

Official Compilation of Codes, Rules and Regulations of the State of New York

Title 21

Part 2188

§2188.1 Introduction.

(a) This Qualified Allocation Plan (“Plan” or “QAP”) is adopted by the New York State Housing Finance Agency (“Agency” or “HFA”) pursuant to Section 42 of the Internal Revenue Code of 1986, as amended (“IRC”) and the Treasury Regulations, Revenue Rulings and Procedures, and other publications of the Internal Revenue Service (“Service” or “IRS”) with binding authority applicable thereunder (collectively, the “Code”), to govern the allocation or allowance by the Agency of any Low Income Housing Tax Credit (“LIHTC”) under IRC Section 42. This plan shall apply to: (i) the allowance by the Agency of LIHTC to projects financed by obligations subject to the Private Activity Bond Cap, the interest on which is exempt from federal income tax, as provided in IRC §42(h)(4) and (ii) any allocation of LIHTC to the Agency by as a sub-allocating agency designated by the New York State Division of Housing and Community Renewal under authority granted by Part 2040 of Title 9 of the New York Codes, Rules and Regulations; In addition, pursuant to IRC §42(m)(1)(B)(iii) and Treasury Regulation 1.42-5, this Plan provides certain procedures that the Agency shall follow in monitoring for noncompliance with the Code and for notifying the IRS thereof.

(b) HFA is generally involved in two kinds of LIHTC projects: (i) projects from the Agency or (ii) projects receiving tax exempt bond financing from another issuer, subject to the Private Activity Bond volume cap provisions contained in Section 146 of the Code, and which accordingly may be eligible for so called "Private Activity Bond Credits" "As of Right" or "4%" Credits" if the project complies with the applicable requirements of this QAP. The Agency does not currently expect to receive any sub-allocation of LIHTC from the Division and therefore does not expect to allocate any competitive, 9%, credits. In the event that the Agency receives a sub-allocation, HFA will allocate the credits pursuant to the definitions processes, procedures and requirements in Part 2040 of Title 9 of the New York Official Compilation of Codes, Rules and Regulations which is available on the agency's web site, www.nyshcr.gov.

(c) The Agency may also be involved with other programs or projects pursuant to this QAP in accordance with federal or state mandates.

§2188.2 Definitions.

(a) "**42(m) Letter**" - Letter prepared by the issuer of the tax exempt obligations financing a project indicating that a project eligible for Private Activity Bond Credits generally complies with the provisions of this QAP and estimating the amount of LIHTC which will be allocated if the project is completed as planned.

(b) "**Adjusted project cost**" - The proportional amount of approved project costs attributable to the LIHTC regulated portion of the project.

(c) **“Agency”** or **“HFA”** — The New York State Housing Finance Agency, a public benefit corporation organized by and under Article 3 of the Private Housing Finance Law.

(d) **“Ceiling Credits,” “State Credit Ceiling LIHTCs,”** or **“9% Credits”** - LIHTC which count against the State Credit Ceiling. Under certain circumstances, such as an acquisition of a building in an acquisition and rehabilitation project, the project may receive “4%” LIHTCs which are subject to the State’s Credit Ceiling. These credits are often also called “cap credits.”

(e) **“Commissioner/CEO”** - shall mean the Commissioner of the Division of Housing and Community Renewal of the State of New York who is also the CEO of the New York State Housing Finance Agency.

(f) **“Code”** - Internal Revenue Code of 1986, as amended, and the Treasury Regulations, Revenue Rulings and Procedures and other publications of the IRS with binding authority applicable thereunder.

(g) **“Commitment Letter”** - Letter committing the Agency to finance a project assuming all conditions in the letter are met.

(h) **“Cost Certification”** - An audited report by an independent third party Certified Public Accountant, with content and opinion in form and substance satisfactory to HFA,

verifying all project costs, the tax credit eligible costs incurred and any other cost data required by HFA for a project as support for the amount of the project's allocation of LIHTCs or as support for the project's eligibility for an IRS Form 8609 allocation.

(i) **“Credit Allocation Authority”** - Authority granted by DHCR to the Agency to allocate State Credit Ceiling LIHTCs.

(j) **“DHCR” or “Division”** - New York State Division of Housing and Community Renewal

(k) **“Due Diligence Reports”** - Appraisals, Market Studies, Environmental Reports and, studies required for rehabilitation or preservation projects, Physical Condition Assessments or other engineering reports which are sought by the Agency in connection with the financing and LIHTC allocation for the project.

(l) **“Feasibility Review”** - A review by the Agency to determine that the proposed project can be financed, completed and operated in compliance with LIHTC regulatory requirements based upon, but not limited to, the reasonableness of development cost, the plan of financing, constructability of the proposed project, rents to be charged, the income and expenses of the project and the market for the units.

(m) **“Housing Opportunity Projects”** — shall mean family projects in an area of opportunity linked to schools that meet or exceed minimum performance standards and that meet or exceed other measures of opportunity, including, but not limited to, the rate of

poverty, as may be set forth in a request for proposals.

(n) "**Identity of Interest**" — shall mean any financial, familial or business ownership relationship between any general partner and any participant in the project's development. This includes, but is not limited to, existence of a reimbursement arrangement or exchange of funds; common financial interests; common officers, directors or stockholders; or family relationships between officers, directors, or stockholders.

