

INCOME LIMITS FOR LIHTC AND BOND-FINANCED PROPERTIES

In the low income housing tax credit (LIHTC) and private activity, tax exempt bond programs, an owner chooses the income limit used to determine eligibility for a low-income unit when electing a property's minimum set aside. Traditionally, owners in both programs used the Department of Housing and Urban Development's (HUD's) very low income limit, calculated at 50 percent of the area median income (AMI), as the basis for calculating their income limits.

If an owner commits to the 20 percent at 50 percent minimum set aside, the income limit used to qualify an applicant for the property's low income units is 50 percent of the AMI. The owner used HUD's very low income limit as the income limit for the property's low income units.

If an owner commits to the 40 percent at 60 percent minimum set aside, (25 percent at 60 percent in New York City), the income limit used to qualify an applicant for the property's low income units is 60 percent of the AMI. The owner calculated 60 percent of the AMI by multiplying HUD's very low income limit by 1.2.

If an owner commits to deep rent skew, the income limit used to qualify applicants for 15 percent of the property's low income units is 40 percent of the AMI. The owner calculated 40 percent of the AMI by multiplying HUD's very low income limit by .8.

In recent years, the data supporting the calculation of HUD's income limits for some areas could have resulted in income limits lower than those in effect in previous years. However, HUD elected to "hold harmless" its income limits by maintaining them at levels that were not less than those in effect the previous year. This was of particular importance for the LIHTC program because the maximum rent an owner may charge for a property's low income units is based on the income limit the owner committed to in the minimum set aside.

MULTIFAMILY TAX SUBSIDY PROJECTS

The Housing and Economic Recovery Act (HERA) of 2008 made statutory changes to how income limits are calculated for LIHTC and bond-financed properties. HERA protects owners from rent decreases in 2009, and it establishes a new system for owners to hold harmless income limits and rents within the LIHTC and tax exempt bond programs beginning in 2010.

On March 19, 2009, HUD issued its income limits for 2009. In addition to the limits for its own programs, HUD now issues a second set of income limits for properties referred to as Multifamily Tax Subsidy Projects (MTSPs). An MTSP is a property financed through the LIHTC and/or tax exempt bond programs. HUD issues separate income limits at 50 percent of the AMI and 60 percent of the AMI calculated specifically for MTSP properties.



For MTSPs, HUD issues two sets of income limits:

One set of income limits for HUD hold-harmless impacted projects, otherwise referred to as Impacted MTSPs; and

One set of income limits for non-Impacted MTSPs.

An Impacted MTSP is any project with income limits that were determined in 2007 or 2008 under HUD's hold-harmless policy. It is believed that the IRS considers a project to have had its income limits determined in 2007 or 2008 if it was in service before 2009. Under this interpretation, a property may qualify as an Impacted MTSP only if it was placed in service before the end of 2008.*

A single building property may qualify as an Impacted MTSP if the owner placed the building in service before the end of 2008.*

A multi-building property may qualify as an Impacted MTSP if the owner placed its first building in service before the end of 2008. Remember that a multi-building property is defined on Line 8b of each building's 8609 form. A building may be part of an Impacted MTSP only if it is included in a property whose first building was placed in service before 2009.*

For an acquisition/rehab property, the owner places the acquisition credits in service on the date of acquisition. The owner places the rehab credits in service for each building at a later date based on when its rehabilitation activities are complete. A property may qualify as an Impacted MTSP if its acquisition credits were in service before 2009.*

*Note: The IRS is expected to issue written guidance as to what defines an Impacted MTSP. It could be based on a factor other than a project's placed in service date. Stay tuned for further updates.

Remember that not every property placed in service before 2009 qualifies as an Impacted MTSP. When looking at the income limit chart for a state, an owner can tell if the county or metropolitan area where a property is located includes Impacted MTSPs. If the chart just lists a Very Low Income Limit and 60% Income Limit, the area does not include Impacted MTSPs and all LIHTC and bond-financed properties use these income limits. If the chart includes two sets of income limits for a county or metro area, each owner must decide if an LIHTC or bond-financed property was placed in service before 2009 and thus qualifies as an Impacted MTSP.

The owner of a non-Impacted MTSP uses the Very Low Income Limit and 60% Income Limit.

The owner of an Impacted MTSP uses the HERA Special 50% and HERA Special 60% income limits.

The 50 percent income limit for a non-Impacted MTSP may be less than the 50 percent income limit for an Impacted MTSP. A quick review of the income limit charts shows a difference ranging from a few hundred dollars up to \$1,500. A non-Impacted MTSP may be required to use an income limit for 2009 that is less than the income limit for an Impacted MTSP.

