

What the Multifamily Industry Needs to Know *About the Biden Administration's Housing Supply Action Plan*

October 18, 2022

On Friday, October 7, 2022, the [Biden Administration announced](#) next steps for implementing the Housing Supply Action Plan that was previously [announced earlier this year](#).

The plan outlined goals aimed at closing the housing supply shortfall in five years, beginning with the creation and preservation of thousands of affordable housing units in the next three years. It also includes provisions intended to assist renters struggling with high rental costs and will focus on developing and preserving housing for low- and moderate-income families.

To learn more about the plan's potential impact on the multifamily industry, explore the below drop-downs for a high-level overview of several key provisions, including:

- finalization of the Low-Income Housing Tax Credit (LIHTC) income averaging rule;
- extension of the LIHTC deadlines to ensure the continued building of affordable housing projects;
- expansion of certain Fannie Mae and Freddie Mac programs;
- promotion of more housing options near transit by rewarding jurisdictions that have removed barriers to housing development;
- awarding more than 19,000 new Section 8 Housing Choice Vouchers.

The information provided herein is general in nature and is not intended to be legal advice. It is designed to assist our members in understanding this issue area, but it is not intended to address specific circumstances or business situations. For specific legal advice, consult your attorney.

LIHTC Income Averaging Rule

As part of the Administration's plan implementation, the Department of Treasury and the Internal Revenue Service (IRS) released [final and temporary regulations](#) to amend the LIHTC income averaging rule (final rule). The LIHTC program is the largest federal incentive for creating affordable housing. The recently released final and temporary regulations set forth guidance on the average income test for LIHTCs.

Background: Generally, under existing guidance in Section 42 of the IRS Code (the Code), an eligible project under LIHTC must satisfy a minimum set-aside test relating to the income of residents in applicable LIHTC units—the 20-50 test and the 40-60 test. For example, 20% of the units were rent-restricted to residents making no more than 50% of the area gross median income (AMGI). The Consolidated Appropriations Act of 2018 (the Act) introduced the concept of income averaging to allow certain units and residents to exceed the set-aside tests. The Act permitted a project to be eligible for LIHTC if “at least 40% of the residential units in the project are both rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by

the taxpayer with respect to the respective unit.” In addition, the average of the residential income limitations must not be greater than 60% of the applicable AMGI in order to qualify for a tax credit.

Diving Deeper into the Final Rule: The final rule notice posits that “many commenters disagreed with the adequacy” of the IRS proposed rule. Specifically, many raised issue with the requirement to implement the Act’s application of the average income test. This requirement would have penalized projects for a single unit’s loss of its low-income status by removing that unit’s imputed income limitation from the computation of the average without impacting the low-income status of any other units. As such, this requirement would have made it far more difficult for a project to qualify for the credit.

Following months of industry advocacy, [including efforts by NMHC and NAA](#), the Treasury Department and the IRS revised their interpretation of the proposed rule so that it is no longer necessary to consider all low-income units in a project for a residential rental property when determining whether the average income test is met.

Final Rule Provisions: Determining Eligibility

In the final rule, for projects electing the average income test, a project for residential rental property meets the requirements if:

- the taxpayer’s project contains a qualified group of units that constitutes 40% or more of the residential units in the project.

A qualified group of units is defined as one where:

- the individual units comprising the group of units satisfy the criteria to qualify as a low-income unit, are rent-restricted;
- are occupied by individuals who meet the income limitation for the unit; and
- where the average of the designated imputed income limitations of the units in the group does not exceed 60% of AMGI.

Final Rule Provisions: Determining Compliance

The IRS’s proposed rule also provided an approach to identifying an applicable fraction used when determining compliance with the average income requirement, by using the same group of low-income units for both satisfying the minimum set-aside requirement and determining the applicable fraction.

The final rule, however, directs taxpayers to identify a qualified group of units that is no smaller than the statutory minimum of 40%, including the low-income units identified for the average income test and any other residential units that qualify as low-income units that are part of a group of units where the average imputed income limitation is less than 60% of AMGI.

Once a qualified group is identified, the applicable fraction for each building in the project can be computed using both the units in the qualified group *and* the building at issue. The rule notes that this method of determining a building’s applicable fraction applies both for ascertaining low-income housing credits and for complying with the extended use requirement.

Final Rule Provisions: Credit Period for Multiple Building Projects

The final rule includes a revision that addresses concerns regarding the credit period applied for multiple building projects where individual buildings in the project have different lease finalization dates, and are thereby applied to different credit periods.

It requires a designation of the imputed income limitation used when calculating adherence to the criteria of the tax credit prior to the date the low-income unit is first occupied—as opposed to the lease date of the building. The rule also allows conversion of a market-rate unit to low-income status, with designation of an income limitation occurring any time before it is first occupied as a low-income unit. This allows taxpayers additional flexibility when determining tax credit applicability for multiple building projects.