(o) "**IRS**" or "**Service**" - Internal Revenue Service.

(p) "**LIHTC**" - Low Income Housing Tax Credit, as the meaning of such term is defined in and by Section 42 and other applicable provisions of the Code.

(q) "**LIHTC Underwriting**" - A review to determine that the proposed or completed project conforms to the requirements of IRC Section 42 and most specifically §42(m)(2) of the Code.

(r) "**Low Income Units**" - Units subject to rent restrictions pursuant to IRC §42(g).

(s) "**Market Rate Units**" - Units not subject to rent restrictions pursuant to IRC §42(g).

(t) "**Members**" - The New York State Housing Finance Agency's membership consisting

of the Commissioner of the Division of Housing and Community Renewal, the Director of the Budget, the Commissioner of Taxation and Finance and four Members appointed by the Governor with the advice and consent of the Senate.

(u) **“Members’ Approval”** - The Members’ authorization of a financing structure and/or an allocation of LIHTC. This authorization gives the Agency’s President and Chief Executive Officer, or their designee, the authority to finance a project and/or make an allocation of LIHTC.

(v) **“Other Issuer”** - An issuer, other than the Agency, of tax exempt bonds subject to the Private Activity Bond Volume Cap established pursuant to Section 142 of the Code.

(w) **“Owner’s Certification”** - Sworn statement by the owner of a project, submitted to the Agency at least annually during the compliance period, certifying that, for the preceding 12-month period, various actions were taken, or not taken, as required by the Code and this QAP.

(x) **“Per Unit Eligible Basis Limit”** - \$575,000 per unit. This limit is applicable beginning in calendar year 2020 and may be adjusted thereafter, no more than annually, using such indexes of inflation and deflation of construction costs as the Agency in its discretion may determine to apply. The limit in effect on the date of a project’s construction closing will apply to that project. The currently effective limit will be published on the Agency’s website.

(y) **“Private Activity Bond Volume Cap”** – A limit on the volume of tax exempt bonds established pursuant to Section 142 of the Code.

(z) **“Plan”** or **“QAP”** - Low Income Housing Tax Credit Qualified Allocation Plan.

(aa) **“Private Activity Bond Credit”** or **“4% Credit”** - LIHTCs which do not count against the State Credit Ceiling because: (a) 50% or more of the aggregate basis of any building, and the land upon which the building is located, receiving LIHTC is financed by tax exempt bonds subject to the Private Activity Bond Volume Cap contained in Section 142 of the Code; or (b) the LIHTCs are solely based on the portion of the eligible basis of the project receiving the LIHTC which is actually financed by tax exempt bonds subject to the Private Activity Bond Volume Cap established pursuant to Section 142 of the Code.

(bb) **“State”** - State of New York.

(cc) **“Scoring Criteria”** - Certain criteria for the evaluation of LIHTC allocation set forth in this QAP in §2188.6.

(dd) **“Section 42”** - Section of the Code authorizing and governing credits against federal income taxes to promote the creation of affordable rental housing.

(ee) **“State Credit Ceiling”** - New York State’s ceiling on the amount of LIHTC which may be issued in a given calendar year. This ceiling consists of “per capita” credits, national pool credits and returned credits as provided in IRC Section 42.

(ff) **“State Designated Building”** - a building, receiving LIHTC that is determined to advance the State’s affordable housing goals and policies which may include, but are not limited to, housing opportunity projects, and other projects, which may be designated in a request for proposals and that are designated by the Agency as requiring an increase in credits up to an amount determined by the Agency to ensure financial feasibility as if the building were located in a difficult development area. Buildings receiving tax exempt bond financing are not eligible to be a State Designated Building.

(gg) **“Term Sheets”** - Descriptions, published from time to time, of the terms and conditions upon which HFA is willing to finance projects under various programs, usually determined by credit enhancement source, and/or type of project or borrower.

(hh) **“Threshold Eligibility Requirements”** - Certain essential requirements for LIHTC allocation set forth below in this QAP at §2188.4.

(ii) **“Visitability Standards”** - All LIHTC visitable units shall include the provision of at least one means of entry on an accessible route (no-step entrance), a 36 inch or greater clear circulation path through the first floor of the unit, including all interior doorways, and

at least a half-bath on the first floor of the unit with a 30 inch by 48 inch clear floor area to accommodate a person in a wheelchair and allow that person to close the door.

Notwithstanding the foregoing, a dwelling unit that contains all necessary components and clearances required by the applicable building code for an accessible dwelling unit on an accessible route shall be considered to meet the visitability circulation requirement.

§2188.3 HFA Private Activity Bond Credits Allowance Process.

(a) Under New York State's overall tax credit allocation process as it pertains to the HFA, the Agency typically allows Private Activity Bond Credits to qualified residential rental projects located in New York State financed by obligations subject to the Private Activity Bond Cap, the interest on which is exempt from federal income tax as provided in Section 42(h)(4) of the Code. Applications for Private Activity Bond Credits for projects financed by the Agency are therefore only made as part of the Agency's overall financing application process as described in (c) through (g) below. Applications for the allowance of As of Right Credits to projects financed by tax exempt bonds from an issuer other than the Agency are governed by the provisions of (h) of this section.

