



JULY 2023

# HOUSING FINANCE AGENCY TOOLKIT

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## YEAR 15 RIGHT OF FIRST REFUSAL



NATIONAL  
HOUSING  
TRUST

Tackling the nation's affordable housing crisis requires ensuring that existing affordable properties are preserved, rather than converted into higher-cost housing. Given that the Low Income Housing Tax Credit (Housing Credit) program has financed more than 3.7 million affordable properties – nearly all of the affordable rental housing built and preserved since the program was authorized in 1986 – preserving this stock must be an integral part of any strategy to address national affordable housing needs.

National Housing Trust (NHT) is leading a national effort to uplift concerns that outside parties motivated solely by profits have sought to unreasonably limit the circumstances in which the nonprofit Right of First Refusal (ROFR) may be exercised, taking advantage of ambiguity that exists in the federal ROFR statute. Challenges to the ROFR have wide-ranging and detrimental impacts on low-income residents who call Housing Credit properties home, in addition to nonprofit general partners who are committed to the long-term preservation of affordable housing communities.<sup>1</sup>

***Strengthening a nonprofits' ROFR to purchase a Housing Credit property at Year 15 to ensure long-term affordability is an essential tool in the preservation toolbox.***

This toolkit of policy and regulatory options offers solutions for state and local Housing Finance Agencies (HFAs) or other Housing Credit allocating agencies to protect affordable housing assets in their states. Divided into two sections, this report outlines policy approaches that which can be implemented in a Qualified Allocation Plan (QAP), Consolidated Request for Proposals, or a policy manual to protect properties receiving future allocations of Housing Credits, as well as technical assistance approaches to protect existing Housing Credit properties. These solutions have already been adopted by at least 20 allocating agencies, and these examples are shared throughout the report as best practices.

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<sup>1</sup> *Investors Mine for Profits in Affordable Housing, Leaving Thousands of Tenants At Risk*, WBUR (April 2021); *Refusing the Right of First Refusal*, Branden Duong from Shelterforce (October 2020).

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For the full text from each state's QAP or accompanying document, please see the Appendices on pages 16 – 51. While challenges to general partner's project-transfer rights involve both nonprofit and for-profit general partners, these solutions focus on strengthening the nonprofit Right of First Refusal (ROFR).

Contact [Moha Thakur](#) at National Housing Trust learn more about the Right of First Refusal in the Housing Credit Program.

Additional resources can be found on our website here: <https://nationalhousingtrust.org/our-work/policy-innovation/strengthening-housing-tax-credit-allocation/housing-credit-year-15>

## Summary of Policy and Regulatory Actions

### KEY POLICIES TO PROTECT HOUSING CREDIT PROPERTIES

1. Implement Protective and Clarifying Language
2. Review Investor Eligibility
3. Protect Property Reserves
4. Ease the Process to Make Offers, Triggering ROFR
5. Automatic Agreement Changes to Reflect Changes in Federal Law

### TECHNICAL ASSISTANCE TO PROTECT HOUSING CREDIT PROPERTIES

1. Early Intervention to Identify Properties Approaching Year 15
2. Technical Assistance to Nonprofits



## Key Policies to Protect Housing Credit Properties

### IMPLEMENT PROTECTIVE AND CLARIFYING LANGUAGE

The ambiguity in the federal statute that governs the nonprofit ROFR in the Housing Credit program is often taken advantage of by aggregators<sup>2</sup>, to their benefit. Common tactics used by investors to challenge the nonprofit ROFR at Year 15 include erroneously claiming that the ROFR included in Section 42 is the same as a common law right of first refusal, disputing the calculation of the ROFR purchase price, and requiring a bona fide offer from an unrelated third party to trigger ROFR rights. By including protective and clarifying language, ROFR will be recognized on behalf of the nonprofit grantee, thereby reducing the ambiguity and ensuring the smooth exercise of the ROFR.

To protect properties receiving a future allocation of Housing Credits, HFAs should include specific clarifying language to ensure the ROFR is recognized on behalf of the nonprofit grantee, including that:

- The ROFR outlined in Section 42(i)(7) is not the same as a right of first refusal under statutory, court-interpreted, or common law.
- The ROFR purchase price should be calculated as the minimum purchase price permissible under Section 42.
  - This ROFR Purchase Price should not automatically include unpaid fees or loans and should be calculated by the project accountants and deemed final other than due to manifest error.
- The ROFR cannot be conditioned upon receipt of a bona fide offer from any party, including a third party.
- The general partner or the owner are authorized and directed to execute all documents necessary to affect the sale and transfer pursuant to the ROFR.
- The ROFR may be exercised for a minimum of 24 months following the end of the compliance period, and thereafter 12 months to close.

