The Low-Income Housing Tax Credit and Childhood Lead Poisoning Prevention

Final Report

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Executive Summary

This report examines how the Low Income Housing Tax Credit (LIHTC) program has handled childhood lead poisoning associated with lead-based paint hazards in old housing undergoing rehabilitation. It describes what additional measures should be taken to ensure that the program advances the goal of eliminating the disease by 2010 and does not inadvertently create lead-based paint hazards in the housing units it rehabilitates, protecting the future viability of the program. The elimination of childhood lead poisoning is a national goal that has been included in the President's Management Agenda and in the Healthy People 2010 goals of the U.S. Department of Health and Human Services, as well as in numerous local jurisdictions. Furthermore, the President's Task Force on Environmental Health and Safety Risks to Children called for financial incentives from the Department of Treasury to help address the problem. The Secretary of the Treasury Department is a member of the President's Task Force on Environmental Health and Safety Risks to Children, which is co-chaired by the Secretary of the Department of Health and Human Services and the Administrator of the Environmental Protection Agency.

The report describes how the LIHTC program is administered, reviews regulations and guidance that govern the program, examines how the issue is (or is not) addressed in the Qualified Allocation Plans (QAP) of all 50 states, the District of Columbia and Chicago (the QAP implements the program), and contains the results of interviews with personnel who have been involved in various aspects of the program. It also examines the role of underwriting standards, the Uniform Physical Condition Standards (which have been established by the U.S. Department of Housing and Urban Development), regulations of the Internal Revenue Service, standard practices, other federal regulations and other local, state and model codes and laws. The methods used to gather the data in this report include interviews, reviews, tabulation of key policies and standards referenced in the QAPs (and associated monitoring documents) and acquisition of data on the number of housing units rehabilitated under the program.

The results show that the LIHTC has emerged in recent years as the principal way in which the federal government stimulates both the production of new affordable housing and also the rehabilitation and preservation of existing affordable housing. In 2007, each state will receive $1.95 multiplied by the state's population in tax credits for distribution (there is also a minimum allocation), a total of over $500 million. These federal funds leverage hundreds of millions of dollars in private sector investment in low-income housing. The units must be occupied by low-income (less than 60% area median income) for at least 15 years under the compliance period specified in the Internal Revenue Code and for a minimum of an additional 15 years, pursuant to an extended low-income housing commitment, which is a state imposed restrictive covenant that is required under the Internal Revenue Code. Estimates of the number of housing units financed with the tax credit vary, but approximately 1.9 million low-income units have been built or rehabilitated since Congress created the program in 1986 through 2006. Approximately 140,000 units are financed each year. HUD reports that 38% are older housing units that have been rehabilitated and that the LIHTC program has enabled 484,795 housing units

to be rehabilitated, with another 15,462 in combination new construction/rehab projects since the program began in 1987. Experts working in the program report that the percentage of units being rehabilitated (as opposed to new construction) is increasing. From 1995-2002, the percentage of low-income housing units undergoing rehab with tax credit financing was approximately 36%.

The program can be expected to produce tens of thousands of rehabilitated units between now and 2010. While there are no data on the age of these units, it is likely that most if not all were built before 1978, which is the year that residential lead-based paint was banned in the U.S., suggesting that these units are at high risk of lead paint hazards.

Key findings of this report include the following:

- There is wide disparity in the way in which the states administer the LIHTC with regard to lead paint hazard controls.
- The number of housing units that have lead paint and that have been rehabilitated under the LIHTC program without the safety of lead hazard control requirements is conservatively estimated to be 193,000 housing units, with another 14,000 being added annually.[1]
- Most states prioritize preservation and rehabilitation of existing older housing units and also prioritize family housing, suggesting that the housing treated under the program are more likely to have both children and lead-based paint.
- Only 15 of the 52 QAPs reviewed here explicitly address lead-based paint and of those, only 4 explicitly state that lead-based paint hazards are required to be eliminated or controlled in housing units being rehabilitated under the program. Using a weighted average based on the dollar amount of each state's allocation, this means that 74% of the housing units being rehabilitated under the LIHTC program do not have lead paint requirements.
- Another 11 of the 52 QAPS reviewed here require "phase I environmental reviews," which are typically defined by a consensus standard from ASTM (formerly the American Society for Testing and Materials). But such reviews do not provide for the detailed risk assessment for lead-based paint and/or lead-based paint hazards, which is required for virtually all other federally assisted housing undergoing rehabilitation.
- The majority of states reference local or state housing or building codes, or model or so-called "international" codes, but these codes, including the model or international codes, do not include lead poisoning prevention elements. Local and

[1] This calculation is based on estimates that 74% of the agencies administering the LIHTC do not have lead requirements (based on a weighted average derived from the tax credit allocation for each state), 36% of the total units treated under the program are units undergoing rehabilitation, 40% of the units have lead paint. (This is based on HUD's national survey for lead paint in the entire US housing stock. While no data on the age of the units rehabbed under the LIHTC are available, 40% may be an underestimate. For example, if the true age of the units is pre-1960, then the percentage with lead paint climbs to between 69-87%. Finally, data show that 95% of LIHTC units rehabilitated are not financed through other HUD programs and are therefore not directly covered by HUD lead paint regulations.

state lead poisoning prevention laws typically cover only units with lead poisoned children. While the U.S. Environmental Protection Agency has issued a proposed rule that would regulate those housing rehabilitation activities likely to produce lead hazards, it has not been finalized (this regulation was required to be finalized in 1996).

- Only 8 QAPs specifically state they use HUD's Uniform Physical Condition Standards (UPCS) in their definition of habitability in housing being rehabilitated. The UPCS incorporate HUD's lead hazard control regulations, but this rather indirect link has only recently been addressed in IRS reference materials, not formal guidance. Currently, housing credit agencies have the option of either using local housing codes or of using the HUD UPCS standards under 26 CFR section 1.42-5(d) of the Income Tax Regulations (but not both)**.** For those states using the HUD UPCS, the IRS instructions for Form 8823 (which is required to be used to report instances of non-compliance) state, "all areas of the housing must be free of…lead-based paint hazards."
- Virtually all states have a minimum rehabilitation cost threshold for the LIHTC program of more than $5,000. For virtually all other federally assisted housing programs, this triggers a housing unit-wide lead-based paint risk assessment and abatement or interim control of all hazards identified. This is not currently a uniform requirement in the LIHTC program.
- Underwriting standards used by private financial institutions do not provide specific lead-based paint requirements; they only provide for a general environmental review, as do the standards used by quasi-public institutions, such as Fannie Mae and Freddie Mac. FHA regulations cover lead paint, but only for multi-family mortgage insurance; the regulations for single family mortgage insurance were not updated in the most recent HUD lead paint regulations, which were issued in 1999.
- IRS reference materials (but not published guidance on lead paint) have been issued recently, noting that the HUD lead safe housing rule applies to states using the HUD UPCS as their inspection standards. However, no specific guidance has been issued detailing the type of lead protocol that must be used under 24 CFR part 35. Further, states not selecting the UPCS are not under an affirmative responsibility to follow any lead safe procedure unless another federal or state or local authority requires compliance. In addition, the Internal Revenue Service has not issued any training materials on lead safe practices.
- The best practices available from two leading trade associations, including the National Council of State Housing Agencies, mention the issue of lead paint in terms of capital needs assessments, but not any guidance or specifics on best practices for compliance monitoring and correction of lead paint hazards. Such best practices are likely to influence larger more sophisticated investors, but smaller "Mom and Pop" investors are unlikely to require assessment and control of lead-based paint hazards.
- Unless explicit requirements are put in place, each year will result in at least another 14,000 housing units with lead paint being rehabilitated without explicit lead paint requirements under the LIHTC program.

- These estimates do not include residential rental projects developed under the mortgage revenue bond program (under section 103 of the Internal Revenue Code), which has created over 850,000 units of housing and an annual development of another 130,000 housing units, some of which include rehabilitation and purchase of units with lead-based paint.

The medical literature is replete with case studies proving that rehabilitation of old housing units with lead-based paint causes severe childhood lead poisoning, unless specific procedures are employed to control dust, protect occupants, conduct specialized cleaning and other measures that are now widely accepted and well defined. For virtually all other federally assisted housing programs, these protective measures are now required by law and compliance is monitored. Yet an explicit and consistent national requirement to protect children from lead exposure from rehabilitation that is financed with low-income housing tax credits is currently absent. Such a uniform requirement would create a more predictable LIHTC market and would help to advance the nation's goal of protecting children from lead poisoning.

In 2003, the Treasury Department and the Internal Revenue Service failed to execute a proposed memorandum of understanding with the Department of Housing and Urban Development and the Department of Agriculture (Rural Housing Service) to cooperatively clarify lead paint hazards in the low-income housing credit program. Earlier, HUD and Treasury successfully executed a memorandum of understanding regarding fair housing requirements. These fair housing requirements are now reflected in all state QAPs, which demonstrates the importance of coordinated guidance and interagency memoranda of understanding. Despite recommendations from HUD and the Department of Agriculture, the Treasury Department and the IRS did not issue comprehensive published technical guidance to the states on monitoring and correcting lead hazards, a situation that persists to this day. This has resulted in confusion and harm to the public health, placing children at unnecessary risk.

Therefore, the Centers for Disease Control and Prevention should work closely with the Internal Revenue Service, the Department of Housing and Urban Development, the Department of Agriculture (which operates rural housing programs), state governments, syndicators, developers, parents, and others to improve the inconsistent and unclear policy that currently exists. In short, it should not be the policy of the U.S. government to subsidize housing units that threaten the health of children.