(b) Applications for HFA financing and/or 4% LIHTC through the Agency will be accepted and processed as they are received throughout the year. There is no separate LIHTC application fee for applicants who are also applying for HFA financing.

(c) Preliminary underwriting information must be submitted in the form required by the Agency.

(d) The preliminary underwriting information, additional material required by the Agency as part of the HFA financing application and the appropriate Due Diligence reports to be obtained by the Agency, will serve as the application for LIHTC from HFA.

(e) Upon, or before, completion of the phase of underwriting prior to submission to the Members, the following actions are taken and reviews are performed:

(1) (i) The first of three LIHTC Underwritings and Feasibility Reviews required by IRC §42(m)(2)(C) is performed.

(ii) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under IRC §42(d)(5)(B) exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.

(2) All applicants must meet the Threshold Eligibility Requirements listed below.

(3) If an applicant for Private Activity Bond Credits meets the Threshold Eligibility Requirements listed below, the application is consistent with this QAP and the application may be considered by the Members for approval of an allocation of Private Activity Bond Credits.

(f) After a project receives the Members' Approval, and after all relevant requirements in the applicable Term Sheet, and Members' Approval are met, the second LIHTC Underwriting and Feasibility Review required by Section 42 is performed prior to the financing for the project.

(1) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under IRC §42 (d)(5)(B), exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.

(2) Projects financed by tax exempt obligations of the Agency and expected to receive Private Activity Bond Credits will receive a 42(m) Letter prior to the issuance of the tax exempt obligations.

(3) Projects which have received a Members' Approval of State Credit Ceiling LIHTCs will be issued a Binding Agreement prior to the financing of the project. The Binding Agreement must be executed by the applicant and returned to the Agency prior to the financing. If a project is not financed by the Agency, the Binding Agreement will incorporate all relevant terms usually contained in Agency financing documents including the setting of appropriate fees.

(g) Projects receiving State Credit Ceiling LIHTC must be placed in service during the calendar year of allocation or obtain a Carryover Allocation Document.

(1) The Cost Certification required to obtain a Carryover Allocation Document must in form and substance acceptable to the Agency.

(2) The Cost Certification must be filed with the Agency by the later of the date which is eleven months after the date that the allocation was made, unless the Agency grants an extension of time in writing to file this Cost Certification.

(h) The third and final LIHTC underwriting and Feasibility Review required by Section 42 is performed prior to the issuance of the IRS Form or Forms 8609, Low Income Housing Credit Allocation Certification.

(1) All projects must provide the Agency with Certificates of Occupancy or Temporary Certificates of Occupancy as they are issued.

(2) The third and final LIHTC underwriting and Feasibility Review must be based on a final Cost Certification satisfactory to the Agency in form and substance and in all ways in compliance with IRC §42.

(3) The final Cost Certification must be filed with the Agency within 120 days after the end of the first year of the credit period for the building within a project with the latest credit period. The Agency may extend this period in its sole discretion.

(4) Form or Forms IRS 8609 formally allocating any LIHTC will not be issued until after the third and final LIHTC underwriting and Feasibility Review, based on a final Cost

Certification satisfactory to the Agency in form and substance and in all ways in compliance with IRC §42, is completed.

(5) If the eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under IRC §42(d)(5)(C), exceeds the Per Unit Eligible Basis Limit, the eligible basis shall be reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit unless the Per Unit Eligible Basis Limit requirement has been waived or is not applicable to the project.

(i) Projects Financed By Other Issuer's Private Activity Bonds.

(1) Projects financed by tax-exempt bonds from an issuer other than the Agency subject to the Private Activity Bond Volume Cap in accordance with IRC §42(h)(4)(A) may be allowed LIHTC which is not taken into account under the State Credit Ceiling. The Agency's Commissioner/CEO, or his or her designee, is hereby authorized to take any actions necessary and appropriate to allow LIHTC to qualified residential rental projects located in New York State that are financed by the proceeds of tax-exempt bonds of an Other Issuer subject to the Private Activity Bond Volume Cap, where such allowance is consistent with this QAP.

(2) Complete applications for the allowance of such LIHTC must be submitted at least 60 days prior to the later of the (i) proposed construction start date or (ii) planned bond sale date in a form approved by the Agency and will be accepted and processed throughout the calendar year. The Agency may request any and all information it deems

necessary or appropriate for project evaluation. If, in the Agency's sole discretion, any submission is incomplete or if documentation is insufficient to complete any evaluation of the proposed project, processing will be suspended. In such instances, the Agency will notify the respective applicant of how the submission is incomplete and provide at least ten business days for the applicant to submit the requested documentation. Complete applications will be reviewed relative to criteria contained herein at §2188.5 for eligibility and public purpose. Within 60 days after receipt of a complete application the Agency will issue to the applicant a finding as to whether the application is consistent with this QAP and the amount of LIHTC for which the project qualifies pursuant to Financial Feasibility Review. If the application is consistent with this QAP, the applicant will receive processing instructions for a final allocation of credit. If the project is found to be inconsistent with this Plan, the owner will be notified of the reasons for such finding.

