Compliance Hot Topics
Texas State Affordable Housing Corporation (TSAHC)

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About TSAHC
About Novogradac & Company LLP

Novogradac & Company LLP is a national certified public accounting and consulting firm with more than 25 offices nationwide. Our clients represent a broad range of industries, with a major emphasis in the real estate sector. We provide publicly and privately held national enterprises with a full spectrum of audit, tax, valuation, expert witness and litigation support, property compliance and general consulting services and we work extensively in the affordable housing, community development, historic preservation and renewable energy fields.

Consistently recognized as a “Best of the Best” firm

Founded in 1989 in San Francisco

Ten annual conferences held across the country

Monthly Novogradac Journal of Tax Credits published in addition to tax credit handbooks

Industry experts, speak at a variety of national and local events, conduct webinars, etc.

Numerous Areas of Expertise

Low-Income Housing Tax Credit

New Markets Tax Credit

Historic Rehabilitation Tax Credit

Renewable Energy

HUD-Financed Properties

Public Housing Authorities

State Tax Credits

Market-Rate Rental Real Estate

Education – Publication/Events

Public Policy
Preparation of financial forecasts
- Business advisory consulting
- Tax consulting and tax compliance assistance
- Risk management services
- Cost segregation reports
- Agreed-upon procedures reports
- Affordable housing consultation, including but not limited to:
  - preparation or review of tax credit and tax-exempt bond
  - applications, analysis of state QAPs, and investor due diligence
Common Multifamily Programs

1. Housing Tax Credit Program (HTC)
2. Tax Exempt Bond Program (Bond)
3. State Housing Trust Fund (SHTF)
4. Tax Credit Assistance Program (TCAP)
5. Tax Credit Exchange Program (Exchange or 1602)
6. HOME Investment Partnership Program (HOME)
7. Neighborhood Stabilization Program (NSP)
8. Repayments from the Tax Credit Assistance Program (TCAP RF)
9. National Housing Trust Fund (NHTF)

<table>
<thead>
<tr>
<th>Program</th>
<th>Authorized Under</th>
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<tbody>
<tr>
<td>HTC</td>
<td>26 U.S. Code §42- Low-income Housing Credit</td>
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<tr>
<td>Bond</td>
<td>26 U.S. Code §142- Exempt Facility Bond</td>
</tr>
<tr>
<td>SHTF</td>
<td>Texas Government Code, Chapter 2306.201- Housing Trust Fund</td>
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<tr>
<td>TCAP</td>
<td>American Recovery and Reinvestment Act of 2009 (ARRA)</td>
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<tr>
<td>HOME</td>
<td>Title II of the Cranston-Gonzalez National Affordable Housing Act (24 C.F.R. Part 92- HOME Investment Partnership Program)</td>
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<tr>
<td>NSP</td>
<td>Housing and Economic Recovery Act of 2008 (HERA)</td>
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<tr>
<td>NHTF</td>
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TSAHC – Financing Options
Affordable Housing Developers

Permanent Financing Loans
- Provides funds that can be used towards the development, acquisition, or rehabilitation of affordable multifamily projects.

Construction Loans
- Provides loans for the construction or rehabilitation of affordable multifamily projects or single family homes. Excellent solution for a small project or as gap financing for a larger development.

Revolving Lines of Credit
- With amounts similar to construction loans, the revolving line of credit offers the opportunity for construction of rehabilitation of affordable single-family homes.
TSAHC – Financing Options
Multifamily Tax Exempt Bonds

We receive 10% of the state’s annual private activity bond volume cap for rental projects and have the authority to issue everywhere in Texas. Proposed developments must meet at least one of the Targeted Housing Needs that our Board of Directors establishes each year:

- At Risk Preservation and Rehabilitation of Existing Affordable Units
- Housing in Rural and Smaller Urban Market
- Senior and Service Enriched Housing Developments
- Housing in Areas with Disaster Declarations

Tax Exempt Bond Compliance Overview

- Section 142 of the Internal Revenue Code of 1986, as amended (the “Code”) imposes rules to ensure Bond compliance.

- Under Section 142(d) of the Code provides that a project must meet either the 20-50 Test or the 40-60 Test in order to be a qualified residential rental project.