A clear and consistent policy would advance the LIHTC program, eliminate confusion and inconsistent guidance and policy, incorporate sound public health principles and most important of all, ensure that children living in houses rehabilitated with tax credits are safe, enabling the nation to move closer to the goal of eliminating an entirely preventable disease.

Background Summary of Relevant Agencies, Policies and Organizations

This section defines key agencies and their respective regulatory authorities, and other stakeholders in the Low Income Housing Tax Credit industry and lead paint hazard identification and control field and is summarized in Table 1. Figure 1 displays the relationships among the various parties within the LIHTC industry. Presently, there is no direct link between most state housing and public health authorities.

Table 1. Agencies and Authorities, Policies, and Other Organizations Involved in the Low Income Housing Tax Credit Program and Lead Paint

Name	Authority or Policy	Comment
Internal Revenue Service, Department of the Treasury	Internal Revenue Code and the Tax Act of 1986 (P.L. 99- 514)	Lead federal agency for the LIHTC
Department of Housing and Urban Development	24 CFR Part 35 (Lead Safe Housing Rule) and 5 CFR Part 5 (Uniform Physical Condition Standards)	Regulates lead paint requirements for federally assisted housing.
Department of Agriculture	Rural Housing Service	Regulates lead paint requirements for certain federally assisted rural housing units, using HUD Lead Safe Housing Rule
State Housing Agencies	Qualified Allocation Plan	Devises local rules and priorities for LIHTC
National Council of State Housing Agencies	Best Practices for State Agencies	Trade association for states; issues best practices for capital needs assessments and other related matters.
National Association of State and Local Equity Funds	Best Practices for Syndicators	Trade association for syndicators. Issues best practices for asset management and compliance monitoring
Fannie Mae, Freddie Mac, Federal Housing Authority (FHA) and other financial institutions	Underwriting standards	Insures and provides mortgages and equity investments
ASTM (formerly American Society for Testing and Materials)	Environmental Review Phase I and II	Publishes consensus standards
International Code Council	Model housing and building codes	Establishes consensus standards for housing habitability, sometimes

		referenced in local or state law in whole or in part
Environmental Protection Agency	Lead Inspection and Abatement Certification Regulation for lead associated with housing rehabilitation (proposed only)	Delegated to most states, oversees lead abatement and other lead activities
Centers for Disease Control and Prevention	Lead Poisoning Prevention Health Guidance	Provides medical and case management guidance on lead poisoning and related aspects for state and local health departments
Other critical parties include developers, builders, investors, asset managers	Comply with Published Guidance	Essential participants to create lead-safe housing.

The Internal Revenue Service is the federal agency responsible for the LIHTC. The regulations for the program are at 26 CFR Section 1.42. Briefly, the regulations provide that each entity distributing tax credits, typically a state housing finance agency, adopt a Qualified Allocation Plan (QAP) that details the procedures and standards to be used in the program. Under 26 CFR section 1.42-5(a) of the Income Tax Regulations, the QAP must state what procedure the state or local housing credit agency will follow in monitoring for non-compliance, including habitability standards. Under section 1.42-5(d)(2) of the Income Tax Regulations, housing credit agencies can use either the HUD Uniform Physical Conditions Standards or local housing health, safety, and building codes for their physical inspection standards. While housing credit agencies have the latitude to select one or the other standards (but not elements of both), there is significant deviation from this requirement, with some states following HUD's Uniform Physical Condition Standards and others following unauthorized inspection standards.

HUD guidance in the low-income housing tax credit program concerning physical inspections is contained in two regulatory provisions. First, HUD has established Uniform Physical Condition Standards at 24 CFR 5.703, principally for use in its Project-Based Section 8 rental assistance program and in its public housing program. Those regulations[1] state that covered entities "must comply with all requirements related to evaluation and reduction of lead-based paint hazards and have available proper certification of such (see 24 CFR Part 35)."

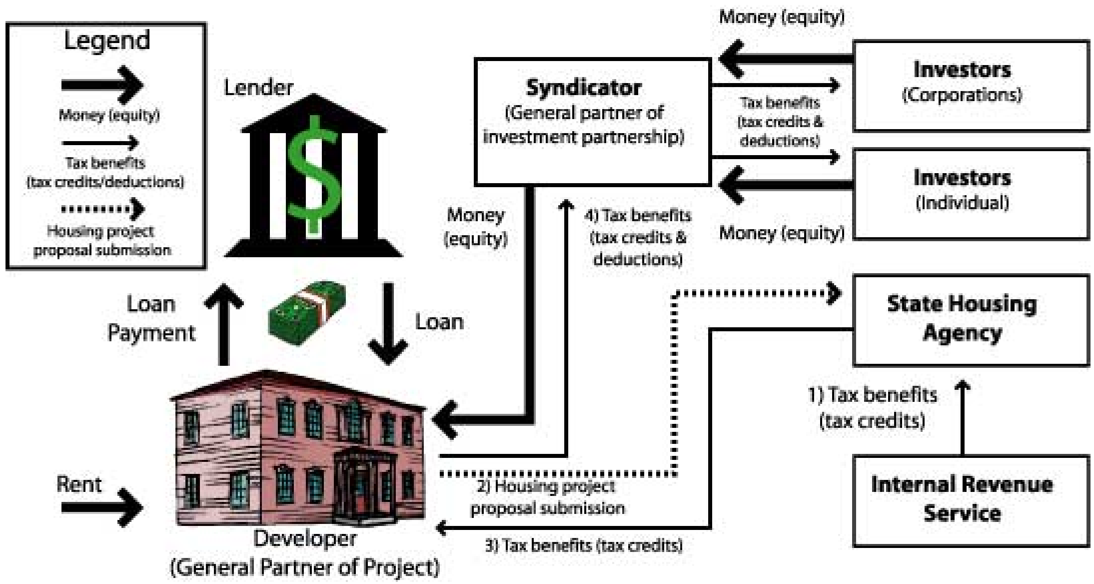
The UPCS reference HUD's second authority, the HUD Lead-Safe Housing Rule at 24 CFR Part 35. This regulation governs lead hazard evaluation and control requirements for all of HUD's federally assisted housing programs. It also covers virtually all other federally assisted housing programs, including the Rural Housing Service at the Department of Agriculture, housing assistance programs operated by the Veterans

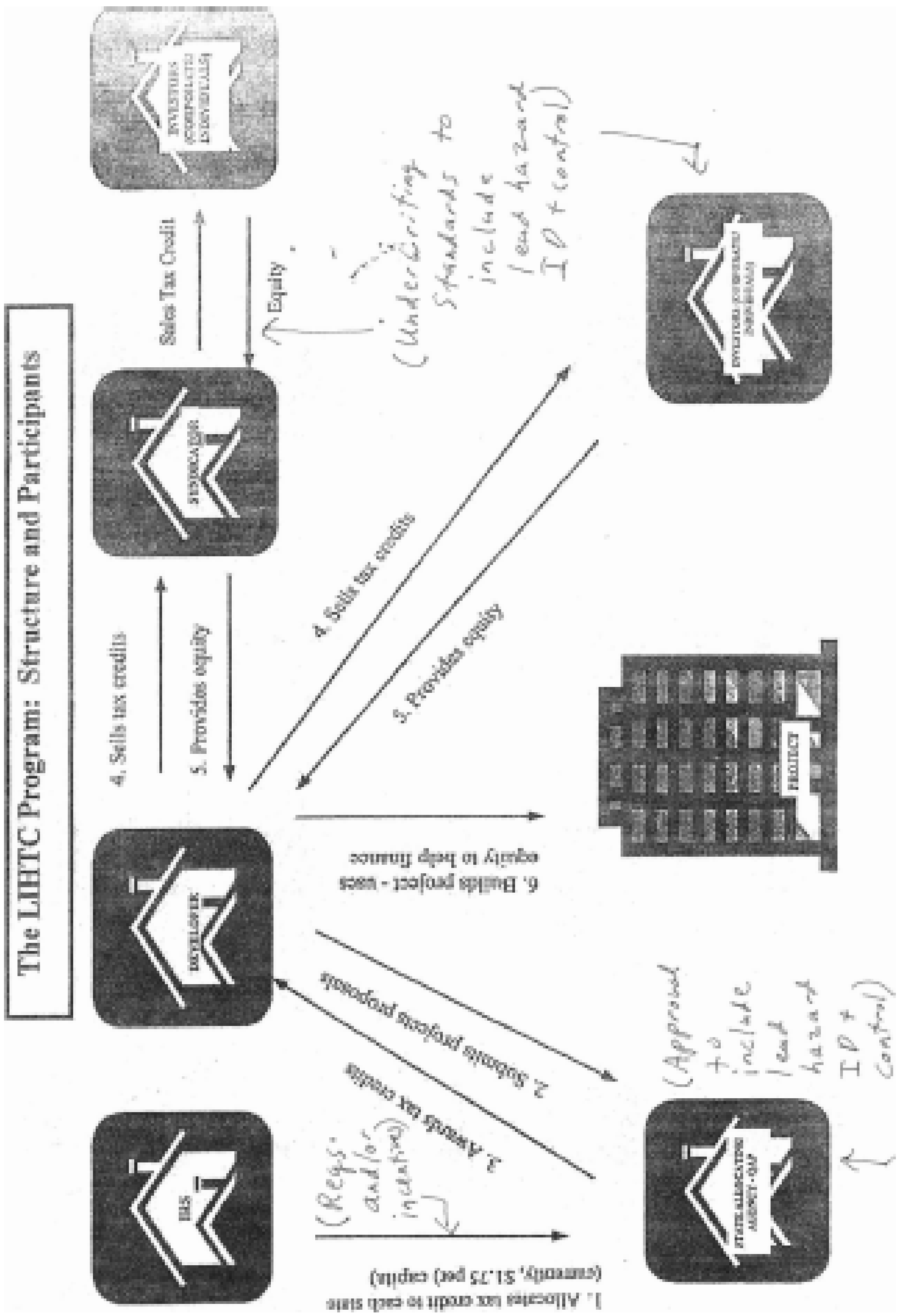
Administration and other programs. The rule was promulgated in September of 1999 and took effect one year later. It has now been in place for nearly seven years. Subpart A of the rule, regarding disclosure of lead-based paint hazards, took effect earlier, in 1996 and applies to virtually all pre-1978 housing, regardless of whether or not the housing receives federal assistance. In addition, Subpart E of the rule, governing single family mortgage insurance, was reserved in 1999 and was not updated. This program (Single Family Mortgage Insurance) is still covered by outdated federal regulations. All other federally assisted housing, including multi-family mortgage insurance, project-based assistance, public housing, tenant-based (housing choice assistance) voucher rental assistance, and housing being rehabilitated or acquired or disposed is now covered by this regulation.