(3) The Agency shall charge a reasonable application fee, due at the time of application. A credit allocation fee, in a reasonable amount determined by the Agency, also is due upon request for issuance of IRS Form 8609. Not-for-profit applicants (or their wholly-owned subsidiaries) which will be the sole general partner or partners of the partnership/project owner or sole managing member or members of the limited liability company/project owner may request and be approved for deferral of payment of the application fee until the construction closing date. All fees shall be published on the Agency's website, <https://hcr.ny.gov/>.

(4) In accordance with IRC §42(m)(2)(D), the issuer of the tax exempt bond financing a project is responsible for determining the dollar amount of LIHTCs which

is necessary for the financial feasibility of such project and its viability as a qualified low-income housing project pursuant to Section 42(g)(1) of the Code throughout the applicable credit period. Such determination must be included in the applicant's request to the Agency for a final allocation of credit. The Agency will process requests for a final allocation of credit within 60 days after the date of receipt of all required documentation including an executed credit regulatory agreement in a form satisfactory to the Agency with proof of recording. The Agency will apply the criteria for Feasibility Review and LIHTC Underwriting, as described herein at §2188.5(d), in determining the amount for the final credit allocation with respect to such project.

(5) Regulatory Term. The regulatory requirements of projects receiving an allocation or allowance of LIHTC under the terms of this Plan are described in §2188.4 of this Plan and shall be subject to compliance monitoring as described in §2188.6 of this Plan.

(6) All applicants must meet the Threshold Eligibility Requirements listed below.

§2188.4 HFA State Credit Ceiling Credits Allowance Process

The Agency does not currently expect to receive any sub-allocation of LIHTC from the Division and therefore does not expect to allocate any competitive, 9%, credits. In the event that the Agency receives a sub-allocation, HFA will allocate the credits pursuant to the definitions, processes, procedures and requirements contained in Part 2040 of Title 9

of the New York Official Compilation of Codes, Rules and Regulations which is available on the agency's web site, <https://hcr.ny.gov/>.

§2188.5 Threshold Eligibility Requirements for LIHTC Allocation.

At each stage of processing, applications will be subject to a threshold eligibility review, which will include, but not necessarily be limited to, whether the project meets the following minimum requirements:

- (a) The applicant is willing to enter into a regulatory agreement with HFA requiring the project to conform to the income, occupancy and rent restrictions of IRC §42.
- (b) The applicant is willing to enter into a regulatory agreement with HFA for extended low income use of the project with a minimum extended use period, ending no earlier than thirty (30) years after the project is placed in service, that is in conformance with the requirements of IRC §42, includes an agreement to waive the right to request a Qualified Contract and provides that the extended use period will not be subject to early termination pursuant to the Qualified Contract provisions of the Code.
- (c) The applicant agrees to comply with all applicable federal and state fair housing laws and regulations and not to engage in any illegal discriminatory conduct including discrimination against Section 8 voucher tenants.

(d) The project receives an acceptable Financial Feasibility Review and underwrites in accordance with the applicable HFA underwriting criteria including meeting any criteria limiting costs, fees or expenses contained in the relevant Term Sheet.

(1) If a project is being bond financed by HFA, the Financial Feasibility Review will be conducted using the standards in the Term Sheet for the program the project is being financed under.

(2) Otherwise the Financial Feasibility Review will be conducted using the standards in the most reasonably applicable Term Sheet published by the Agency.

(e) The eligible basis of all the buildings in a project divided by the number of units in a project, prior to any increase for buildings in high cost areas under IRC §42(d)(5)(B), in the applicant's request for LIHTC and/or in any Cost Certifications to support the allocation of such LIHTC, does not exceed the Per Unit Eligible Basis Limit or the eligible basis has been reduced to the maximum eligible basis permitted by the Per Unit Eligible Basis Limit under §2188.3(e)(1)(ii), (f)(1), and (h)(5) hereinabove. This requirement may be waived by the Members if the Members make a finding that it is in the public interest to recognize a greater amount of eligible basis per unit.

(f) The project is of the appropriate type (new construction, substantial rehabilitation, moderate rehabilitation and/or acquisition) and design needed to address the housing needs in the area where project is located.

(g) The size of the units in the proposed project must be appropriate for the type of

occupancy proposed.

(h) The applicant has site control, consistent with the Code, for the project real estate through a lease, option, purchase contract or deed.

(i) At the time of application, the project applicant has identified all required governmental approvals necessary to construct and operate the project. At each subsequent stage of processing, the applicant must secure all required governmental approvals to construct and operate the project.

(j) The project applicant has successfully developed and operated projects comparable to the proposed project and/or has, or will obtain, the capacity and experience to undertake, complete and operate the proposed project.

(k) The Agency has, prior to the second LIHTC underwriting, completed a credit and background review of the project developer, owner and/or manager and their principals with acceptable results.

(l) The project developer, owner and/or manager and their principals does not include anyone who has participated in a state assisted program or project, with HFA, DHCR or any other state entity, that has been determined to be out of compliance with statutes, rules, regulations, policies or agreements and has not been corrected or otherwise resolved as determined by the supervising agency. The project developer, owner and/or

manager and their principals also does not corrected include anyone who, in sole judgement of the Agency, has initiated or been the decision maker in requesting a qualified contract under §42(h)(6)(F) after the effective date of this QAP. The project developer, owner and/or manager and their principals must inform the Agency in a timely manner of any notice of non-compliance issued at any time.