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<sup>2</sup> [Beware the Aggregator](#) by David Davenport. Tax Credit Advisor (April 2017)

## Best Practices

### District of Columbia states:

- A right to consent to the exercise of a ROFR
- The ROFR may not be conditioned upon receipt of a bona fide or third-party offer
- The ROFR in Section 42(i)(7) is not the same as a common law ROFR.
- The ROFR to be exercisable for a period of at least 24 months following the end of the Compliance Period, in addition to least 12 months to close following exercise
- The ROFR price does not exceed debt plus taxes plus amounts owed to the investor as determined by the project accountants.

### New York City requires:

- A Letter of Intent from a qualified equity provider that provides for a ROFR with eight listed features including:
  - o Three options for general partners to transfer ownership to a nonprofit through the ROFR
    - 1) subject to the consent of the limited partner, the general partner may sell the project to a nonprofit grantee pursuant to the ROFR;
    - 2) without the consent of the owner, the property may be sold to the nonprofit after a bona fide third party offer is made; and
    - 3) if the project is offered for sale publicly, the general partner may sell the project to the nonprofit grantee.
- Language in the LOI must be included in the partnership agreement

## REVIEW INVESTOR ELIGIBILITY

Investors challenging the nonprofit ROFR may have a history of engaging in practices that extract resources out of affordable housing. By reviewing investor eligibility, either during the Housing Credit application process or investor transfer, the agency can limit the number of affordable housing properties that are awarded or transferred to these entities.

To limit the involvement of these investors, HFAs should require Agency approval of investors based on standards designed to discourage entities that have a history of engaging in practices that extract resources out of affordable housing. These standards include:

- Agency approval for transfer of investor partner or equity provider;
- Agency approval or Letter of Intent to vet new investor or equity provider;
- Debar investor parties that have stymied ROFR in other states, including those that have refused to honor a ROFR or been involved in a lawsuit challenging the exercise of a ROFR.

Some states clearly define investors that are excluded from participating in the Housing Credit program due to their actions undermining the right of first refusal / right of first option, requesting a qualified contract, or in other ways shorten the length of affordability of Housing Credit properties.

If equity providers face regulatory sanctions impeding their ability to do new business within a state, this should cause them to consider modifying their practices with respect to existing properties. This type of policy, however, may not be effective with investors who are simply acquiring control of investor limited partnerships. This approach evaluates an investor's eligibility for future deals based on how they have handled the ROFR on existing properties, and therefore may impact those investors who are in the business of originating new financing or those who wish to continue to participate in the affordable housing industry in future. Alternatively, this policy objective could be achieved by giving credit applicants extra points for selecting an equity provider who has not engaged activities to deny ROFR contractual rights of nonprofits.

### **Best Practices**

**Massachusetts** excludes:

- Equity providers who have been involved in "aggregator" activity "seeking to undermine the exercise of a LIHTC right of first refusal/right of first option..."

**Oregon** includes:

- Specific terms in the extended use agreement requiring notice and approval by Agency of transfers of partnership or member interests.
- Agency intention to debar, from the Housing Credit Program, project sponsors, investors, syndicators, or lenders who have a demonstrated a history of conduct detrimental to long-term compliance with extended use agreements, whether in Oregon or another state, and the provision of affordable tax credit units.

## **PROTECT PROPERTY RESERVES**

When equity providers refuse to leave a Housing Credit partnership, many may negotiate for a large monetary payout in exchange for their exit. Equity providers who drain resources from a property are directly undermining the mission of a nonprofit and its ability to serve its residents and provide safe, stable, affordable housing. Therefore, ensuring property replacement reserves remain with the property ensures that they are used to maintain the property and serve residents, rather than pay off the equity provider. However, there may be other reserves

on the property that are not covered by this policy and will mean that funds will need to be obtained from elsewhere to pay out an Equity provider.

### **Best Practices**

#### **California** requires:

- all unexpended funds in project reserve accounts shall remain with the project to be used for the benefit of the property and/or its residents.

