



August 14, 2023

Jennifer Schwartz  
Assistant Director for Tax Policy and Advocacy  
Mr. James Tassos  
Deputy Director of Tax Policy and Strategic Incentives  
National Council of State Housing Agencies  
444 North Capitol Street NW  
Suite 438  
Washington, DC 20001

Re: NCSHA's Draft Recommended Practices for Housing Credit Administration ("Practices")

Dear Jennifer and Jim:

Novogradac & Company LLP established the LIHTC Working Group to provide low-income housing tax credit (LIHTC) industry participants a platform to resolve technical and administrative issues. Our members include nonprofit and for-profit developers, property managers, lenders, syndicators, investors, accountants, lawyers and other professionals. We strive to make the LIHTC program even more efficient by delivering benefits to help build affordable rental housing throughout the nation in a wide variety of different housing markets.

On behalf of the members of the LIHTC Working Group, we respectfully submit our comments on the Practices.

2. We support this change and suggest adding that agencies should limit the size of awards when demand for private activity bonds (PAB) exceeds supply. The most important is PABs should be no more than 55% to 60% of total sources at award (see, e.g., Colorado).
9. While facilitating sites in high opportunity areas is necessary, we suggest the Practices state such policies should avoid creating disadvantages for developments on Tribal land.
11. We suggest revising last sentence of the second paragraph in the Discussion section to:  
"Agencies whose geography is shared with one or more Tribal Nations have taken additional steps..." Tribal Nations are sovereigns and deserve a government-to-government relationship with state agencies.
14. We support this change.
15. We support this change.

17. The changes in this Practice are a step in the right direction but should go further:
- The word “ideally” is unnecessary when followed by an expectation that the documentation is complete. Three months is enough time to issue Forms 8609.
  - Review of cost certifications should take into account a materiality standard. For example, not questioning line items representing less than 0.001% of the total budget, or larger amounts if the difference does not affect the allocation.
  - Agencies should understand Sept. 15<sup>th</sup> is a critical tax filing deadline. Delaying Forms 8609 past this date may cause problems for the property (timing adjuster).
18. The phrasing of “no less than” followed by a range is unclear. If the Practices will have a minimum, we suggest three months (see, e.g., California). We do not consider an increase in replacement reserves to be necessary. Instead there could be a statement about how the required amount should increase annually along with operating expenses.
19. We support this change.
26. We support this change and suggest adding specifics, such as
- no longer enforcing the student rule, and
  - reducing the frequency of file review to every five years.
37. We support this change.
47. The proposal does not specify whether the new tenant protections would cover future developments (part of to-be-adopted qualified allocation plans) or the current portfolio (added to compliance manuals). While being general can help achieve consensus among a diverse group of participants, this distinction is too important to not address.

Regardless of the applicability, agencies should seek consensus among interested parties before adopting any mandates beyond federal requirements and state/local landlord-tenant law. The level of agreement should be higher for any limitations imposed on existing properties. Some provisions could result in operational challenges and/or revenue loss in ways owners did not accept when executing use agreements and other documentation.

By contrast, agencies have a responsibility to educate on and enforce protections such as the Department of Housing and Urban Development's 2016 “Application of Fair Housing Act Standards to the Use of Criminal Records” memorandum. We are unaware of similar federal requirements for screening of prior eviction judgments.

48. The proposed new right of first refusal (ROFR) Practice is sufficiently problematic that we suggest not including anything along these lines. At a high level, ROFR is less about preservation than the negotiated agreement between partners. The LIHTC Working Group absolutely supports efforts to promote the former, but not by inserting agency staff into the latter. Even more troubling is asking agencies to effectively take a side in these negotiations.

Furthermore, we are not certain the proposed partnership language would have the intended effect. The definition of "right of first refusal" and "bona fide" are the subject of statutory and judicial interpretation that varies across the United States. Based on our understanding of informal statements, Treasury and IRS personnel consider this to be a state law issue, which explains the lack of guidance. As such, depending on the jurisdiction, adopting Practice #48 could preclude the Section 42(i)(7) safe-harbor protections.

Another important consideration is staff capacity to enforce policies along these lines. Every incentive and threshold requirement must have corresponding compliance, and understanding the nuances of partnership agreements is not a widely-held knowledge base. Adding to the challenge is applicants rarely know the investor until after award, meaning any representation may be more of an aspiration.

Agencies also would face challenges documenting "a record of refusing to recognize nonprofit ROFR requirements" to the level necessary to sustain being ineligible for award. Unlike other bad-actor determinations (e.g., bankruptcy, foreclosure, qualified contract), there is no clearly defined public record event. Instead the task would be interpreting which parties are related and what they have done in private dealings.

To the extent the Practices include something regarding ROFR, it could be to require each partner has its own experienced LIHTC counsel, with costs covered by the property's budget. The attorneys could submit letters stating they advised the partner of its rights and responsibilities under the partnership agreement. That way the agreement will reflect all parties being protected and making informed choices.

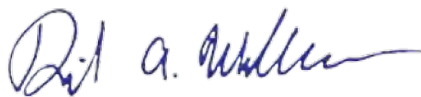
An additional ROFR statement we would support is for agencies to conduct an open, inclusive process to draft consensus requirements reflecting staff capacity.

We greatly appreciate these efforts to improve the LIHTC program and look forward to working with the NCSHA as it finalizes the recommendations.

Please do not hesitate to contact me at [Dirk.Wallace@novoco.com](mailto:Dirk.Wallace@novoco.com) or (330) 365-5400 if you have any questions regarding our comments or if we can be of further assistance.

## THE LIHTC WORKING GROUP

Very truly yours,  
NOVOGRADAC & COMPANY LLP

by   
Dirk A. Wallace