(m) HFA's Due Diligence Reports include an Appraisal and/or Market Study from a licensed third party appraiser or a market study consultant, which is satisfactory in HFA's sole judgment, concerning the demand for the units to be constructed, the value of the proposed project and any other matters or issues addressed in the Due Diligence Reports.

(n) If the project developer, owner and/or manager and/or their principals have had any prior involvement with HFA, there are no unresolved LIHTC compliance or other compliance issues. The project developer, owner and/or manager and their principals must inform HFA in a timely manner of any notice of non-compliance issued at any time.

(o) If the project developer, owner and/or manager and/or their principals have had any prior involvement with any state agency financing housing, there are no outstanding defaults or compliance problems which have not been resolved to the satisfaction of the agency involved.

(p) Projects which contain both Low Income and Market Rate Units must comply with the Agency's proportionality and distribution policy unless such compliance is waived by HFA.

(1) The Agency's proportionality and distribution policy provides that Low Income Units must be comparable to Market Rate Units; the Low Income Units must be acceptably distributed through all unit types and all floors and/or buildings in the project; and no floor and/or building should contain an undue concentration of Low Income Units.

(2) The average quality standard must be the same for the Low Income Units as for the Market Rate Units unless the Agency approves additional or modified amenities which cause the Market Rate Units to be above the average quality standard of the Low Income Units.

(3) If the Market Rate Units are above the average quality standard of the Low Income Units, the project is subject to the provisions of Code Section 42(d)(3) which reduces eligible basis where there are disproportionate standards for units and the applicant must advise the Agency, and any Cost Certification must certify, if the cost on a per square foot basis for the Market Rate Units is no more than 15% more than the cost for the Low Income Units and therefore meets the requirements of §42(d)(3)(B)(i)(I) of the Code and is, or will be, excluded from basis pursuant to IRC §42(d)(3)(B)(i)(II).

(q) The project's design and construction must comply with green and energy efficiency and sustainable building practices and measures appropriate for the type of building proposed as set forth in the Agency's currently effective published Termsheets and other guidance. Rehabilitation projects must take into account, among other factors, cost effectiveness based on the scope of reconstruction necessary and the historic nature of the project. All projects must identify how green and energy efficiency sustainable building

requirements will be met and agree to provide, prior to construction closing, a certification from a responsible green and/or energy professional that the project will meet such requirements.

(r) All LIHTC-assisted first floor units in new construction projects without an elevator, all LIHTC assisted units in new construction projects with an elevator, and as many LIHTC-assisted units as feasible in adaptive reuse or rehabilitation projects shall meet Visitability Standards, except when such standards are demonstrated to be irreconcilable with federal, state or local statutes, regulations, ordinances or codes.

(s) The minimum qualified basis for rehabilitation expenditures is three times the per low income unit qualified basis amount under IRC §42(e)(3)(A)(ii)(II) in effect at the time of a project's construction closing. This requirement may be waived by the Members upon a finding that it is in the public interest to permit a lower minimum qualified basis for rehabilitation expenditures.

(t) The applicant will agree to permit HFA to commission a cost audit of all the project related costs, agree to permit the Agency to commission an energy and green performance audit and include a provision in all contracts with contractors, design professionals and consultants that permits the Agency's auditors to examine the books and records relevant to the project.

(u) The project applicant agrees not to contract for any services related to the project with any entity on any Federal or New York State debarment list and include a provision in all contracts related to the project barring the participation of entities on such lists.

(v) The project applicant, developer, owner, general contractor and/or manager and their principals are in compliance with all relevant federal, New York State, Division, Agency policies and requirements, and local laws and regulations, including but not limited to the prohibition against discriminating against Section 8 Housing Choice Voucher holders, nondiscrimination and marketing policies, guidelines and requirements.

§2188.6 Scoring Criteria for State Credit Ceiling LIHTC Allocation.

If HFA receives a sub-allocation of credits, all projects applying for a State Credit Ceiling LIHTC Allocation shall be evaluated in accordance with the Definition, Process, Threshold Eligibility Requirements, General, and Scoring Criteria contained in Title 9, Part 2040 of the New York Codes, Rules and Regulations (NYCRR) (the “DHCR QAP”) which is available on the agency’s web site, <https://hcr.ny.gov/>.

§2188.7 Procedures for Monitoring of Projects.

(a) With respect to each project to which the Agency has allocated or allowed LIHTC, the owner of the project shall be required to execute a Regulatory Agreement, which outlines the program requirements. The Regulatory Agreement will be recorded as a restrictive covenant binding all subsequent owners and managing agents of the project.

(b) LIHTC Monitoring Officer. All HFA administrative functions related to the operation

of qualified low-income buildings shall be the responsibility of the monitoring officer who, unless otherwise designated by the Commissioner/CEO, shall be the Senior Vice President for Statewide Asset Management. The monitoring officer will be responsible for enforcing all regulatory agreements and reporting noncompliance to the IRS. All correspondence and/or legal notices should be addressed to the attention of the low-income housing monitoring officer at HFA's Office of Housing Operations/Statewide Asset Management.