The requirements for rehabilitation at 24 CFR Part 35 Subpart J, are particularly relevant here. The requirements essentially provide for a lead-based paint risk assessment when more there is more than $5,000 in hard costs of rehabilitation per unit. If lead-based paint hazards are found, they must be eliminated using interim controls or abatement when rehabilitation costs are between $5,000 - $25,000 per unit; if costs are above $25,000 per unit, then the hazards must be permanently eliminated through abatement. If the costs are below $5,000, hazards must be eliminated in the work area only. Virtually all state LIHTC QAPs state that the hard costs of rehabilitation must be above $5,000, triggering lead risk assessments and lead safe work practices.

EPA has put in place regulations covering certification (licensing) of lead inspectors, risk assessors, and abatement contractors, as well as performance of laboratories analyzing lead samples, exposure standards for lead in paint, dust and bare soil and, together with HUD in a joint regulation, disclosure of known lead-based paint and/or lead-based paint hazards at time of sale or rent. However, EPA has proposed, but not yet finalized, regulations covering lead paint in the context of housing rehabilitation.

Figure 1. The Low Income Housing Tax Credit Process
From: The Danter Company
(http://www.danter.com/taxcredit/lihtccht.htm)





The LIHTC Program: Structure and Participants
IRS
DEVELOPER
SYNDICATOR
INVESTORS (CORPORATE/INDIVIDUAL)
PROJECT
1. Allocates tax credit to each state (currently, $1.75 per capita)
(Regs: and/or incentive)
2. Submits projects proposals
3. Awards tax credits
(Approval to include lead hazard ID + control)
4. Sells tax credits
5. Provides equity
4. Sells tax credits
5. Provides equity
Sales Tax Credit
Equity
(Underwriting Standards to include lead hazard ID + control)
6. Builds project - uses equity to help finance

Introduction

The Low Income Housing Tax Credit (LIHTC) program was created by Section 42 of the Tax Reform Act of 1986 (Public Law 99- 514) and is the principal way that the federal government stimulates the production and preservation of affordable housing for low-income individuals and families. The program leverages the expenditure of public money in the form of uncollected tax revenue with private equity investment to fund low income housing development. Each state receives tax credits annually, based on a formula that can change from year to year; in 2000 Congress indexed the tax credit cap to inflation. In 2007, each state and territory will receive a total LIHTC of $1.95 multiplied by the total population, with a minimum of $2,275,000.[2] Collectively, this is worth hundreds of millions of dollars annually. It is then up to housing credit agencies (typically a state housing finance agency) to develop an application process and priorities for allocating the credits within the Internal Revenue Code and IRS published guidance requirements. Developers submit housing project plan applications for credits. The credits are generally sold to investors, either directly or through a syndicator. The role of the syndicator is to attract private capital for investment in the project. The Tax Reform Act of 1986 eliminated many tax shelters, but the LIHTC program emerged as a major way that financial institutions and others could reduce their tax liabilities.[3]

The LIHTC is currently the most important program through which the federal government encourages the development of affordable rental housing. The LIHTC works to encourage private investors to provide equity for the development of low income housing in return for reduced federal tax liability. In the years since the program's inception a complex industry has grown up around the syndication of the tax credits and the development and financing of LIHTC projects, although investors range from large financial institutions to “Mom and Pop” investors.[4] Estimates from the National Council of State Housing Agencies (NCSHA) show that 1.9 million housing units have been created since the program's inception to 2006.[5]

LIHTC projects must remain in compliance with program regulations for a minimum of 15 years, or the credits may be recaptured or denied by the Internal Revenue Service. Pursuant to the Internal Revenue Code, housing credit agencies must impose a minimum of an additional 15 years of compliance in accordance with restrictive covenants known as extended low-income housing commitments under 26 U.S.C. section 42(h)(6) of the Internal Revenue Code.

The Congressional Research Service recently provided a further analysis of recent developments in the Low-Income Housing Tax Credit Program, as follows:[6]

> The Low-Income Housing Tax Credit (LIHTC) reduces the income tax liability of taxpayers claiming the credit. These taxpayers are typically investors in real estate development projects that have traded cash for the tax credits and in that way support the production of affordable housing. The credit is intended to lower the financing costs of housing developments so that the rental prices of units can

be lower than market rates. In the 109th Congress, the Gulf Opportunity Zone Act of 2005 (P.L. 109-135) expanded the amount of LIHTC allocation authority for Alabama, Louisiana, and Mississippi. In addition to the 2006 allocation of $1.90 per capita for each state, the LIHTC allocation was increased for 2006, 2007, and 2008, which suggests that even more units will be rehabilitated in the coming years. The act also made an additional $3.5 million in LIHTC authority available to both Texas and Florida in 2006. Other legislation introduced in the 109th Congress proposed additional increases in the allocation authority of the LIHTC. H.R. 2681, the Affordable Housing Tax Credit Enhancement Act of 2005, proposed to double LIHTC authority nationwide.

The LIHTC was created by the Tax Reform Act of 1986 (P.L. 99- 514) to provide an incentive for the acquisition (excluding land) and development or the rehabilitation of affordable rental housing. These federal housing tax credits are awarded to developers of qualified projects. Sponsors, or developers, of real estate projects apply to the corresponding state housing finance authority for LIHTC allocations for their projects. Developers either use the credits or sell them to investors to raise capital (or equity) for real estate projects. The tax benefit reduces the debt and/or equity that the developer would otherwise have to incur. With lower financing costs, tax credit properties can potentially offer lower, more affordable rents.

The process of allocating, awarding, and then claiming the LIHTC is complex and lengthy. The LIHTC is allocated annually to states according to federal law. State housing agencies are required to allocate credits to developers of rental housing according to federally required, but state created, allocation plans. Many states have two allocation periods per year. Developers apply for the credits by proposing plans to state agencies. On average, one project out of five may receive an allocation of tax credits. Upon receipt of a LIHTC allocation, developers typically must exchange the tax credits for equity. Taxpayers claiming the tax credits are usually real estate investors, not developers. The tax credits cannot be claimed until the real estate development is complete and operable, i.e. “placed in service.”…

LIHTCs are allocated to each state according to its population and are typically administered by the state's Housing Finance Agency (HFA). HFAs receive annual tax credits equal to $1.90 per person in 2006.[2] The minimum tax credit ceiling for states with small populations rises from $2,125,000 in 2005 to $2,190,000 in 2006.[2] However, these limits do not apply in the case of development projects that are financed with tax-exempt bond proceeds. Tax credits that are not allocated by states are added to a national pool and then

[2] From 1986 through 2000, the initial credit allocation amount was $1.25 per capita. The allocation was increased to $1.50 in 2001, to $1.75 in 2002 and 2003, and indexed for inflation annually thereafter. The 2004 allocation was $1.80, and the 2005 allocation was $1.85

distributed to those states that apply for the excess credits. However, to be eligible for those credits, a state must have allocated all of its previously allotted tax credits. HFAs award tax credits to developers according to a Qualified Allocation Plan (QAP) that outlines the states' affordable housing priorities and how to apply for tax credits. Federal law requires that the QAP give priority to projects that serve the lowest income households and that remain affordable for the longest period of time.

In order to be eligible for the LIHTC, properties are required to meet certain tests that restrict both the amount of rent that is assessed to tenants and the income of eligible tenants. The "income test" for a qualified low-income housing project requires that the project owner irrevocably elect one of two income level tests, either a 20-50 test or a 40-60 test. In order to satisfy the first test, at least 20% of the units must be occupied by individuals with income of 50% or less of the area's median gross income, adjusted for family size. To satisfy the second test, at least 40% of the units must be occupied by individuals with income of 60% or less of the area's median gross income, adjusted for family size.[3] A qualified low-income housing project must meet the "gross rents test" by ensuring rents do not exceed 30% of the elected 50% or 60% of area median gross income, depending on which income test the project elected.