Final Rule Provisions: Rent-Restricted Units

The final rule will allow developers to qualify for the credits through the average income of households in rent-restricted units, rather than requiring units to meet differing thresholds based on the specific unit. Further, the rule limits the impact of one unit’s noncompliance on a project’s ability to satisfy the average income test. As the White House notes in its press release, this rule will create more financially stable mixed-income projects with the help of federal subsidies and allow for additional affordable units for extremely low-income tenants by permitting cross-subsidization of projects. The regulation will go into effect upon publication in the Federal Register on October 12, 2022.

LIHTC Deadline Extension

The IRS issued IRS Notice 2022-52, which extended certain deadlines for LIHTC projects. In response to labor and supply-chain disruptions, the notice extended deadlines for when an affordable housing project seeking LIHTCs must be placed-in-service. The below chart sets forth the extended deadlines:

LIHTC-Related Requirement	Original Deadline (not including prior extensions)	Extended Deadline
Placement in service of the low-income building	December 31, 2020	December 31, 2022
	December 31, 2021 (subject to different deadlines based on certain situations/fact patterns)	December 31, 2023
	December 31, 2022	December 31, 2024
	December 31, 2023	December 31, 2024
Reasonable period for restoration or replacement following a casualty	On or after April 1, 2020	Earlier of the original deadline plus 24 months and December 31, 2023

Correction time period	On or after April 1, 2020, but prior to December 31, 2022	Earlier of the original deadline plus one year and December 31, 2023
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Housing Finance Reform

The Federal Housing Finance Agency (FHFA) expanded government-sponsored enterprises (GSE) Fannie Mae’s and Freddie Mac’s Forward Commitment programs, providing more financing flexibility to housing developers. The forward commitments are agreements to purchase loans at a later date with certain financing terms locked in, allowing developers to secure financing to pay off construction loans when both construction and the occupancy approval are complete.

FHFA previously set the annual cap for the GSE’s forward commitments at \$78 billion but will now exempt \$3 billion of forward commitments from that cap. FHFA also lifted Freddie Mac’s \$500 million cap on forward commitments for properties that do not receive LIHTCs, requiring that financed projects are at least 20% affordable over the applicable loan term. According to a statement by Freddie Mac, the changes grant the GSEs flexibility to execute forwards for affordable and workforce housing. The White House statement also indicated that such projects often align with other state and local incentives to create affordability without additional federal subsidies.

Transit-Oriented Development

Several provisions included in the plan aim to promote transit-oriented development and reward jurisdictions that reform zoning and land-use policies—including:

- Expanding federal financing for transit-oriented development and affordable housing.** Through the Transportation Infrastructure Finance and Innovation Act (TIFIA) program, the Department of Transportation (DOT) provides low-cost, long-term financing of infrastructure projects to close funding gaps. On October 4, DOT announced TIFIA 49, a new initiative that authorizes sponsors creating transit-oriented development projects (including public housing) to borrow up to 49% of eligible project costs, an increase from the original 33%. Transit-oriented projects are projects to improve or construct public infrastructure that are either located within approximately half a mile of a transit location, or for economic development, including commercial and residential development. Projects must be at least \$10 million in size in order to be eligible. The loans include low interest rates (Treasury rates), up to a 35-year repayment period, deferrable for five years after substantial project completion and no-prepayment penalty.
- Providing \$30 million in planning and project development funding.** DOT and the Department of Housing and Urban Development (HUD) partnered together to launch the Thriving Communities Program. The initiative will provide \$30 million in technical assistance to under-resourced communities to identify, develop, and deliver comprehensive transportation, housing, and community revitalization activities. According to DOT, the program will prioritize communities that are working to advance projects to reduce housing and transportation cost burdens and improve housing conditions, amongst other priorities.

DOT released a Notice of Funding Opportunity (NOFO) for capacity builders interested in supporting disadvantaged communities and also shall issue a call for letters of interest from communities interested in receiving Thriving Communities technical assistance.

- **Increasing transportation funding investments.** Earlier this year, DOT announced competitive grant programs totaling funds of nearly \$6 billion. These programs awarded jurisdictions that have adopted land-use policies to promote density and rural main street revitalization. DOT has begun awarding grants for some of the programs, including grant recipients for projects where local governments are improving their transportation infrastructure and promoting a range of policy goals.

Section 8 Housing Choice Vouchers

The Department of Housing and Urban Development (HUD) announce the awarding of more than 19,000 new Housing Choice Vouchers (HCVs) to almost 2,000 Public Housing Agencies (PHAs) in nearly every community across the country. According to HUD's press release, "this is the most expansive allocation of flexible new rental assistance in 20 years.

In some communities, this is the first allocation of new vouchers in decades." The vouchers announced are among the nearly 100,000 new HCV included in the American Rescue Plan and Fiscal Year 2022 budget. The total award amount is \$214,519,250. Funding for these vouchers was included in the FY 2022 appropriations act and was based on the President's FY 2022 budget request. [A list of the awards is available here](#)