(c) Section 42(m)(1)(B)(iii) of the Code mandates that state housing credit agencies monitor all placed in service tax credit developments for compliance with the provisions of Section 42. The Code also mandates that the state housing credit agencies notify the Internal Revenue Service of any instance of noncompliance through the issuance of IRS Form 8823. Although the Agency is responsible for monitoring the owner's compliance with the Code, it is expressly understood that this responsibility does not and will not make the Agency liable in any manner whatsoever for any noncompliance by the owner.

(d) Monitoring Fees:

(1) A reasonable annual monitoring fee will be charged by the Agency and will vary depending on the type and size of the project.

(2) The monitoring fee for any project financed by HFA shall be included in the Agency's normal financing servicing fee for the applicable financing program as specified in the appropriate financing documents.

(3) If HFA does not provide permanent financing to a project for which it allocates

LIHTC, or if the permanent financing of a project is prepaid, or the Agency otherwise is no longer entitled to a fee for servicing such financing, the Agency shall charge a monitoring fee based on the Agency's estimate of the costs associated with monitoring the project. The Agency reserves the right to adjust monitoring fees based on administrative or other cost increases to monitor overall compliance.

(e) Required Staff Training:

(1) The Agency mandates applicants to require management staff administering any project which may receive an allocation of LIHTC to complete a certification program from an entity acceptable to the Agency on Low Income Housing Tax Credit compliance before the project is placed in service.

(2) All project management plans must include a requirement that appropriate staff administering any project containing Low Income Units shall receive training and certification at the commencement of employment and refresher training in LIHTC compliance as necessary, not less than every five years.

_(f) Recordkeeping and Record Retention.

(1) Recordkeeping. The Regulatory Agreement shall provide that the owner of the project is required to keep records for each building with respect to which LIHTC has been allocated or allowed that show for each year in the "compliance period" (as

defined in Code Section 42(i)(1)):

- (i) The total number of residential rental units in each building (including the number of bedrooms and the size in square feet of each residential rental unit);
- (ii) The percentage of residential rental units in each building that are Low Income Units (as defined in Code Section 42(i)(3));
- (iii) The rent charged on each residential rental unit in each building (including any utility allowances);
- (iv) The Low Income Units vacancies in each building and information that shows when, and to whom, the next such available units were rented;
- (v) The annual income certification and recertification of each tenant of a Low Income Unit in the project if a waiver has not been granted under §2188.7(h) below;
- (vi) Documentation to support the income certification and recertification made by each tenant of a "Low Income Unit" (for example, a copy of the tenant's federal income tax return, Forms W-2, or verifications of income from third parties such as employers or state agencies paying unemployment compensation), in accordance with Section 1.42-5(b)(1)(vii) of the applicable IRS regulations;
- (vii) The "eligible basis" (as defined in Code Section 42(d)) and the "qualified basis" (as defined in Code Section 42(c)) of each building, at the end of the first year of the

"credit period" (as defined in Code Section 42(f)(1)), the placed in service date of each building, the applicable fraction chart for each building, list of services and amenities offered to all residential tenants with corresponding fee charges, if any, and a copy of the IRS Form 8609;

(viii) The character and use of the nonresidential portion of the building included in the building's "eligible basis";

(ix) In a format acceptable to the Agency, the data elements specified by the Agency that are necessary for the Agency to meet its reporting requirements under Section 36, Collection of Information on Tenants in Tax Credit Projects, of Title I of the United State Housing Act of 1937; and

(x) Such other information as the Agency may reasonably request from time to time.

(2) Record Retention. The Regulatory Agreement shall provide that the owner of the project shall retain the foregoing records for at least six years after the due date (including any extensions for any filings required to be made by the owner with the Internal Revenue Service or its successor agency) for that year, except that the records for the first year of the "credit period" shall be retained for at least six (6) years after the due date (including any extensions for any filings required to be made by the owner with the Internal Revenue Service or its successor agency) for the last year of the "compliance period."

(3) Inspection Record Retention. The Regulatory Agreement shall provide that the owner of the project shall retain the original local health, safety, or building code violation reports or notices that were issued by the State or local government unit responsible for making local health, safety, or building code inspections for the Agency's inspection under §2188.7(i) below. Retention of the original violation reports or notices is required until the later of when the Agency reviews the violation reports or notices and completes its inspection under §2188.7(i) below or when the violation is corrected.

(g) Certification, Inspection and Review.

(1) Certification period. Annual certifications shall be submitted for all projects for which final credit allocation has been issued and shall be submitted annually for the period during which the project is subject to regulation under the code. The owner of a low-income housing project shall certify annually under the penalty of perjury that the project or building is in compliance with all applicable State and Federal laws, regulations, procedures, policies and contractual obligations in a form approved by HFA.

(2) The project meets the requirements of:

(i) whichever minimum set-aside test was elected for the project and

(ii) if applicable to the project, the 15-40 test under IRC §42(g)(4) and IRC §142(d)(4)(B) for "deep rent skewed" projects.

(3) There was no change in the "applicable fraction" (as defined in IRC §42(c)(1)(B)) of any building in the project, or that there was a change, and a description of the change.

(4) The owner has received an annual income certification from each tenant of a Low Income Unit and documentation to support that certification, or, in case of a tenant receiving Section 8 housing assistance payments, a statement from a public housing authority described in paragraph (b)(1)(vii) of Section 1.42-5 of the IRS regulations, if a waiver has not been granted pursuant to §2188.7(h) below.