The types of projects eligible for the LIHTC are apartment buildings, single family dwellings, duplexes, or townhouses. Projects may include more than one building. Tax credit project types also vary by the type of tenants served. Housing can be for families and/or special needs populations including the elderly. Enhanced LIHTCs are available for difficult development areas (DDAs) and qualified census tracts (QCTs) as an incentive to developers to invest in more distressed areas: areas where the need is greatest for affordable housing, but which can be the most difficult to develop. In these distressed areas, the LIHTC can be claimed for 130% (instead of the normal 100%) of the project's total cost excluding land costs. This also means that available credits can be increased by up to 30%.

Developers of housing projects compete for tax credits as part of the financing for the real estate development by submitting proposals to the HFA. Types of developers include nonprofit organizations, for-profit organizations, joint ventures, partnerships, limited partnerships, trusts, corporations, and limited liability corporations. For-profit developers can either retain tax credits as financing for projects or sell them; nonprofit developers sell tax credits. Trading tax credits, or selling them, refers to the process of exchanging tax credits for equity investment in real estate projects. Developers recruit investors to provide equity to fund development projects and offer the tax credits to those investors in exchange for their commitment. When credits are sold, the sale is

[3] U.S. Department of Treasury, Internal Revenue Service, Internal Revenue Code, Section 42(g)(1)

usually structured with a limited partnership between the developer and the investor, and sometimes administered by syndicators who must adhere to the complex provisions of the tax code...As the general partner, the developer has a very small ownership percentage but maintains the authority to build and run the project on a day-to-day basis. The investor, as a limited partner, has a large ownership percentage with an otherwise passive role. Typically, the investor does not expect the project to produce income. Instead, investors look to the credits, which will be used to offset their income tax liabilities, as their return on investment. The investor can also receive tax benefits related to any tax losses generated through the project's operating costs, interest on its debt, and deductions such as depreciation and amortization.

For the taxpayers who provide equity to real estate projects in exchange for the credits, there is a primary investment in real estate and a secondary tax benefit (the tax credits and any depreciation and/or interest expense). Investors can be either individuals or corporations, although most investors are corporations. The type of tax credit investor has changed over the life of the LIHTC. Upon the introduction of the LIHTC in 1986, public partnerships were the primary source of equity investment in tax credit projects, but diminished profit margins have driven some syndicators out of the retail investment market. In recent years, the vast majority of investors have come from corporations, either investing directly or through private partnerships.[4] Different types of investors have different motivations for investing in tax credits. An estimated 43% of investors are subject to the Community Reinvestment Act (CRA), and investment in LIHTCs is favorably considered under the investment test component of the CRA. Other investors include real estate, insurance, utility, and manufacturing firms, many of which list the rate of return on investment as their primary purpose for investing in tax credits. Tax sheltering is the second-most highly ranked purpose for investing.[5]

The LIHTC finances part of the total cost of many projects rather than the full cost and, as a result, must be combined with other resources. The financial resources that may be used in conjunction with the LIHTC include conventional mortgage loans provided by private lenders and alternative financing and grants from public or private sources. Specifically, sources of financing can include Community Development Block Grant (CDBG) loans and grants, Federal HOME loans, the Affordable Housing Program of the Federal Home Loan Banks, and loans from utilities and banks. Individual states provide financing as well, some of which may be in the form of tax credits modeled after the federal provision.

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[4] HousingFinance.com, "Corporate Investment and the Future of Tax Credits: What Should You Expect," at [http://www.housingfinance.com/housingreferencecenter/Corporate_Investment.html]

[5] Jean L. Cummings and Denise DiPasquale, "Building Affordable Housing: An Analysis of the Low-Income Housing Tax Credit," City Research, 1998, p. 33.

> Additionally, some LIHTC projects may have tenants who receive other government subsidies such as housing vouchers.
>
> The value of the credit is approximately 9% of qualified basis per year for new construction, or 4% of qualified basis per year for rehabilitation or federally subsidized buildings.

It is noteworthy that it is these same low-income families with young children who are at greatest risk of childhood lead poisoning, which is confirmed by CDC's surveillance data[7] and numerous studies.

Methods

To uncover the intersection of the LIHTC program and childhood lead poisoning prevention, the following tasks were completed for this report:

1. Assessment of state and local jurisdictions administering the low-income housing tax credit and other financial institutions (Fannie Mae, Freddie Mac, FHA, VA, lenders, etc.) to learn more about the LIHTC process and effects of the tax credit program.
2. A review of practices by underwriters of housing loans to describe the impact of the tax credit program as an incentive for property owners to protect children from lead exposure; while creating and/or maintaining affordable and safe housing for low-income persons and families.
3. A review of practices by the National Council of State Housing Agencies, the National Conference of State Legislatures, and other similar associations to assess existing regulatory policies and practices with regard to the intersection of lead paint regulations and low-income housing tax credits.
4. A review of existing low-income housing tax credit regulations with regard to lead-based paint regulations and oversight by the Internal Revenue Service, the Department of Housing and Urban Development, the Department of Agriculture (Rural Housing Service) and state and local governments and determine approximately how many housing units potentially containing lead-based paint hazards are renovated annually through the LIHTC and other similar programs.
5. A review of Fannie Mae, Freddie Mac and FHA regarding lead-based paint underwriting and other similar regulatory or insurance standards.
6. A review of pertinent state and local low-income housing tax agencies and developers regarding monitoring protocols for lead-based paint requirements in low-income housing tax credit for housing rehabilitation.
7. A review of existing low-income housing tax credit regulations with regard to lead-based paint regulations and oversight by the Internal Revenue Service, the Department of Housing and Urban Development, the Department of Agriculture (Rural Housing Service) and state and local governments and determine approximately how many housing units potentially containing lead-based paint hazards are renovated annually.
8. Evaluate the effectiveness of training programs offered by HUD and the Department of Justice to assure that developers, property managers, state housing finance agencies, architects, and other covered entities are complying with the Lead-Safe Housing Rule requirements and using lead-safe practices when rehabilitating or performing reconstruction of pre-1978 housing (29 CFR Part 35, Subparts B through M and R).

Qualified Allocation Plans (QAPs) were acquired on-line for all 50 states and two local jurisdictions (Chicago and Washington DC). The QAP for the Virgin Islands is not available and was not reviewed for this report, but this is not expected to alter the key findings. The link to each plan is provided below and each was subjected to a detailed review to identify key lead and health and safety criteria. The number of states with and without these criteria was determined. Key individuals in two trade organizations and syndication experts were also interviewed. Applicable regulations, best practices, codes, consensus standards and underwriting standards were obtained and reviewed.

Results

Assessment of State Qualified Allocation Plans

Table 2 below shows that there is wide disparity in the way in which the states administer the LIHTC with regard to lead paint. Although state control has been a major feature of this program, minimum standards are widely regarded as essential. In fact, low-income housing quality has been improved as a result of the application of some minimum requirements required by the Internal Revenue Service**.** [8, 9] Nevertheless, the table shows that lead paint requirements are for the most part not explicit, in contrast with fair housing requirements.

Most states prioritize preservation and rehabilitation of existing older housing units and also prioritize family housing. This suggests that the work done under the LIHTC program can be expected to target low-income families with children, the same population at increased risk for lead poisoning.

Only 15 of the 52 QAPs reviewed for this report explicitly address lead-based paint and of those, only 4 explicitly require that lead-based paint hazards to be eliminated or controlled in housing units being rehabilitated under the program. The 15 states that explicitly mention lead-based paint in their respective QAPs are as follows:

Arizona
Arkansas
Connecticut
Georgia
Illinois
Indiana
Iowa
Massachusetts
Missouri
Nebraska
Nevada
New Hampshire
North Carolina
North Dakota
Pennsylvania

Based on the dollar amount of each of these 15 state's allocation, only $152 million of the total $577 million is being used with explicit lead paint requirements in place. In other words, 74% of the LIHTC program has no written lead paint requirements in place. While it is possible that some of these funds would include lead paint requirements under local law, most local and state laws do not include lead protection elements for rehabilitation. The Environmental Protection Agency has issued a proposed regulation to cover certain housing rehabilitation practices that could result in excessive lead exposures, but the regulation was required to be in place by 1996 and has still not been finalized.

Another 11 of the 52 QAPS reviewed require “phase I environmental reviews,” but such reviews do not include a detailed risk assessment for lead-based paint and/or lead-based paint hazards, which is required for virtually all other federally assisted housing undergoing rehabilitation. Lead-based paint inspections and risk assessments must be carried out by state-licensed professionals (or for those states that do not have such programs, they must be certified by EPA).

Table 2 also shows that the majority of states reference local or state housing or building codes, or model or so-called “international” codes. Unfortunately, all model and international codes have not included lead poisoning prevention elements. Local and state lead poisoning prevention laws typically cover only units with lead poisoned children.

Table 2. Qualified Allocation Plans and Their Treatment of Lead Paint and Related Housing Rehabilitation.

