

## Reduction in State-to-State Variability for Income Definition

### Lead Office: Treasury-IRS

Participating Offices: Treasury-IRS, USDA-RD, HUD-MF, HUD-PIH, HUD-CPD

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### Issue Statement:

Various Federal programs to support affordable housing have slightly differing requirements for income certifications and require property managers to submit information on different forms. This may lead to inconsistencies in determinations of income and rents. In addition, property managers and owners sometimes submit income information through different processes. This may lead to inconsistencies and/or add to owners' or governmental agencies' administrative burden.

#### Evaluation of program differences:

1. In general, sections 42(g) and 142(d) of the Internal Revenue Code (Code) require income determinations for purposes of the Low Income Housing Tax Credit (LIHTC) to follow the determinations in HUD's Section 8 program.<sup>1</sup> That is, both programs use identical definitions for amounts that are included in—or excluded from—gross income. There are, however, two<sup>2</sup> significant differences—
  - Under section 142(d)(2)(B)(ii) of the Code, for determinations made before January 1, 2012, certain basic military housing allowances are not taken into account in determining a tenant's income. This exclusion does not apply for purposes of programs under Section 8 of the Housing Act.
  - Even when various programs employ the same theoretical definitions of income, the amounts actually determined may vary because of differential access to relevant data. HUD programs may avail themselves of the information in HUD's Enterprise Income Verification system (EIV) for access to data from the Social Security Administration. USDA and IRS, however, are statutorily prevented from using this information.
2. Even if the definitions are the same, there may be variations in the ways that different programs use those definitions. For example—
  - Annual recertifications under section 42 of the Code attempt to determine a tenant's annual income. By contrast, Section 8 of the Housing Act provides monthly rent supplements. In order for these supplements to be adjusted for short-term variations in the tenant's economic

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<sup>1</sup> Section 142(d)(2)(B) provides in relevant part, "The income of individuals and area median gross income shall be determined by the Secretary [of the Treasury or the Secretary's delegate] in a manner consistent with the determinations of lower income families and area median gross income under section 8 of the United States Housing Act of 1937 ...."

<sup>2</sup> A third statutory difference relates not to ascertaining a tenant's income but to determinations of area median gross income for property located in certain rural areas. See section 42(i)(8) of the Code.

circumstances, more-frequent-than-annual adjustments to income may be required, based on “interim” certifications. Adjustments of this sort would have no role to play under section 42. Because this difference responds to basic differences between the programs, alignment as to timing would be inappropriate. Similarly, the HUD HOME program does not use interim recertifications.

- Individuals who are HUD or RD compliant may have been living in a building for several years at a time when the building owner receives LIHTC support for rehabilitation. The LIHTC program provides ‘grandfathering’ for tenants whose circumstances have improved since their initial LIHTC qualification, but the Code does not extend grandfathering to the tenants’ status under other Federal affordable-housing programs. Thus, even though assessment of the tenants’ current income does not differ from that used for HUD or USDA-RD purposes, the practical consequences may differ drastically. By not recognizing HUD and USDA-RD ‘grandfathering,’ the LIHTC program treats units that these tenants occupy as not being low-income units.
  - Even programs that directly or indirectly use HUD data regarding Area Median Income may make their own annual data updates applicable with effective dates that differ from HUD’s and from each other’s. Also, under USDA procedures, median income for an area does not decrease, even if new HUD data show such a reduction.
3. Developers operating in multiple States encounter a number of significant annoyances that impose additional costs. The LIHTC program sets general substantive and procedural requirements with which State HFAs have to comply, but many of the implementing details are left to the States’ discretion. Some stakeholders believe that this flexibility is one of the strengths of the LIHTC program. Others, however, contend that the absence of cohesive, specific, mandatory Federal guidance means that multi-State developers incur extra costs for, among other items, software and staff training. Following are some examples of these differences:
- Some States compute amounts of income to the nearest penny, while others round to the nearest dollar. HUD-MF, HUD-PIH, and USDA-RD follow the latter practice. (Some believe that greater precision is appropriate for LIHTC computations, which produces a binary result—eligible vs. ineligible—than for computations that contribute to a monthly subsidy.)
  - Varying relation codes are used to communicate to the owner’s software the role that an individual may play in a (potential) resident family. This variation seems to be only partially due to the fact that only HUD can access the level of detail in EIV data.
  - For LIHTC purposes, owners are required only to retain sufficient documentation to show that a tenant is qualified. As a result, States vary in the volume of data (for example, underlying worksheets of components of a reported total) for which they require reporting. HUD, with its EIV access, requires full detail of income and assets.
  - For purposes of the LIHTC requirements, States vary in some of the details of income computation (e.g., whether to include a portion of the earned income of a family member that turns 18 during the coming year). This may be due to HFA confusion about how this circumstance is treated for HUD Section 8 purposes.

## **Proposed Alignment(s):**

### Alignment(s) summary:

1. Alignment will be sought for varying definitions of income.
2. Alignment will be sought for other variations in the use of income that do not relate either to the different purposes for which the various programs use measured income or to the different sources of data available to different programs. The development and promulgation of a single tenant income form for all Federal programs would be one example of this.
3. The team will further explore the extent to which State-to-State variability can be reduced consistent with statutory rules that implicitly promote State flexibility. One course of action would be the promulgation of specific requirements. Another would be identifying and promulgating best practices for the States to adopt voluntarily.

### Specific actions to effect alignment:

1. Differences in application
  - Preliminary inquiry suggests that legislation may be needed in order for the LIHTC program to “grandfather” pre-existing tenants who qualify under a HUD or USDA-RD program but who are over-income (or otherwise not qualified) at the beginning of a LIHTC rehabilitation. Any such relief could be specifically focused on the terms and timing of the HUD or USDA-RD qualification. Alignment of this sort, however, is unlikely to extend beyond the continuing tenants that would have been qualified for LIHTC at the time that they first qualified for some other Federal affordable-housing program.
  - All affected programs could examine the possibility of coordinated adoption of new annual Area Median Income data. (This may be an appropriate context in which to revisit the effective date rules in the HUD releases.)
  - All affected programs could examine the possibility of developing and promulgating a common tenant-income certification form.
2. State-to-State variability
  - Some stakeholders and Federal personnel urge that reduction in the avoidable inefficiencies that plague developers would greatly help the tenants who might receive housing but for the developer’s difficulties. That goal might justify Federal imposition of greater State-to-State uniformity of State-administered requirements. Others believe that considerations of federalism require rejection of this mandatory approach. In either case, however, there seems to be no reason why the various Federal programs could not promulgate best practices for States voluntarily to adopt.  
Such an effort would be analogous to the development of the State HFA LIHTC Data Transfer Standard. The National Affordable Housing Management Association (NAHMA) developed an open data standard to assist with the computer-to-computer exchange of information required for the LIHTC program. To facilitate access to the standard, NAHMA chose a very widely used format for its publication—Extensible Markup Language (XML). There appears to have been incomplete acceptance of this standard by the State agencies for which it was designed.

**Challenges to effecting proposed solution(s):**

- Legislation, rather than regulatory action, may be needed to address possible “grandfathering” of continuing occupants who are over income for purposes of a LIHTC-funded rehabilitation.
- Regulatory or IT changes may be necessary in order to coordinate applicability of updated median income data.
- Federal promulgation of voluntary best practices may require more resources than can be justified by an outcome that would still tolerate substantial State-to-State variation.