The Agency notes that many limited partnership agreements (LPAs) do not reflect this requirement but rather allow distribution of reserves as cash flow or use of the reserves for other purposes. However, owners of all projects that received reservations of tax credits in or after 1997 are subject to the requirement for reserves to remain with the project regardless of any LPA language to the contrary.

#### **Nevada** ensures:

- Property replacement reserves must remain with the property until the end of the extended use period, used exclusively for their intended purpose and not be removed or transferred to any other entity.

## **EASE THE PROCESS TO MAKE OFFERS, TRIGGERING ROFR**

Some existing partnership agreements specifically require a bona fide third party offer to purchase a property to trigger the ROFR. In addition, some courts have ruled that there must be a bona fide third party offer under state common law even when the agreement does not include any language requiring such. Because of the difficulty of getting a third party to make a bona fide offer that is higher than the ROFR statutory price, it is difficult, if not impossible, to secure such offers that are necessary to trigger the ROFR. To address this problem, allocating agencies may either:

- allow an offer solicited by the GP or ROFR grantee in order to trigger the ROFR to be a bona fide third party offer;
- allow the holder of the ROFR to make the offer on the property that triggers the Right of First Refusal;
- allow the allocating agency to hold and trigger the ROFR; or
- support the creation of a special entity endowed with the financial resources and capacity to make bona fide third party offers. Specifically, HFAs could provide financing to back these offers and/or recruit other parties to establish and manage this entity.

## **Best Practices**

### **New York City** encourages:

- Parties to define the term “bona fide third party” in both the letter of intent and the Agreement. At a minimum, the letter of intent and Agreement should provide that an offer will not cease to be a bona fide third party offer merely as a result of such offer having been solicited by the GP or ROFR grantee.

### **Vermont** requires:

- Affordability into perpetuity as well as the option to provide a ROFR to sell a property to a nonprofit at the end of the 15-year compliance period.
  - o The ROFR, as defined in Vermont, allows a nonprofit (if part of the limited partnership) to make an offer on the property that then triggers the ROFR to purchase the property at Year 15.
  - o If there is no non-profit partner, the Agency holds the ROFR.

## **AUTOMATIC AGREEMENT CHANGES TO REFLECT FEDERAL LAW**

Advocates have pushed for changes to the federal ROFR statute that will retroactively and prospectively provide protective and clarifying language. The most recent attempt to insert language into federal legislation was in 2021. In that instance, Congress proposed additional legislation to amend Section 42(i)(7) to address the disputes to the nonprofit Right of First Refusal. While this legislation was not passed by Congress, NHT and other advocates continue to fight for protecting and clarifying language to be added to federal legislation.

For current partnerships, the proposed legislation would:

- i. Allow the inclusion of partnership assets related to the building in the definition of property;
- ii. Allow the option holder to exercise the right of first refusal without requiring the approval of an investor or requiring a bona fide third-party offer;
- iii. Change the purchase price to include only debt and not debt plus exit taxes; and
- iv. Clarify that the ROFR can be exercised through purchasing partnership interests and the property.

For future partnerships, the proposed legislation would:

- i. Convert the nonprofit ROFR to a purchase option for agreements entered into after passage would change the nonprofit ROFR to be a simple purchase price and remove exit taxes.

Importantly, these proposed changes to the statute would not change any language in partnership agreements where there is explicit language and clarification around the nonprofit ROFR, simply those where there is ambiguity.

As advocates work to update federal legislation, states should include language to allow for automatic changes to reflect changes in the federal ROFR statute when amended through federal legislation.

### **Best Practices**

**New York City** and **Virginia** require:

- Partnership agreements to include language that automatically converts the ROFR to a purchase option as proposed in pending federal legislation that would amend section 42(i)(7), the ROFR safe harbor in the Internal Revenue Code.

**Table 1: Summary of Tactics used to Challenge, and Key Policies to Strengthen, the ROFR**

Key HFA Policy	Tactic Employed to Challenge the ROFR	Solution to Strengthen the ROFR	HFAs that have Adopted Solutions
<b>Implement Protective and Clarifying Language</b>	Taking the position that the Section 42(i)(7) ROFR is the same as a common law right-of-first-refusal.	Clarify that the ROFR outlined in Section 42(i)(7) is not the same as a right of first refusal under statutory, court-interpreted, or common law.	Indiana Maine Massachusetts New Hampshire New York City Oregon Virginia Washington, D.C.
	Disputing the calculation of the ROFR purchase price.	Clarify that the ROFR purchase price should be calculated as the minimum purchase price permissible under Section 42.	California Colorado Georgia Indiana Maine Massachusetts Nebraska New Hampshire New York City Oregon Virginia Washington, D.C.