(See next pages)

State	2006 LIHTC Authority	Link to QAP	Use HUD UPSC or other Code?	Health & Safety Requirement?	Explicit Lead Paint Require-ment?	Lead Paint Moni-toring?	Is Rehab Priorit-ized?	Units for Families w/children prioritized?	Minimum Rehab Threshold ($/unit)
Alabama	$8,660,200	http://www.ahfa.com/Content/Multifamily/Allocation_Plans/LIHTCQAP07final.pdf also see: http://www.ahfa.com/Content/Multifamily/Compliance/ComplianceManual06.pdf	UPCS	N (but Phase 1 Required)	N	N	Y	Y	$8,000
Alaska	$2,190,000	More details…	State and	N	N	N	Y	Y	$15,000

			Local Building Code						
Arizona	$11,284,100	More details...	Both	Y	Y	N	Y	Y	$5,000
Arkansas	$5,280,100	More details...	State	Y	Y	N	Y	Y	$15,000
California	$68,650,800	More details...	State	Y	N	N	N	N	Not specified
Chicago	$5,200,000*	http://egov.cityofchicago.org/webportal/COCWebPortal/COC_ATTACH/2006QAP.pdf	UPS or local code	N	N	N	N	N	Not specified
Colorado	$8,863,500	More details...	Local codes pre-empt UPS	N (Phase 1 Required)	N	N	N	Y	$6,600
Connecticut	$6,669,000	More details...	Local code or UPS	Y	Y	Y	Y	Y	$9,000

Delaware	$2,190,000	http://www.destatehousing.com/services/servicesmedia/LIHTC_FR2006_1_QAP_Final.pdf also: http://www.destatehousing.com/services/servicesmedia/DSHA_Tax_Credit_Compliance_Monitoring_Manual_2006.pdf	Local code	N	N	N	N	N	
District of Columbia	$2,190,000	More dettails...	Not specified	N	N	N	N	N	$3,000
Florida	$33,801,000	More details...	Not speciied	N	N	N	N	Y	Not specified

Georgia	$17,238,700	More details…	Local code	Y	Y	N	N	Y	Not specified
Hawaii	$2,422,500	More details…	Local code	N	N	N	N	Y	Not specified
Idaho	$2,715,100	More details…	HUD Minimum Property Stds + Model Codes	Y	N (Lead mentioned in "Level 1" Environmental	N	N	Y	$7,500
Illinois	$24,249,700	More details…	State Code	Y	Y	N	Y	Y	$8,000
Indiana	$11,916,800	More details…	Local code	Y	Y	Y	Y	Y	Not specified
Iowa	$5,635,400	http://www.iowafinanceauthority.gov/documents/Final2007QAP.doc	Model codes	Y	Y	N	Y	Y	$10,000
Kansas	$5,215,500	More details…	Local codes	N	N	N	N	N	$4,000
Kentucky	$7,928,700	http://www.fuze	State or	N	N	N	N	Y	Not specified

		qna.com/kyhousing/consumer/kbdetail.asp?kbid=724&keyword=QAP&submit=Find	local building code						
Louisiana	$8,595,600	More details...	HUD UPS	Y	N	N	N	Y	$3,000
Maine	$2,511,800	http://www.mainehousing.org/index.html	MSHA Green Building Standards	Y	N	N	Y	Y	Not specified
Maryland	$10,640,000	More details...	Local codes or HUD UPS	Y	N	N	N	N	Not specified
Massachusetts	$12,158,100	More details...	State or local code	Y	Y (deleading)	N	Y	Y	Not specified
Michigan	$19,229,900	More details...	State or local	N (Phase 1	N	N	N	N	Not specified

			code	Required)					
Minnesota	$9,752,700	More details…	State or local code	N	N	N	N	N	$5,000
Mississippi	$5,549,900	More details…	Local health, safety and building codes	Y	N	N	N	N	$10,000
Missouri	$11,020,000	More details…	State and local building codes	Y	Y (HUD Guidelines)	N	Y	N	Not specified
Montana	$2,190,000	More details…	Local codes	N	N	N	N	Y	Not specified
Nebraska	$3,342,100	More details…	Local codes	N	Y (Env Assessment only, but no duty to correct	N	N	N	Not specified
Nevada	$4,588,500	More details…	HUD UPS	Y	Y	Y	Y	Y	$10,000

New Hampshire	$2,489,000	http://www.novoco.com/low_income_housing/resource_files/qap/newhampshire_draft_07.pdf	HUD UPS	Y	Y	Y	Y	Y	50% Total Development Cost
New Jersey	$16,564,200	More details…	Local and State Code	N	N (Phase 1 mentions lead, but not required	N	N	N	50% acquisition cost
New Mexico	$3,663,200	More details…	Model codes “when reasonable	N	N	N	N	N	$3,000
New York	$36,663,200	More details…	State and Local Codes “pre-empt” HUD UPS	Y	N	N	N	Y	25% of total development cost

North Carolina	$16,497,700	More details…	State and Local Codes	Y	Y	Y	Y	Y	$15,000
North Dakota	$2,190,000	http://www.ndhfa.state.nd.us/Web_Images/2006%20allocation%20plan%20-%20final.doc	Local safety health and building codes	Y (Local Codes)	Y (Capital needs assessment will "consider" lead paint)	N	Y	Y	$7,500
Ohio	$21,781,600	http://www.ohiohome.org/compliance_tc/QAP/06QAP.pdf	Local safety health and building codes	N (Phase 1 required)	N (Capital needs assessment std mandates paint condition	N	N	Y	$10,000
Oklahoma	$6,741,200	More details…	Local and national housing codes	N (Phase 1 required)	N	N	N	Y	$7,500

Oregon	$6,917,900	More details...	Local, state, federal health safety and building codes	N (Level 1 Env Rev required	N	N (HUD UPS)	Y	Y	$3,000
Pennsylvania	$23,617,000	http://www.phfa.org/forms/multifamily_program_notices/2007_allocation_plan.pdf	Applicable Local, state and federal housing codes	N (Phase 1 required)	Y	N	Y	Y	10,000
Rhode Island	$2,190,000	http://www.novoco.com/low_income_housing/resource_files/qap/rhodeisla	State or local health or building and HUD UPS	Y	N	N	Y	Y	$3,000

		nd_final_07.pdf							
South Carolina	$8,084,500	http://www.schousing.com/library/Tax%20Credit/2007/2007%20Final%20QAP.pdf	Local codes	N (Env Review Required)	N	N	Y	Y	Not specified
South Dakota	$2,190,000	http://www.sdhda.org/developer/2006%20HTCQAP%20Amended1.pdf	Local codes or International Plumbing, Electrical and Building Code	N	N	N	Y	Y	$10,000
Tennessee	$11,239,700	http://www.tennessee.gov/thda/Programs	Local codes or 2003 Int'l	N	N	N	Y	Y	25% of total development costs

		/lihtc/07qap.pdf	Building Code or Int'l Property Maintenance Code						
Texas	$43,434,000	http://www.tdhca.state.tx.us/pdf/draftrules/5h-QAP.pdf	Local codes or Int'l code council and HUD UPS	N (Phase 1 required)	N	N	Y	Y	$12,000 ($6,000 for rural)
Utah	$4,693,000	More details...	"Current rehab code"	N (Phase 1 required)	N	N	N	N	$10,000
Vermont	$2,190,000	http://www.vhfa.org/documents/developers/qap.	Local health safety and building	N	Lead Paint "A Top Tier Priority" but no explicit requirem	N	Y	Y	$3,000

		pdf	codes		ent				
Virgin Islands	$2,125,000	Not available							
Virginia	$14,377,300	More details…	Local health safety and building codes	N (Phase 1 “may be required”	N	N	N	N	$7,500
Washington	$11,947,200	More details… Also see: http://www.wshfc.org/tax-credits/application/D-Policies.pdf	IRS Code and local code	N	N	N	N	N	Not specified
West Virginia	$3,452,300	More details…	Local, state and int’l health, safety	Y	N	N	N	Y	$7,500

			and building codes OR HUD UPS						
Wisconsin	$10,518,400	http://www.wheda.com/cat_tca/2006/QAP_2005-06_Amended.pdf also see: http://www.wheda.com/Manual_TCM/AHTCManual.pdf	Local health, safety and building codes	Y	N	N	N	Y	$3,000
Wyoming	$2,190,000	More details...	Local and National Building Code (UBC,	N	N	N	N	N	$15,000

			CABO, or BOCA).						
Totals	**$573 million**		**8 use HUD UPCS**	**23=Y**	**15=Y**	**4=Y**	**23=Y**	**35=Y**	**--**

Form **8823**
(Rev. Oct. 2005)
Department of the Treasury
Internal Revenue Service

Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition

Note: *File a separate Form 8823 for each building that is disposed of or goes out of compliance.*

OMB No. 1545-1204

Check here if this is an amended return ▶ ☐

1 Building name (if any). Check if item 1 differs from Form 8609 ▶ ☐

Street address

City or town, state, and ZIP code

2 Building identification number (BIN)

3 Owner's name. Check if item 3 differs from Form 8609 ▶ ☐

Street address

City or town, state, and ZIP code

4 Owner's taxpayer identification number ☐ EIN ☐ SSN

IRS Use Only

5 Total credit allocated to this BIN ▶ $

6 If this building is part of a multiple building project, enter the number of buildings in the project ▶

7 a Total number of residential units in this building ▶

b Total number of low-income units in this building ▶

c Total number of residential units in this building determined to have noncompliance issues ▶

d Total number of units reviewed by agency (see instructions) ▶

8 Date building ceased to comply with the low-income housing credit provisions (see instructions) (MMDDYYYY)

9 Date noncompliance corrected (if applicable) (see instructions) (MMDDYYYY)

10 Check this box if you are filing only to show correction of a previously reported noncompliance problem ▶ ☐

11 Check the box(es) that apply:	Out of compliance	Noncompliance corrected
a Household income above income limit upon initial occupancy	☐	☐
b Owner failed to correctly complete or document tenant's annual income recertification	☐	☐
c Violation(s) of the UPCS or local inspection standards (see instructions) (attach explanation)	☐	☐
d Owner failed to provide annual certifications or provided incomplete or inaccurate certifications	☐	☐
e Changes in Eligible Basis or the Applicable Percentage (see instructions)	☐	☐
f Project failed to meet minimum set-aside requirement (20/50, 40/60 test) (see instructions)	☐	☐
g Gross rent(s) exceed tax credit limits	☐	☐
h Project not available to the general public (see instructions) (attach explanation)	☐	☐
i Violation(s) of the Available Unit Rule under section 42(g)(2)(D)(ii)	☐	☐
j Violation(s) of the Vacant Unit Rule under Reg. 1.42-5(c)(1)(ix)	☐	☐
k Owner failed to execute and record extended-use agreement within time prescribed by section 42(h)(6)(J)	☐	☐
l Low-income units occupied by nonqualified full-time students	☐	☐
m Owner did not properly calculate utility allowance	☐	☐
n Owner has failed to respond to agency requests for monitoring reviews	☐	☐
o Low-income units used on a transient basis (attach explanation)	☐	☐
p Project is no longer in compliance nor participating in the section 42 program (attach explanation)	☐	
q Other noncompliance issues (attach explanation)	☐	☐

