; not only for compliance with federal compliance regulations, but through the lens of the applicable awarding entity. Her experience in both the private and regulatory sectors of the industry allows her to synthesize complicated federal and state regulations and present that information in a concise and easily digestible manner. Ms. Naquin serves on the TAAHP (Texas Affiliation of Affordable Housing Providers) Governing Board and is the co-chair of their compliance committee. Her certifications include the COS (Certified Occupancy Specialist), HCCP (Housing Credit Certified Professional), and the NPCC (Novogradac Property Compliance Certification).