(5) Each Low Income Unit in the project is rent restricted within the meaning of IRC §42(g)(2).

(6) All units in the project are and have been for use by the general public and used on a nontransient basis (except for transitional housing for the homeless provided under IRC §42(i)(3)(B)(iii)).

(7) Each building in the project is and has been suitable for occupancy, in compliance with all applicable local health, safety, and building codes and the State or local government unit responsible for making local health, safety, or building code inspections did not issue a violation report for any building or low-income unit in the project. If a violation report or notice was issued by the governmental unit, the owner

must either attach a statement describing the nature of the violation(s) or a copy of each violation report to the Owner's Certification. The owner must also indicate whether the violation has been corrected.

(8) There has been no change in the "eligible basis" of any building in the project or, if there has been a change, the nature of the change.

(9) All tenant facilities included in the "eligible basis" of any building in the project, such as swimming pools, other recreational facilities, and parking areas, are provided on a comparable basis without charge to all tenants in the building.

(10) If and when a Low Income Unit in the building became vacant during the year, reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to a tenant having a qualifying income before any units in the building were or will be rented to tenants not having a qualifying income; except, in the case of a deep rent skewed project, if and when a Low Income Unit in the building became vacant during the year, reasonable attempts were or are being made to rent that unit or the next available Low Income Unit in the building to a tenant having a qualifying income before any Low Income Units in the building were or will be rented to tenants not having a qualifying income.

(11) If the income of the tenant of a Low Income Unit in the building increased above 140% of the applicable income limitation elected pursuant to IRC §42(g)(1), then, pursuant to IRC §42(g)(2)(D)(ii), the next available unit of comparable or smaller size in

the building was or will be rented to a tenant having a qualifying income; except that in the case of a deep rent skewed project, if the income of a tenant of a Low Income Unit increased above 170% of the income limitation applicable to the project pursuant to the election made under IRC §42(g)(1), then the provisions of IRC §42(g)(2)(D)(ii) with respect to the occupation of any Low Income Unit in the building by a new resident were or will be applied.

(12) An "extended low income housing commitment" as defined in IRC §42(h)(6), was in effect (for buildings subject to IRC §7108(c)(1) of the Revenue Reconciliation Act of 1989) which includes the requirement that the owner cannot refuse to lease a unit in the project to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937.

(13) The project is in compliance with the Code, including any Treasury Regulations, this QAP, all other applicable laws, rules and regulations and, if applicable, with the HFA Regulatory Agreement.

(14) If applicable, the owner received its credit allocation from the portion of the state ceiling set-aside for the project involving a qualified nonprofit organization under IRC §42(h)(5) and its nonprofit entity materially participated in the operation of the development within the meaning of Section 469(h) of the Code.

(15) The owner has not refused to lease a unit in the project to any holder of a

voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937 because of the status of the prospective tenant as such a holder.

(16) There has been no finding of discrimination under the Fair Housing Act, 42 U.S.C. 36013619, against the project. A finding of discrimination includes an adverse final decision by the Secretary of the Department of Housing and Urban Development (HUD), 24 CFR 180.680, an adverse final decision by a substantially equivalent state or local fair housing agency, 42 U.S.C. 3616a(a)(1), or an adverse judgment from a federal court. All Owner's Certifications shall be reviewed for compliance with the requirements of Section 42 and retained by the Agency for not less than three years from the end of the calendar year in which the Agency receives the certifications.

- (i) Waiver of Annual Tenant Income Recertification Requirement. Annual tenant income recertifications requirements are waived for any project where all the tenants are income qualified for any year if during such year no residential unit in the project is occupied by a new resident whose income exceeds the applicable income limit. The Agency reserves the right, at its discretion, to continue requiring annual income recertifications, or to reinstate annual recertification requirements. All 100% tax credit projects monitored under this QAP must seek HFA's written concurrence prior to implementing waivers of the tenant income recertification requirement. Guidelines and protocols to be followed for obtaining HFA's concurrence are posted on the Agency's website.

- (j) Inspection and Review. The Regulatory Agreement shall provide that the Agency shall have the right to perform inspections and reviews necessary and convenient for project

monitoring, and the project owner and the employees and agents thereof shall cooperate with the Agency with respect to such inspections and reviews, and shall facilitate audits of the Project during and through the end of the compliance period. Such audits may include physical inspection of any building in the project and any individual Low Income Unit in any building in the project. The Regulatory Agreement shall further provide that the project owner shall include provisions in the lease given to each low income tenant requiring the tenant to permit inspection of the Low Income Unit by the authorized representatives of the Agency in compliance with the provisions of the Code and this Plan. Such audits, site visits, and physical inspections shall be performed at least as often as required by the Code, and may be as frequent as deemed necessary and appropriate by the Agency in its sole discretion. The audits may also include review of the owner's records as described in the record keeping section herein.

(k) In addition to the inspections described above, the Regulatory Agreement shall provide that HFA shall have the right to perform, upon reasonable notice, an on site inspection of any LIHTC project at least through the end of the compliance period and, to the extent deemed applicable by the Agency, the extended use period, in order to implement and/or enforce any provision of the QAP or the Code.

(l) Notification of Noncompliance.