*Please note that links to Agency websites or policy documents may have expired since publishing. Please reach out to National Housing Trust with any concerns.*

	Claiming that the investor partner has the authority to make or limit decisions on behalf of the partnership.	Clarify that the nonprofit has the authority to take any actions that could trigger the ROFR and close on the sale of the property through the ROFR.	Maine New York City Vermont Washington, D.C.
<b>Review Investor Eligibility</b>	Outside parties, who may subsequently challenge the conditions and scope of the ROFR, acquire the investor partnership in Housing Credit properties.	Require agency approval of the transfer of investor interests based on specific standards.	California Idaho Maine Nebraska New York Oregon Pennsylvania Rhode Island Tennessee Virginia Washington
	Outside parties who have previously challenged a ROFR continue to participate in the investor partnership of Housing Credit properties.	Require a Letter of Intent to vet investor eligibility.	Maine Massachusetts New Hampshire Pennsylvania Oregon Virginia Washington, D.C.



<b>Protect Property Reserves</b>	Investors make monetary demands to exit the partnership, subsequently depleting property reserves.	Require property replacement reserves to remain with the property.	California Nevada
<b>Ease Process to Make Offer, Trigger ROFR</b>	Claiming that a bonafide offer from an unrelated third party is necessary to trigger the ROFR.	Clarify that the nonprofit ROFR cannot be conditioned upon receipt of a bona fide offer from any party, including a third party.	New York City Washington, D.C.
	Claiming that a bonafide offer from an unrelated third party is necessary to trigger the ROFR.	Allow holder of ROFR or HFA to Trigger ROFR.	Vermont
<b>Changes to Federal Policy</b>	Lobbying against changes to the federal ROFR statute.	Ensure automatic change to state law to reflect changes in federal law.	New York City Virginia

## Technical Assistance to Protect Existing Housing Credit Properties

### EARLY INTERVENTION TO IDENTIFY PROPERTIES APPROACHING YEAR 15

Ideally, allocating agencies should be in contact with nonprofit owners by Year 12 to prepare them for Year 15 discussions with their investors for the purpose of arranging an orderly exit. This would be undertaken to ensure nonprofits understand their rights under the partnership agreement and are prepared to assert those rights in discussions with their investors.

Supporting nonprofits by Year 12 requires an allocating agency or state to track Housing Credit properties, accounting for each property and, at minimum, its related affordability period. This will allow an agency to reach out to an owner / developer to support a nonprofit prior to and during Year 15.

#### Best Practice

**Florida** accomplishes this through:

- the Florida Housing Data Clearinghouse (FHDC), which provides public access to data about housing needs and supply, subsidized rental housing, and household demographics across all Florida communities. The FHDC is jointly funded by Florida Housing Finance Corporation and the Shimberg Center for Housing Studies at the University of Florida.

### TECHNICAL ASSISTANCE TO NONPROFITS

Not all nonprofit general partners in Housing Credit properties are familiar with their rights under the partnership agreement or under Section 42. Faced with an unreasonable demand from their limited partner, and often without the resources to mount a legal challenge, many nonprofits are inclined to find a way to pay the investor to go away, perhaps by liquidating property reserve funds, borrowing against the nonprofit's balance sheet, or refinancing the property with more debt. Allocating agencies can help protect the affordable housing assets in their states, and the capacities of their nonprofit affordable housing providers, by educating them about their rights and providing technical assistance on how to deal with their investor.

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## APPENDIX A

### CALIFORNIA

#### TAX CREDIT ALLOCATION COMMITTEE REGULATIONS

##### Compliance:

Regulatory Agreement. All recipients of Tax Credits, whether Federal only, or both Federal and State, are required to execute a regulatory agreement, as a condition to the Committee's making an allocation, which will be recorded against the property for which the Tax Credits are allocated, and, if applicable, will reflect all scoring criteria proposed by the applicant in the competition for Federal and/or State housing Credit Ceiling.