  At least 20% of units must be rent restricted for households with incomes at or below at 50% area medium income or,

  At least 40% of units must be rent restricted for households with incomes at or below at 50% area medium income

  Note: If the borrower is a 501(c)(3) organization, the project must also set aside 75% of units at 80% AMI.
Common Multifamily Programs

- HTC
- Bond
- SHTF
- TCAP
- Exchange

- HOME
- NSP
- TCAP RF
- NHTF

So why is program compliance so difficult?

Because many developments, if not all, are layered with multiple funding. This makes it difficult and creates challenges for the staff responsible for managing compliance. Below are a few common compliance issues noted during onsite visits.

Affordability Periods/ Set Aside Requirements

Compliance Rules/ Tenant Selection Plan
Common Multifamily Programs

In general, multifamily programs use the same standard in determining household income

_Tenant income is calculated in a manner consistent with the determination of annual income under section 8 of the United States Housing Act of 1937 (“Section 8”), not in accordance with the determination of gross income for federal income tax liability._

Common Multifamily Programs

What does it mean to calculated in a manner consistent with the determination of annual income under section 8 of the United States Housing Act of 1937?

- Federal Source
- HUD 4350.3
- Handbook to CFR
Income Limits

- On March 30, 2018, the Department of Housing and Urban Development (HUD) published the 2018 HUD Program Limits and Multifamily Tax Subsidy Project (MTSP) Income Limits, both of which are effective as of April 1, 2018.
  - HUD/MTSP income limits are published for metro areas and non-metro counties throughout the country.
  - MTSP income limits determine which households qualify to occupy units in low-income housing tax credit (LIHTC) rental properties.
  - They are also used to determine rent limits that LIHTC property owners may charge low-income households occupying these units.
Income Limits

Change in HUD-Published MTSP Limits 2017 to 2018

- The 4-person income limit is increased if it is ≤ 95% of last year’s 50% income limit, and:
  - Reduced to the greater of 105 percent of last year’s very low-income limit; or,
  - Twice the change in the national median family income estimate, if that amount would be larger than 5 percent.
- Between FY 2017 and FY 2018, the estimate of national median family income increased and the change in income limits is capped at 111.5% of last year’s 50% income limit (≈ 11.5% increase)
Income Limits

Income Limits Determinations for FY 2018 Very Low Income Limits

- Equal to 50% AMI
- State Median Income Area
- High Housing Cost Area
- Low Housing Cost Area
- 5% Floor
- 11.5% Cap

What’s New?

- The Consolidated Appropriations Act of 2018 (aka omnibus spending bill), introduced 2 changes to the HTC Program:
  1. Increased the amount of the tax credit volume cap by 12.5% over the next 4 years; and,
  2. A new minimum set-aside... Income Averaging!
Minimum Set-Aside

Pre-March 23rd

Set aside at least 20% of units in a project to be rent restricted for households with incomes at or below 50% of area median income

OR

Set aside at least 40% of units in a project to be rent restricted for households with incomes at or below 60% of area median income

Minimum Set-Aside

IRS Form 8609
BEFORE the new minimum set-aside option...

Form 8609, Line 10c
Minimum Set-Aside

INCOME AVERAGING IS NOT AVAILABLE FOR THE TAX EXEMPT BOND PROGRAM!!!

Income Averaging- Effective Date

• Effective for minimum set-aside elections made after enactment (March 23rd)
• Earlier elections are irrevocable
• States will have discretion on when and what projects are allowed to use income averaging
**Minimum Set-Aside**

Set aside at least **20%** of units in a project to be rent restricted for households with incomes at or below **50%** of area median income

OR

Set aside at least **40%** of units in a project to be rent restricted for households with incomes at or below **60%** of area median income

**NOW!**

Set aside at least **40%** of units in a project to be rent restricted and have household income limits (designated in 10% increments from 20% to 80%) whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.

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**Income Averaging - Minimum Set-Aside**

IRS Form 8609 with the new minimum set-aside option...

Form 8609, Line 10c
Income Averaging- IRS Guidance

IRS guidance is not required to start using income averaging; law has changed.

Would help with questions (designating units and if/how/when the designations can change).