(1) Notice to Owner. The Regulatory Agreement shall provide that the Agency shall notify the owner promptly in writing if the Agency does not receive the certification described in §2188.7 (f) and (h) of this Plan, or is not permitted to inspect the tenant income documentation, or discovers by inspection, review, or in any other manner, that

the project is not in compliance with the provisions of Section 42.

(2) Correction Period. The Regulatory Agreement shall provide that the owner of the project must supply any missing certification required to be supplied to the Agency, or correct any noncompliance with the requirements of Section 42, within a period (the "Correction Period") of no more than 90 days from the time of notice from the Agency to the owner as described in the preceding paragraph. The Regulatory Agreement shall further provide that the Agency may extend the Correction Period for up to six months, but only if the Agency determines that there is good cause for granting the extension.

(3) Notice to Internal Revenue Service. The Regulatory Agreement shall provide that the Agency shall file IRS Form 8823, "Low Income Housing Credit Agencies Report of Noncompliance and Building Disposition," with the IRS no later than 45 days after the end of the Correction Period, whether or not the noncompliance or failure to certify is corrected. The filing and contents of such Form 8823 by the Agency shall be governed by the applicable Income Tax Regulations or other rules promulgated by the IRS. The Regulatory Agreement shall provide that the Agency shall retain records of any noncompliance or failure to certify reported on any Form 8823 filed by the Agency for a period of six years from the filing of said Form 8823.

(m) Agency Retention of Records. HFA shall retain records of noncompliance or failure to certify for six years beyond the Agency's filing of the respective Form 8823. In other cases HFA must retain the certifications and records described in §2188.7(f) and (g) of

this QAP for three years from the end of the calendar year the Agency receives the certified records.

(n) Compliance with the requirements of the Code is the sole responsibility of the owner of the building for which the credit is allowable. HFA's obligation to monitor for compliance with the requirements of the Code does not create liability for an owner's noncompliance.

(o) Delegation. To the extent permitted under applicable law, and determined by the Commissioner/CEO of the Agency to be advisable, the Agency may delegate monitoring functions under this Plan to any other housing credit agency or any qualified agent selected by the Agency.

§2188.8 Miscellaneous Provisions.

(a) Subsidy Layering Review: Applicability.

(1) Certain projects that receive LIHTC are subject to a process called "subsidy layering review." Pursuant to Section 102(d) of the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. §3545(d), the Department of Housing and Urban Development ("HUD") is required to ensure that housing projects are not awarded excessive subsidies by combining "HUD Housing Assistance" with "Other Government Assistance."

(2) The review process whereby HUD ensures against excessive subsidy is termed "subsidy layering review." Every project with HUD Housing Assistance and LIHTC is subject to subsidy layering review. Note, however, that the mere transfer of existing HUD Housing Assistance (such as a Section 236 Contract or a HAP Contract) does not trigger subsidy layering review. Only the award of new HUD Housing Assistance (combined with Other Government Assistance) triggers the review.

(3) Pursuant to Section 911 of the Housing and Community Development Act of 1992, 42 U.S.C. §3545 note, state or local agencies may elect to undertake subsidy layering review on behalf of HUD for projects that receive LIHTC. The Agency has elected to undertake subsidy layering review when allowable.

(b) No Recourse or Reliance. No provision of this QAP shall be the basis for any claim against the Agency or any Member, officer or employee of the Agency. The QAP may be amended at any time, and such amendment may be prospective or retroactive. The QAP may also be applied as necessary and convenient in response to federal or state mandates.

(c) Information Requests. Requests for information made under the Freedom of Information Law must be forwarded to Freedom of Information Officer, New York State Housing Finance Agency, 641 Lexington Avenue, New York, NY 10022.

(d) Any and all changes in the ownership interests or principals of any project (prior to issuance of IRS Form 8609) for which an application has been submitted to HFA, will be

subject to the approval of the Agency which reserves the right to disallow any application where there have been changes in the ownership interests or principals.

(e) Requests for a Qualified Contract during the period such a request is permitted under Code §42(h)(6). This section only applies to projects in which the project owner has a regulatory agreement executed by the Agency which specifically grants the right to request a qualified contract. A project owner may request only in writing, by certified mail to HFA to the attention of the LIHTC Monitoring Officer, that HFA produce a qualified contract from a buyer who will continue to operate the building(s) for low income use. A request for a qualified contract shall be an irrevocable offer to sell during the applicable one year period. If HFA presents a qualified contract during the above one year period, such qualified contract shall confer upon the buyer an exclusive right to purchase the project. For the purpose of determining the value of a qualified contract, "cash distributions from (or available for distribution from) the project" as set forth in the Code shall include management incentive fees paid or due to anyone who at any time after the issuance of an IRS Form 8609 had any ownership interest in the project. The Agency will specify the checklist of items required to be submitted as part of a Request for a Qualified Contract. A nonrefundable fee, in a reasonable amount determined by the Agency, is due upon submission of a Request for a Qualified Contract. The owner shall be required to pay for any services reasonably determined by HFA to be necessary for the technical review of a Request for a Qualified Contract to an accountant, appraiser or other relevant expert.

(f) All projects shall at all times maintain adequate records, in the Agency's sole discretion, concerning vacancies. These records should be updated at least monthly and, upon HFA's request, provided to the Agency in order to maintain the State's ability to quickly respond to natural disasters and other emergencies.