12 Additional information for any item above. Attach explanation and check box ▶ ☐

13 a Building disposition by ☐ Sale ☐ Foreclosure ☐ Destruction ☐ Other (attach explanation)

b Date of disposition (MMDDYYYY)

c New Owner's Name

d **New owner's** taxpayer identification number ☐ EIN ☐ SSN

Street address

14 Name of contact person

City or town, state, and ZIP code

15 Telephone number of contact person ( ) Ext.

Under penalties of perjury, I declare that I have examined this report, including accompanying statements and schedules, and to the best of my knowledge and belief, it is true, correct, and complete.

▶ Signature of authorizing official ▶ Print name and title ▶ Date (MMDDYYYY)

For Paperwork Reduction Act Notice, see instructions. Cat. No. 12308D Form **8823** (Rev. 10-2005)

Item 11c. Housing credit agencies must use either **(a)** the local health, safety, and building codes (or other habitability standards) or **(b)** the Uniform Physical Conditions Standards (UPCS) (24 C.F.R. section 5.703) to inspect the project, but not in combination. The UPCS does not supersede or preempt local codes. Thus, if a housing credit agency using the UPCS becomes aware of any violation of local codes, the agency must report the violation. Attach a statement describing either **(a)** the deficiency and its severity under the UPCS, i.e., minor (level 1), major (level 2), and severe (level 3) or **(b)** the health, safety, or building violation under the local codes. The Department of Housing and Urban

Health and Safety Hazards. All areas and components of the housing must be free of health and safety hazards. These include, but are not limited to: air quality, electrical hazards, elevators, emergency/fire exits, flammable materials, garbage and debris, handrail hazards, infestation, and lead-based paint. For

Note: IRS Form 8823 and the associated instructions clearly stated that the HUD UPCS require that "all areas of the housing must be free of…lead-based paint hazards."

Assessment of IRS Guidance

26 CFR 1.42-5(d) of the Income Tax Regulations provides that housing credit agencies have the choice of using either local health, safety, and building codes or HUD's Uniform Physical Conditions Standards (UPCS) for their physical inspection standards. The UPCS incorporate HUD's lead hazard control regulations at 24 CFR Part 35. While housing credit agencies have the latitude to select one or the other inspection standards (but not elements of both), there was significant deviation from this requirement, with some states following HUD's Housing Quality Standards and other unauthorized or unspecified inspection standards, not HUD's UPCS. Only 8 QAPs specifically state they use HUD's UPCS in their definition of habitability in housing undergoing rehabilitation. The instructions for IRS Form 8823 state in item 11c that instances of non-compliance must be reported (the IRS Form and Instructions immediately follow Table 1). In January 2007, the IRS specified in reference materials, which does not constitute official guidance, the subpart of the HUD Lead Safe Housing Rule that should be followed in complying with the UPCS inspection standard (i.e. Subpart J, which covers housing rehabilitation.[10]

The IRS reference materials provide the following language:

" Health and Safety Concerns: All areas and components of the housing must be free of health and safety hazards. These areas include, but are not limited to, air quality, electrical hazards, elevators, emergency/fire exits, flammable materials, garbage and debris, handrail hazards, infestation and lead based paint. For example, buildings must have fire exits that are not blocked and have hand rails that are not damaged, loose, missing portions, or otherwise unusable. The housing must have no evidence of infestation by rats, mice, or other vermin. The housing must have no evidence of electrical hazards, natural hazards, or fire hazards. The dwelling units and common areas must have proper ventilation and be free of mold as well as odor (e.g., propane, natural, sewer or methane gas) or other observable deficiencies. The housing must comply with all requirements related to the evaluation and reduction of lead-based paint hazards and have available proper certifications of such."[6]

The footnote 5 above is noteworthy, because it references the part of the HUD lead safe housing rule that pertains to rehabilitation, i.e., Subpart J of 24 CFR Part 35. Again, there does not appear to be any official IRS position on how the Lead Safe Housing Rule should be implemented in rehabilitation projects and there is no uniform requirement across all low-income housing credit units in the United States concerning the precise lead control requirements that should apply in LIHTC program. Currently, states have the option of either using state or local housing codes or of using the HUD standards (but not both).

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[6] As defined in Subpart J of 24 CFR part 35.

The same IRS reference material states the following:

> "This category is used to report noncompliance when rental units, building exteriors and systems, common areas, and the property site in a project are not suitable for occupancy. State agencies should assess whether low-income housing tax credit properties are in safe, decent, sanitary condition and in good repair, according to either the Uniform Physical Conditions Standards[7] (UPCS) established by HUD[8], or local inspection standards. The standards to be used should be identified in the Qualified Allocation Plan[9] (QAP).State agencies are not required to use the REAC protocol in using the UPCS. State agencies cannot combine selected portions of the UPCS with portions of local standards; only one inspection standard can be selected and used."

In short, while the IRS reference material (not official published guidance) contains an explicit reference to the HUD Uniform Physical Condition Standards and to the relevant part of the HUD Lead Safe Housing Rule, there is no uniform IRS official guidance on the issue of lead safety across all low-income housing credit projects, no specified protocol for compliance under the UPCS for housing credit agencies to follow, and no training guidance for housing credit agencies, developers, and project owners on the Lead Safe Housing Rule**.**

Assessment of Underwriting Standards and Best Practices

Underwriting standards used by private financial institutions only provide for a general environmental review, as do the standards used by quasi-public institutions, such as Fannie Mae and Freddie Mac. These underwriting standards are not publicly available. FHA regulations cover lead paint, but only for multi-family mortgage insurance; the regulations for single family mortgage insurance were not updated in the most recent HUD lead paint regulations, which were issued in 1999 (see Subpart E of 24 CFR Part 35).

Best practices available from two leading trade associations in the field mention lead paint. These include a report from the National Conference of State Housing Agencies Working Group on Housing Credit Allocation and Underwriting Recommended Practices (Dec 2003),[11] which states in the section on capital needs assessment:

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[7] The Uniform Physical Conditions are available at www.gpoaccess.gov. On the main page, select the "Code of Federal Regulations" option and then enter "24CFR5.703" into the search feature using the quotes ("…").

[8] Department of Housing and Urban Development

[9] See IRC §42(m)(1)(B)(iii).

11. Capital Needs Assessment

Recommendation

Allocating Agencies should require any award of Housing Credits for rehabilitation to be preceded by and take into account a capital needs assessment by a competent third party, such as a licensed architect or engineer. Alternatively, the Allocating Agency may perform the assessment if it has qualified construction analysts on staff. Such staff assessments may be particularly appropriate to avoid duplication of effort or when no other capable provider is available.

The assessment should include a site visit and physical inspection of the interior and exterior of units and structures, as well as an interview with available on-site property management and maintenance personnel to inquire about past repairs/improvements, pending repairs, and existing or chronic physical deficiencies. The assessment should consider the presence of environmental hazards, such as asbestos, lead paint, and mold, on the site. Alternatively, the Allocating Agency should encourage the developer to undertake a Phase I environmental study.

Issues identified by the capital needs assessment should be addressed in the rehabilitation proposal and considered by the Allocating Agency in establishing operating and replacement reserve requirements.

The Affordable Housing Investors Council, in a document titled "AHIC Recommended Underwriting Guidelines"[12] and labeled "draft" state:

management data and comparable property information.

- Environmental site assessments provide information regarding environmental risk and remediation. Significant environmental issues may require assistance by legal counsel and/or Licensed Environmental Professional ("LEP").

The requirement to use a licensed environmental professional could be construed to mean a licensed lead-based paint inspector or risk assessor, but the guidance is not as specific as it could be and there is no explicit guidance on how to eliminate lead-based paint hazards.

<u>Estimate of Number of LIHTC Housing Units At Risk Of Lead Paint Hazards</u>

The number of housing units that have been rehabilitated under the LIHTC program since its inception without lead hazard evaluation and control requirements is large, and can be estimated as follows:

Using the weighted average derived from the dollar value of each state QAP that does not have an explicit lead-based paint requirement shows that 74% of the dollars used in the LIHTC program are unlikely to have had lead paint requirements. In 2006, approximately \$152 million in LIHTC financing had explicit lead paint requirements, out of a total of \$577 million (see table 1). Because it is likely that even fewer states had lead paint requirements in the late 1980s and early 1990s when the LIHTC program began, this is a conservative estimate. In addition, only 4 states have explicit lead paint monitoring requirements, suggesting that 74% is indeed a conservative estimate.