When planning a new property, a developer must utilize the MTSP income limit chart correctly. If the new property will be located in a county or metro area including Impacted MTSPs, the developer must remember that the new property will not qualify as an Impacted MTSP. The developer must use the lower income limits for non-Impacted MTSPs when projecting rent levels for a new LIHTC property.

What if a developer is planning to resyndicate an existing LIHTC property? Does the fact that the owner placed the property's original credit allocation in service before 2009, and continued to operate the property as an affordable property under its extended use agreement after its 15 year compliance period qualify the project as an Impacted MTSP? The IRS will need to provide an answer to this question.

INCOME LIMITS FOR NON-IMPACTED MTSPS

For non-impacted MTSPs, 50 percent of the AMI for 2009 is the greater of the HUD very low income limit for 2009 or the HUD very low income limit for 2008. Sixty percent of the AMI for 2009 is 50 percent of the AMI for 2009 multiplied by 1.2. Forty percent of the AMI for 2009 is 50 percent of the AMI for 2009 multiplied .8.

In subsequent years, owners will be protected from income limit and rent decreases. Fifty percent of the AMI for a non-impacted MTSP will be the highest income limit achieved during its qualifying period. It is believed that for the LIHTC program, a property's qualifying period begins the first year of the compliance period for the first building in the property, and for the tax exempt bond program, it is the first year of its qualified project period.**

For every non-Impacted MTSP, income limits for future years will depend on what happens to area income limits during its qualifying period. The highest income limit achieved will vary by project. An owner will need to document the highest income limit achieved during a project's qualifying period.

**Note: The IRS is expected to issue written guidance as to what defines the qualifying period for LIHTC and bond-financed properties. Stay tuned for further updates.

Questions remain regarding the starting income limits for a project placed in service in 2010 or later. How will 50 percent of the AMI be calculated for these non-Impacted projects? With HUD planning to stop holding harmless its income limits in 2010, is the industry facing the possibility that properties placed in service in 2010 will start with lower rents than those placed in service in 2009? Or will the income limits for new non-Impacted projects always be held harmless to be maintained at least at levels in effect the previous year? The industry awaits further guidance from the IRS.

INCOME LIMITS FOR IMPACTED MTSPS

For Impacted MTSPs, 50 percent of the AMI for 2009 is the greater of 50 percent of the AMI for non-Impacted MTSPs, or the HUD very low income limit for fiscal year 2008 multiplied by the ratio between the median family income for 2009 and the median family income for 2008. Sixty percent of the AMI is calculated as 50 percent of the AMI for 2009 multiplied by 1.2. Forty percent of the AMI is 50 percent of the AMI for 2009 multiplied by .8. This methodology will insure that Impacted MTSPs will experience an increase in their income limits and rents in 2009.

In subsequent years, for an Impacted MTSP, 50 percent of the AMI will be calculated as the greater of 50 percent of the AMI for non-Impacted MTSPs, or the HUD very low income limit for fiscal year 2008 multiplied by the ratio between the median family income for the current year and the median family income for 2008.

There are questions as to what exactly is meant in this situation as the income limit for a non-Impacted MTSP. Do the IRS and HUD mean to refer to the income limit for a non-Impacted MTSP placed in service in the current year? The industry awaits further information regarding this issue.

ALTERNATIVE INCOME LIMITS

In a regulatory agreement, an owner may agree to use an income limit for some of a property's low income limits that differs from the income limit required by the property's minimum set aside. For example, an owner may commit to the 40 percent at 60 percent minimum set aside but also agree to use 30 percent of the AMI to qualify applicants for some of the property's low income units. A unit rented to a household qualifying at 60 percent of the AMI qualifies to produce a federal tax credit, but the owner must rent some units to households at 30 percent of the AMI to meet all the conditions under which the property received its credit allocation from the state or local agency. For MTSPs, HUD issues income limits calculated at 50 percent of the AMI and 60 percent of the AMI. An owner may need to calculate other income limits as required by their regulatory agreements. Multiply 50 percent of the AMI for the property by -

- .9 to calculate 45 percent of the AMI.
- .8 to calculate 40 percent of the AMI.
- .7 to calculate 35 percent of the AMI.
- .6 to calculate 30 percent of the AMI.
- .5 to calculate 25 percent of the AMI.
- .4 to calculate 20 percent of the AMI.
- .3 to calculate 15 percent of the AMI.
- .2 to calculate 10 percent of the AMI.

ANNUAL RECERTIFICATIONS AND THE 140 PERCENT RULE

Owners in the LIHTC program compare a resident's annual income to 140 percent of their current income limit, 170 percent when an owner has elected to deep rent skew, as part of the annual recertification process. If a resident's income rises above 140 percent of their income limit, the owner must rent the next (or currently) available unit within the same building to an LIHTC-eligible resident. This rule is unchanged by the new methodology for calculating a property's income limit. An owner determines a property's current income limits from the MTSP Income Limits chart issued by HUD. At an annual recertification, the owner multiplies the property's current income limit by 1.4 to determine a resident's recertification income limit.