Not certain when, or if IRS guidance will be released.

In the meantime, agencies will need to interpret and develop policies.

Income Averaging- TDHCA Proposed Approach

- TDHCA held a Roundtable May 25, 2018 to discuss proposal.
- Report item presented at the June 28, 2018 TDHCA Governing Board Meeting [item 3(b)].
Income Averaging- TDHCA Proposed Approach

<table>
<thead>
<tr>
<th>Status of Property</th>
<th>Federal</th>
<th>TDHCA Proposed Approach</th>
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<tbody>
<tr>
<td>Not yet applied for LIHTC</td>
<td>Eligible to elect</td>
<td>Currently undergoing drafting of 2019 QAP</td>
</tr>
<tr>
<td>Applied but not yet awarded</td>
<td>Eligible to elect</td>
<td>• Tentatively allowed- may need to re-underwrite to make sure that the deal remains financially feasible &amp; utilizes no more credits than necessary to ensure feasibility to construct and operate through the credit period</td>
</tr>
<tr>
<td>Awarded but not yet filed Form 8609 (even projects placed in service)</td>
<td>Eligible to elect</td>
<td>• May require an Amendment to the application and/or LURA</td>
</tr>
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Income Averaging- Designating Units

• Must be 20%, 30%, 40%, 50%, 60%, 70% or 80% (both rent and income)
• Can reach 60% average in a number of ways
• No federal requirement to designate a pro-rata share among bedroom sizes
• Agencies could adopt policies that are more restrictive
**Income Averaging - Designating Units**

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**Example**:

- 2 units at 30 percent allows...
- 3 units at 80 percent
- 6 units at 70 percent

**TDHCA DRAFT Compliance Guidelines**

- Unit designations can float
  - Example: Owner committed to a mix of 30%, 60% and 80% units with an overall low income percentage of 55%. As long as the overall low income percentage remains ≤ 55%, the unit designations can change to any combination of 20%, 30%, 40%, 50%, 70% or 80%
- A Project will be reported as failing to meet the minimum set-aside test if less than 40% of the units in the Project meet the owner’s intended designation
- 20%, 30%, 40%, 50%, 70% or 80% must be dispersed across unit types in a manner does not violate fair housing law.
100% Low Income Projects

- Neither required nor prohibited from completing annual recertifications
- If the owner chooses to perform annual recertifications, household rent can be adjusted provided that the Project maintains an average ≤ the percentage represented at application

Mixed Income Projects

- If the AMI tier of a household changes at recertification, the household’s rent can be adjusted to their new designations (higher or lower) as long as the Project maintains an average income ≤ the percentage represented at application
- If the there is an increase household income and re-designating the rent to the new (higher) AMI tier would result in the Project average to exceed the required AMI average, compliance is maintained by keeping the rent restricted to the limit that maintains the required AMI average.
What’s New?

- Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions
  - Released by HUD on April 4, 2016
- This guidance addresses how the discriminatory effects and disparate treatment methods of proof apply in Fair Housing Act cases in which a housing provider justifies an adverse housing action – such as a refusal to rent or renew a lease – based on an individual’s criminal history.
- “Look Back” period

Criminal History Screening

- Policies and/or practices that exclude persons based on criminal history MUST be tailored to serve the housing providers’ substantial, legitimate, nondiscriminatory interest and take into consideration such factors as type of crime & length of time since conviction
  - Having a criminal record is not a protected characteristic of the Fair Housing Act
    - A criminal history-based restrictions violates the Fair Housing Act if their burden falls more often on renters of one race/national origin over another
    - Discriminatory effects liability
  - A violation occurs when the policy/practice has an unjustified discriminatory effect, EVEN IF there not intent to discriminate.
Criminal History Screening

Discriminatory effects liability is assessed under a 3 step burden shifting standard requiring a fact-specific analysis:

1. Evaluating whether the criminal history policy or practice has a discriminatory effect
2. Evaluating whether the challenged policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest
3. Evaluating whether there is a less discriminatory alternative

Step 1: Evaluating whether the criminal history policy or practice has a discriminatory effect

In the first step of the analysis, a plaintiff (or HUD in an administrative adjudication) must prove that the criminal history policy has a discriminatory effect, that is, that the policy results in a disparate impact on a group of persons because of their race or national origin. This burden is satisfied by presenting evidence proving that the challenged practice actually or predictably results in a disparate impact.
In the second step of the discriminatory effects analysis, the burden shifts to the housing provider to prove that the challenged policy or practice is justified – that is, that it is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider. The interest proffered by the housing provider may not be hypothetical or speculative, meaning the housing provider must be able to provide evidence proving both that the housing provider has a substantial, legitimate, nondiscriminatory interest supporting the challenged policy and that the challenged policy actually achieves that interest discriminatory interest.