Furthermore, the discussion above showed that 36% of the LIHTC program dollars are being used for rehabilitation purposes. This is also likely to be a conservative estimate, because professionals in the field believe that the trend is toward more rehabilitation (as opposed to new construction), not less.[13]

A fraction of the housing rehabilitated under the LIHTC program is also financed with funds from HUD, such as the Community Development Block Grant Program, HOME, and Hope VI, all of which would be required to comply with the HUD Lead-Safe Housing Rule. In the HUD LIHTC database report dated Dec 20, 2006 (see Table 6 in the report at: http://www.huduser.org/Datasets/lihtc/tables9504.pdf), the percentage of units rehabilitated with CDBG, HOME, and Hope VI funding was 2.7%, 8.3% and <1%, respectively. Conservatively, this means that approximately 5% of rehab in the LIHTC program is funded through HUD funds (FHA insured mortgages are not included in this total, because single family housing insurance is not included in the HUD Lead Safe Housing Rule, and the vast majority of older units rehabilitated in the LIHTC program are single family homes, i.e., four or fewer units per building). In short, 95% of LIHTC rehab is not HUD financed and thus not explicitly covered by the HUD Lead Safe Housing regulation.

Finally, HUD's National Survey of Lead and Allergens shows that 40% of all US housing units have lead-based paint.[14] This is also likely to underestimate the true percentage of housing units with lead paint undergoing rehabilitation under the LIHTC program, because this is the percentage of all units with lead paint, regardless of age. If it is true that the rehabilitated units are older on average than all US housing, then the percentage would rise. For example, the percentages of US housing with lead paint that were built between 1940-1959 and before 1940 are 69% and 87% respectively. However, HUD reports that there are no data on the age of housing undergoing rehabilitation under the LIHTC program,[15] so we use the conservative estimate of 40%.

A conservative estimate can be calculated as follows:

Number of units in LIHTC at risk of lead from 1986 to 2006 =

Total number of LIHTC units financed x R x Q x P x H

Where:

R is the fraction of units rehabilitated (36%)
Q is the dollar weighted fraction of QAPs with no lead paint requirements (74%)
P is the fraction of units with lead paint (40%)
H is the fraction of units not covered by other HUD programs (95%)

Thus:

1,900,000 units x 36% x 74% x 40% x 95% = 193,000 housing units

This same method can be applied to derive an annual number of LIHTC units at risk of failing to incorporate lead-based paint requirements going forward, assuming there is no change in regulations or statutory authority. According to the National Council of State Housing Agencies, 140,000 housing units receive LIHTC financing annually. Therefore,

140,000 x 36% x 74% x 40% x 95% = 14,200 housing units

Unless explicit requirements are put in place, each year will result in at least another 14,000 old housing units with lead paint being rehabilitated without explicit lead paint requirements under the LIHTC program.

These estimates do not include residential rental housing developed under the mortgage revenue bond program of section 143 of the Internal Revenue Code. The mortgage revenue bond program has developed over 850,000 units of housing and helps to produce annually 130,000 units of housing. These units include rehabilitation projects and residential rental units with lead-based paint.

Case Study From Oregon

A case study demonstrates how a state housing agency responded to a request for greater clarity on lead-based paint requirements in a state QAP. Briefly, the state responded to the request by stating there were other programs that addressed lead-based paint, suggesting it is not a matter of concern for the state housing finance agency. At the same time, the agency responded that it will comply with HUD’s Lead Safe Housing Rule, “as instructed by Treasury.” Thus, states are clearly looking to the U.S. Department of the Treasury to explain precisely what is required.

The following was included in the documentation for the Oregon QAP in:

OREGON HOUSING AND COMMUNITY SERVICES DEPARTMENT
2005/2006 LOW INCOME HOUSING TAX CREDIT ALLOCATION PLAN
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Testimony from the Oregon Law Center (lead paint section only)

There is a serious concern over lead-based paint hazards in properties that were built prior to January 1,1978 and were rehabilitated using LIHTCs administered by the Department of Treasury under section 42 of the Internal Revenue Code. This is an issue that impacts the safety and healthy development of thousands of children. It is also, undoubtedly, an issue that will have a disparate impact on children in minority communities. The Federal Government has recognized the extreme danger of lead paint poisoning, particularly to young children, through passage of the Residential Lead-Based paint Hazard Reduction Act of 1972, 42 U.S.C.4852d. Protections regarding the fundamental health and safety hazards associated with lead paint are found in the U.S. Department of Housing and Urban Development's (HUD) Lead-Safe Housing Rule at 24 CFR part *35.* Sound public policy suggests that these protections also apply to the Federal Government's largest housing program for the creation of affordable housing, Treasury's LIHTC program. We write to urge OHCS to require all applicants for LIHTCs to follow HUD's Lead-Safe Housing Rule in Oregon. We note that the Treasury recently modified section 1 .42(5)(d)(2) of the Income Tax Regulations. This section, as modified, mandates that state housing credit agencies utilize either local health and safety codes or HUD's Uniform Physical Conditions Standards (UPCS) as the inspection standard for habitability and safety purposes. The UPCS at 24 CER part 5.703(f) requires that "IIt]he housing must comply with all requirements related to the evaluation and reduction of lead-based paint hazards and have available proper certifications of such (see 24 CFR part *35).”* Consequently, state housing credit agencies and tax credit property owners following and complying with the UPCS, are under an affirmative requirement to abide by the procedures for evaluating and reducing lead paint hazards. Unfortunately, the Treasury did not directly discuss in section 1 .42-(5)(d)(2) the specific types of lead paint control under 24 CFR part 35 that would govern the tax credit program. As a result, many state housing credit agencies are either confused about the appropriate lead paint evaluation and reduction procedures or have simply chosen to ignore the problem at the expense of thousands of children who reside in older properties receiving low income housing tax credits. Oregon should clarify that recipients of tax credits must comply with appropriate lead paint abatement policies. We emphasize, however, that this issue only impacts properties built before January 1, 1978, which is a small segment of the total LIHTC property-base. Consequently, most LIHTC properties will not be affected. In addition, the cost to those tax credit owners that are covered under these lead paint control rules will be minimal. For example, HUD estimated in its Economic Analysis of the Final Rule on Lead-Based Paint, issued on September 7, 1999, that the cost of compliance with this rule would be *$95* per unit in multi-family housing. Further, HUD estimated that the savings to the Federal Government in reduced future medical and special education costs as a result of compliance with these lead control statutes would be $840 per unit. It is also important to note that the existing

HUD guidance at 24 CFR part 35 has been successfully implemented in the private housing market in connection with the tenant-based section 8 housing program. This regulation has helped reduce lead-based hazards and has improved the lives of children while at the same time reducing the ultimate costs to the Federal Government. It should be applied uniformly to properties rehabilitated using low income housing tax credits. Thank you for the opportunity to comment on the draft QAP. We hope that the final QAP issued by OHCS will include all of the above issues.
Respectfully Submitted,
Edward Johnson
Oregon Law Center
813 SW Alder St. #500

Reply to:

Edward Johnson
Oregon Law Center
813 SW Alder St. #500
Portland OR 07205
RE: 2005-2006 State of Oregon Low Income Housing Tax Credit Qualified Allocation Plan (QAP)

Dear Mr. Johnson;
Thank you for your letter of April 1, 2004 in regard to proposed changes to the State of Oregon's QAP for 2005 - 2006. I will respond to the specific issues specifically addressed in your letter.

3. Lead Based Paint The department is very concerned with the potential presence of Lead Based Paint in housing developments particularly those projects where small children reside. Specifically, the LIHTC program does not require activities associated with the treatment, abatement and/or removal of lead based paint hazards. Other federal programs that provide funds to a project will require activities that reduce the hazards and risks associated with the presence of Lead Based Paint. OHCS will comply with 24 CFR part 35 as instructed by Treasury. I appreciate the time you have taken to identify your concerns with the proposed QAP. I trust I have addressed the issues included in your letter. Your participation in making revisions to the State of Oregon's Qualified Allocation Plan is especially valued.
Sincerely;
Karen Clearwater
LIHTC Program Representative

Recommendations

The medical literature is replete with case studies showing that rehabilitation of old housing units with lead-based paint causes severe childhood lead poisoning, unless specific procedures are employed to control dust, protect occupants, conduct specialized cleaning and other measures that are now widely accepted and well defined. For virtually all other federally assisted housing programs, these protective measures are now required by law and compliance is monitored. Yet an explicit and consistent national requirement to protect children from lead exposure from rehabilitation that is financed with low-income housing tax credits is currently absent. Such a uniform requirement would create a more predictable LIHTC market and would help to advance the nation’s goal of protecting children from lead poisoning.

Therefore, the Centers for Disease Control and Prevention should work closely with the Department of the Treasury, the Internal Revenue Service, the Department of Housing and Urban Development, the Department of Agriculture (which operates rural housing programs),EPA, other federal agencies, state governments, syndicators, developers and others to improve the inconsistent and unclear policy that currently exists.

It should not be the policy of the US government to subsidize the rehabilitation of older housing without ensuring that such housing is also safe and healthy for children.