CALCULATING MAXIMUM ALLOWABLE RENTS

For owners in the LIHTC program, maximum allowable rent is calculated as 30 percent of a property's income limit. The owner imputes a household size of one person for an efficiency/studio apartment, and one and one-half persons per bedroom for other unit sizes. Maximum allowable rent for an LIHTC unit is 30 percent of the property's income limit for the imputed household size. Nothing about the rules for calculating maximum LIHTC rents have changed based on the new methodology for calculating a property's income limits.

An owner determines a property's current income limits from the MTSP Income Limits chart issued by HUD. The owner multiplies the property's income limit for the imputed household size by 30 percent and divides the result by 12 months to determine a unit's maximum monthly gross rent. When dividing the maximum annual rent by 12, always round down to the nearest whole dollar. Rounding up to the nearest whole dollar, even by a few cents, could result in charging more than allowed for an LIHTC unit on an annual basis and a loss of credits from noncompliance. For a resident responsible for paying some or all of their utilities directly to the utility provider, subtract the approved utility allowance from the monthly gross rent to determine the maximum monthly tenant rent.

On July 29, 2008, the IRS issued a new regulation governing the utility allowance for the LIHTC program. State and local housing agencies decide which of the five options now allowed by the IRS an owner may use in their jurisdiction to calculate a property's utility allowance. A method now allowed by your monitoring agency could result in a lower utility allowance and higher tenant rent for your property. Owners looking for additional relief in how to determine a property's maximum tenant rent should contact their LIHTC agency.

RENT FLOORS

In Revenue Procedure 94-57, the IRS established the concept of a rent floor for every LIHTC property that received its credit allocation after 1989. That is, if the area income limits fall, an owner must lower a property's maximum allowable rents but only to the point where the current rents meet the rent floor. Which rule an owner follows to determine a property's rent floor is based on when the LIHTC agency allocated the tax credits.

If the agency allocated the credits before October 12, 1994, the rent floor is based on the income limits in effect when the building first qualified for credits.

If the agency allocated the credits after October 12, 1994, the rent floor is based on the income limits in effect when the building was placed in service, or when the agency allocated the credits, as elected by the owner.

The new methodology for calculating income limits for LIHTC properties appears to nullify Revenue Procedure 94-57. An owner should confer with council before completing any form required by an allocating agency regarding a property's rent floor.

THE HOME PROGRAM

The HOME program also requires that an owner use HUD's income limits to determine the maximum allowable rent for both low HOME and high HOME units. However, it does not appear at this time that HUD will be following methodology comparable to that now used by the LIHTC program for calculating maximum allowable rent. On April 7, 2009, HUD issued the 2009 income limits and rents for the HOME program. They issued income limits calculated at 80 percent, 60 percent, 50 percent, and 30 percent of the AMI. They did not, however, issue a second set of income limits for projects located in Impacted counties and metro areas for the LIHTC program. This appears to mean that for 2009, for an Impacted MTSP with HOME funds, 50 and 60 percent of the AMI for the LIHTC program will differ from 50 and 60 percent of the AMI for the HOME program. The industry awaits news on the possibility of coordinating HOME and LIHTC income limits in the future.

IMPACT ON MIXED FINANCE LIHTC PROPERTIES

Many LIHTC and tax exempt bond properties benefit from a HUD mortgage subsidy or rental subsidy program. Owners of LIHTC or bond-financed properties with Section 236 or Section 221(d)(3) mortgage insurance, Section 202 direct loans, Section 202 or 811 capital grants, housing assistance payment contracts through the Section 8, RAP, Rent Supplement or PRAC programs, or occupancy subsidy through the public housing program must know how to select the correct income limit to satisfy both IRS and HUD requirements. The owner must use the income limits HUD issues for its programs to determine eligibility for the relevant HUD program, and the MTSP income limits to determine eligibility for an LIHTC or tax exempt bond unit. For example, an owner of an LIHTC property with project-based Section 8 rental assistance may be using 50 percent of the AMI to qualify households for both the LIHTC and Section 8 programs. Using the new system for calculating income limits for the LIHTC program, 50 percent of the AMI for Section 8 may differ from 50 percent of the AMI for the LIHTC program. This owner must use HUD's very low income limit on the HUD-50059 form, and the applicable MTSP 50 percent income limit on the LIHTC tenant income certification. This is of particular importance because HUD intends to stop implementing a hold-harmless policy for its income limits in 2010.

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