(1) For all projects receiving a reservation of competitive 9% federal tax credits on or after January 1, 2016 for which all general partners will be Qualified Nonprofit Organizations, the partnership agreement shall include a Right of First Refusal ("ROFR") for one or more of the nonprofit general partners to purchase the project after the end of the 15-year federal compliance period. The price to purchase the project under this ROFR shall be the minimum price allowed under IRC Section 42(i) plus any amounts required to be paid to the tax credit investors that remain unpaid for approved Asset Management Fees and required payments under the limited partnership agreement for tax credit adjusters that remain outstanding at the time of the sale. The applicant shall demonstrate compliance with this requirement prior to the issuance of the 8609 forms.

(2) For all projects receiving a reservation of 4% and 9% federal tax credits on or after January 1, 2016, the regulatory agreement shall require written approval of the Executive Director for any Transfer Event.

##### Definition of Transfer Event:

"Transfer Event" shall mean (i) a transfer of the ownership of a project, (ii) the sale or assignment of a partnership interest in a project owner and/or (iii) the refinancing of secured debt on a project. The following shall not be deemed a Transfer Event: (i) the transfer of the project or a partnership or membership interest in a project owner in which reserves remain with the project and the debt encumbering the project is not increased, refinanced or otherwise modified, (ii) the refinancing of project debt which does not increase the outstanding principal balance of the debt other than in the amount of the closing costs and fees paid to the project lender and third parties as transaction Regulations Section 10302 - 10305 costs, provided that reserves remain with the project, (iii) the replacement of a general partner by a limited partner upon the occurrence of a default by a general partner in accordance with partnership agreement of the project owner, (iv) a transfer pursuant to a foreclosure or deed in lieu of foreclosure to a non-related party, (v) a "Subsequent Transfer" pursuant to Section 10320(b)(4)(B) hereof, (vi) a transfer of the ownership of a project subject to an existing tax credit regulatory agreement with a remaining term of five (5) or less years if the transfer is made in connection with a new reservation of 9% or 4% tax credits, or (vii) the sale of a project, or the sale or assignment of a partnership interest in a project owner, to an unrelated party for which the parties entered into a purchase agreement prior to October 9,

2015. Notwithstanding the foregoing, the term “Transfer Event” shall be applicable only to projects in which at least 50% of the units are Tax Credit Units.

### [California Tax Credit Allocation Committee Memo](#)

[RE: Guidance relating to placed in service packages and limited partnership agreement language relating to reserves](#)

Dated August 2, 2018

Since 1997, TCAC’s regulations have generally required that “all unexpended funds in project reserve accounts shall remain with the project to be used for the benefit of the property and/or its residents.” The one exception is that the operating reserve may be released following achievement of a minimum annual debt service ratio of 1.15 for three consecutive years following stabilized occupancy only to pay deferred developer fees.

It has recently come to TCAC’s attention that many limited partnership agreements (LPAs) do not reflect this requirement but rather allow distribution of reserves as cash flow or use of the reserves for other purposes. Whereas regulations have the force of law, TCAC reminds owners of all projects that received reservations of tax credits in or after 1997 that they are subject to the requirement for reserves to remain with the project regardless of any LPA language to the contrary. TCAC may issue program sanctions for violations of this requirement.

## APPENDIX B

### COLORADO

#### 2023-2024 QUALIFIED ALLOCATION PLAN

##### Right of First Refusal

If an Owner of a Housing Tax Credit project is interested in selling the property after the 15-year Housing Tax Credit compliance period, then the Owner can opt to sell the property to a qualified nonprofit organization, a government agency, or certain types of tenant organizations. A Housing Tax Credit project will not lose its tax benefits if there is a Right of First Refusal in favor of such parties to purchase the property for the Code-mandated minimum purchase price. The Code defines the minimum purchase price as the sum of the principal amount of outstanding indebtedness secured by the building (other than indebtedness incurred within the five-year period ending on the date of the sale to the tenants), and all federal, State, and local taxes attributable to such sale.