An example of what a Memorandum of Understanding among the relevant federal agencies can be seen from the experience of the intersection of fair housing requirements and the Low Income Housing Tax Credit Program as shown below:

Low Income Housing Tax Credit

Memorandum Of Understanding Among The Department Of The Treasury, The Department Of Housing And Urban Development, And The Department Of Justice

Preamble

The United States Departments of the Treasury, Housing and Urban Development, and Justice enter into this memorandum of understanding (MOU) in a cooperative effort to promote enhanced compliance with the Fair Housing Act (ACT), 42 U.S.C. §§ 3601 et seq., for the benefit of residents of low-income housing tax credit properties and the general public.

It is recognized that the Department of Treasury's (Treasury) Internal Revenue Service (IRS) is responsible for administering and enforcing the tax laws in the low-income housing tax credit program under § 42 of the Internal Revenue Code, 26 U.S.C. § 42. In accordance with § 1.42-9 of the Income Tax Regulations, 26 C.F.R. § 1.342-9, low income housing tax credit properties are to be rented in a manner consistent with the Act. Noncompliance of these properties with the low-income housing tax credit provisions is required to be reported to the IRS by state housing finance agencies under 26 U.S.C. § 42(m)(1)(B)(iii).

It is recognized that the Department of Housing and Urban Development (HUD) is responsible for enforcing the Act, 42 U.S.C. §§ 3601 et seq. In doing so, HUD is required to investigate allegations of housing discrimination, attempt conciliation of the complaint, and determine whether there is reasonable cause to believe discrimination has occurred under the Act. Upon finding reasonable cause, HUD must bring the case before an administrative law judge, or if either party elects to have claims or complaints decided in a civil action, HUD must refer the complaint to the Department of Justice for prosecution in the United States District Court.

It is recognized that the Department of Justice (Justice) is responsible for enforcing the Act, 42 U.S.C. 3601 et seq. Pursuant to section 3614 of the Act, Justice may file a lawsuit whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of discrimination or denial of rights to a group of persons where such a denial raises an issue of general importance. Justice also may file a lawsuit upon referral of matters from HUD involving the legality of any state or local zoning or other land use law or ordinance and after receiving a referral from HUD following an election by a party to a HUD complaint to have the matter decided in a civil action. Justice may enter into settlement agreements and consent decrees with property owners to obtain compliance with the Act. In event a property owners fails to comply with the terms of the settlement agreement or consent decree, Justice may seek a court judgement to enforce the terms of the settlement agreement or consent decree.

1.Coordination of Notifying Low-Income Housing Tax Credit Property Owners about Charges, Lawsuits, and Other Actions

HUD and Justice will identify low-income housing tax credit properties for which there is: 1) a charge by the Secretary of HUD for a violation of the Act; 2) a probable cause finding under a substantially equivalent fair housing state law or local ordinance by a substantially equivalent state or local agency; 3) a lawsuit under the Act filed by Justice; or 4) a settlement agreement or consent order entered into between HUD or Justice and the owner of a low-income housing tax credit property. HUD or Justice will then transmit the address of the property and a summary of these actions to the appropriate state housing finance agency, using a current list of contacts and addresses of state housing finance agencies provided by the IRS.

Upon the state housing finance agencies reporting this information to the IRS (using Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance), the IRS will send a letter to involved property owners notifying them that a finding of discrimination, including an adverse final decision by the Secretary of HUD, an adverse final decision by a substantially equivalent state or local fair housing agency, or an adverse judgement by a federal court, could result in the loss of low-income housing tax credits. Similarly, the IRS will also send notification to property owners that a judgement enforcing the terms of a settlement agreement to property owners that a judgement enforcing the terms of a settlement agreement or consent decree could result in the loss of low-income housing tax credits. The IRS, HUD, and Justice will collaboratively develop the model letters addressed to property owners and other entities. HUD and Justice will also send to the IRS and the appropriate state housing finance agency a summary of the above-referenced actions, describing relevant information such as the precise nature of the violation, the dates of the violation, and proposed corrective actions.

1.Designating Contacts and Interagency Technical Assistance and Training

Hud and Justice will designate personnel to provide the IRS upon request with technical assistance and problem resolution concerning emerging civil rights and discrimination matters involving the administration of the low-income housing tax credit program (e.g., accessibility issues, section 8 vouchers, civil rights interpretative issues, and published guidance). In addition, HUD and Justice will provide training upon request to a few designated IRS personnel about the Act. The IRS will designate personnel to provide technical assistance and training upon request to HUD and Justice personnel on general tax administration issues under the low-income housing tax credit program, in a manner consistent with the IRS's disclosure limitations contained in section 6103 of the Internal Revenue Code.

1.Training for State Housing Finance Agencies and Others

HUD and Justice will make training available upon request to state housing finance agencies and other entities (e.g., developers, property management companies, syndicators) on the Act, including training on inspecting for Act accessibility criteria referenced in the uniform physical condition standards in 24 CFR 5.703. HUD will also encourage substantially equivalent state and local fair housing agencies to invite state housing finance agencies and other entities to participate in civil rights training developed by the substantially equivalent agencies.

1.HUD's Pilot Program to Train Architects on the Act's Accessibility Requirements

HUD has begun the process of developing a pilot program in one region of the country to provide training and technical assistance to architects and others on the accessible design and construction requirements of the Act. HUD has also proposed expanding this program to four regions in FY 2001. HUD will promote participation in the program by members of the American Institute of Architects, including those involved with the design and construction of low-income housing tax credit properties.

1.Cooperation in Research Concerning Low-Income Tax Credit Properties

HUD and Treasury will cooperate in research sponsored by either Department concerning low-income housing tax credit properties.

1.Cooperation to Identify and Remove Unlawful Barriers to Section 8 Tenants

In consultation with the state housing finance agencies, HUD, Justice, and the IRS will cooperate in in identifying and removing unlawful barriers to occupancy of low-income housing tax credit properties by individuals holding section 8 vouchers.

1.Cooperation in Assisting Syndicators of Low-Income Housing Tax Credit

HUD, Justice, and the IRS will cooperate in helping the national associations of investment syndicators of low-income housing tax credit properties to enhance practices by syndicators in monitoring and promoting compliance with the Act and the low-income housing tax credit program.

1.Annual Civil Rights Meeting Among Federal Agencies and Participation in National Conference of State Housing Finance Agencies

HUD, Justice, treasury, and other interested federal agencies will meet annually to discuss emerging civil rights issues and new methods and programs to increase civil rights compliance in the low-income housing tax credit program. IRS will encourage the state housing finance agencies to invite HUD and Justice to than annual national conference of state housing finance agencies. HUD and Justice agree to designate personnel to conduct training and discuss emerging civil rights issues at the national conference.

Implementation

This MOU will become effective 30 days from the date of the last signature on this documents.

The parties agree to confer on the interpretation and application of the memorandum as necessary and to conduct a mutual annual review of its operation.>

Nothing in this MOU shall be construed to impair or affect i) HUD's or Justice's authority to enforce the Act, ii) the IRS's authority to administer the low-income housing tax credit program, including complete administrative discretion to deny low-income housing tax credits in the event of a violation of the ACT, or iii) the IRS's disclosure limitations under section 6103 of the Internal Revenue Code.

Conclusion

A clear and consistent policy, such as was completed for fair housing issues, would advance the LIHTC program, eliminate confusion and inconsistent guidance and policy, incorporate sound public health principles and most important of all, ensure that children living in houses rehabilitated with low-income housing tax credits are safe, enabling the nation to move closer to the goal of eliminating childhood lead poisoning, an entirely preventable disease.

Endnotes and Bibliography

[1] 24 CFR 5.703(f)
[2] National Council of State Housing Agencies. Low-Income Housing Tax Credit Fact Sheet http://www.ncsha.org/uploads/Housing_Credit_Fact_Sheet.pdf
[3] National Association of State and Local Equity Funds. Creation of the Low Income Housing Tax Credit Program. http://www.naslef.org/creation.html
[4] Personal communication. Jim Rieker Midwest Housing Equity Group. February 2007
[5] National Council of State Housing Agencies. Low-Income Housing Tax Credit Fact Sheet http://www.ncsha.org/uploads/Housing_Credit_Fact_Sheet.pdf

[6] Jackson P. An Introduction into the Low Income Housing Tax Credit Program. Congressional Research Service. RS 22389 Dec 12, 2006
[7]Meyer, P., Pivetz, T., Dignam, T., et al., 2003. Surveillance for elevated blood lead levels among children 1997–2001. Morb. Mort. Wkly. Rep. 52, SS-10.
[8] Personal communication. Jim Rieker Midwest Housing Equity Group. February 2007
[9] Personal communication. Stockton Williams Enterprise Community Partners January 2007
[10] Internal Revenue Service. Compliance Guide for the Low Income Housing Tax Credit Program, January 2007
[11] National Conference of State Housing Agencies Working Group on Housing Credit Allocation and Underwriting Recommended Practices (Dec 2003) available: http://www.ncsha.org/uploads/03_Report_with_Links_and_Cover.pdf
[12] Affordable Housing Investors Council, AHIC Recommended Underwriting Guidelines. Available: http://www.ahic.org/ahicportal/uploads/AHIC%20Underwriting%20Criteria%20.pdf
[13] Personal communication with John C. Hughes, Jr., National Council of State Housing Agencies. And, Stockton Williams, Enterprise Community Partners
[14] National Survey of Lead and Allergens in Housing: Final Report, Oct 31, 2002. (Table 4.1) Available: http://www.hud.gov/offices/lead/techstudies/NSLAH_V1.doc
[15] Personal Communication, Michael Hollar, U.S. Department of Housing and Urban Development, Dec 2006