**Step 2: Evaluating whether the challenged policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest**

**Exclusions Because of Prior Arrest**
- Excluding because of prior arrests without convictions CANNOT satisfy the burden
- Arrest ≠ Conviction

**Exclusions Because of Prior Conviction**
- A blanket prohibition on any person with a conviction record no matter when it occurred, nature of conviction or what’s happened since CANNOT satisfy the burden
- “Look Back” periods
Criminal History Screening

Reporting that after six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record.

Criminal History Screening

**Step 3:** Evaluating whether there is a less discriminatory alternative

The third step of the discriminatory effects analysis is applicable only if a housing provider successfully proves that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest. In the third step, the burden shifts back to the plaintiff or HUD to prove that such interest could be served by another practice that has a less discriminatory effect.
Criminal History Screening

- Statutory Exemption from Fair Housing Act Liability
  - Specific to exclusion of persons *convicted* of illegal manufacturing or distributing of a Controlled Substance
  - the exemption is limited to disparate impact claims based on drug manufacturing or distribution convictions, and does not provide a defense to disparate impact claims based on other drug-related convictions, such as the denial of housing due to a person’s conviction for drug possession

Tenant Selection Plan

Owners must maintain a written Tenant Selection Plan that:

1. Determine an applicant’s basic eligibility (i.e., occupancy, income and rent limits, fees and deposits, student restrictions, if any, etc.)

2. Procedures used in taking applications and opening, closing, and selecting applicants from the waitlist

3. Applicant screening criteria: The Tenant Selection Plan must list the items management is screening for and must provide the scores and findings that result in ineligibility.

Management must apply their tenant selection plan uniformly and consistent with all applicable laws.
Tenant Selection Plan

Applicant screening criteria – Basic Eligibility

• Occupancy standards
• Income and Rent restrictions *may have multiple AMI restrictions*
• Preferences (i.e., elderly preference)
• Fees Deposits
• Student restrictions, when applicable
• Required Fair Housing and Antidiscrimination statements
• Notice of Violence Against Women Reauthorization Act (VAWA)

Basic Eligibility Requirements

Tenant Selection Plan Screening

Applicant screening criteria - Credit Requirement example

Credit Requirement: Depending on the condition of the applicant’s credit, they may be required to pay an additional deposit, or it may result in a denial. Applicant(s) with certain credit scores may require an additional deposit as set forth below:

- A credit score of 600 or above is accepted with our regular deposit of $450.
- A credit score of 501 – 599 is accepted with a regular deposit + $250.
- A credit score of 500 or below will be denied.

Avoid the use of the terms “bad credit” or “Negative rental history”
Tenant Selection Plan Screening

Applicant screening criteria – Rental Requirement example

Residence History: Applicants are required to list their two (2) former yet recent residential addresses on their rental application. Rental history must be verifiable and satisfactory (i.e., no prior evictions within the last 2 years, no more than 3 or more late rent payments within a 12 month period, or repeated disturbances (i.e., disturbing rights and comforts of residents, unauthorized occupants, property damage and or other disturbances not related to the circumstances protected by VAWA).

Avoid the use of the term “poor housekeeping”

Tenant Selection Plan Screening

Applicant screening criteria - Criminal Screening “Look Back” period example

This document is a publication of the Austin/Travis County Reentry Roundtable, a collaborative committed to promoting safe and healthy communities through effective reentry and reintegration of formerly incarcerated persons and individuals with criminal histories. Learn more at reentryroundtable.net.
Compliance Overview Summary

- Educate site staff
- Read your Agreements
- Engage with your monitoring agency
- Stay informed

Questions...