##### Ownership Changes

Throughout the Housing Tax Credit Extended Use Period, owners must advise CHFA in writing prior to any building disposition, including transfers of partial interest in the ownership entity and sales of ownership entities. If an owner is considering disposing of a building or an interest in a building, CHFA's written consent is required prior to any such transfer. Transfer fees may also be required. CHFA will consent to the transfer only if the purchaser is, in CHFA's discretion, reasonably expected to continue to operate the property as a qualified low-income building for the duration of the Extended Use Period. The development, management agent, and owner must be in compliance, current on submissions, and in good standing with CHFA programs at the time of the proposed transfer to obtain consent for an ownership transfer. To begin the process for requesting CHFA's consent to an ownership transfer, the current owner must notify in writing both the Program Compliance Officer assigned to the property and CHFA's Multifamily Asset Manager. Depending on the new owner's experience with LIHTC in Colorado, CHFA may require, as a condition to the transfer consent, that CHFA-administered compliance training is completed and/or that a tax credit compliance consultant be engaged.

## APPENDIX C

### DISTRICT OF COLUMBIA

#### 2023 QUALIFIED ALLOCATION PLAN

##### Non-profit Participation and Right of First Refusal

Projects in which a Qualified Non-profit Organization holds a right of first refusal to purchase the Project at the end of the Compliance Period based on IRC Section 42(i)(7), as may be amended from time to time, must meet several requirements. The right of first refusal may be exercised anytime within a twenty-four (24) month period, or longer period, after the close of the Compliance Period. Once exercised, the Qualified Non-profit Organization shall have at least twelve (12) months to close on the purchase of the Project or the interests of the nonmanaging members of the Ownership Entity. The Qualified Non-profit Organization may assign the right of first refusal to a governmental entity, another Qualified Non-profit Organization, or a tenant organization. In all instances where the non-managing members of the Ownership Entity have the right to consent to the exercise or assignment of the right of first refusal, such consent shall not be unreasonably withheld, conditioned or delayed. The non-managing members of the Ownership Entity may not withhold consent for a non-material breach of the Ownership Entity organizational documents. The purchase price shall be calculated by the Project accountants and shall be based on the minimum purchase price in IRC Section 42(i)(7)(B) plus the amount needed to pay any unpaid fees, loans or other amounts due to the non-managing members of the Ownership Entity from the managing member or general partner, as applicable.

The right of first refusal cannot be conditioned upon receipt by the Owner of a bona fide offer from any party, including a third party. The right of first refusal as outlined in IRC Section 42(i)(7), as may be amended from time to time, is not the same as a Right of first refusal under statutory, court-interpreted, or common law.

##### Financing Letters and Terms

As part of each LIHTC equity Letter of Intent, applicants are required to ask potential investors or syndicators to submit a written acknowledgement that they have never sought to achieve early termination of a LIHTC extended use agreement through the qualified contract process, nor have they sought to undermine the exercise of a right of first refusal or a non-profit's option to purchase in prior transactions as described in more detail in the Non-Profit Participation and Right of First Refusal section.

## APPENDIX D

### GEORGIA

#### 2022 QUALIFIED ALLOCATION PLAN

##### Right of First Refusal

One (1) point to Applicants for committing to provide a right of first refusal to a qualified nonprofit organization or a local housing authority (or a wholly-owned subsidiary) if the Owner elects to transfer an interest in the property during the Compliance and Extended Use Period in accordance with DCA requirements and Section 42(i)(7) of the Code. All applicants are eligible to receive points under this category, regardless of whether the sponsor is a nonprofit or a for-profit organization. Ownership transfers for the purposes of resyndication will not trigger the right of first refusal.

##### Exhibit A of Appendix II, DCA Right of First Refusal (ROFR) Process

Applicants receiving points under Scoring Section Extended Affordability Commitment, subsection C. Right of First Refusal, commit to provide an ROFR to a qualified nonprofit organization or a local housing authority or a wholly-owned subsidiary of such organization in accordance with Section 42(i)(7), the requirements in this section, and subject to DCA approval of the terms. The ROFR process is only triggered when a third party makes an offer on the property or for an ownership interest in the partnership.

All applicants are eligible to receive points under this category, regardless of whether the sponsor is a nonprofit or a for-profit organization. Additionally, ownership transfers for purposes of resyndication will not trigger the right of first refusal process.

The price in an ROFR transaction must not exceed the greater of the minimum purchase price set forth in Section 42(i)(7) of the Code or fair market value of the property, the latter defined to be the as-is restricted and encumbered value of the property, as determined by an appraisal to be commissioned by DCA and paid for by the Owner. DCA will commission the appraisal within thirty (30) days of receiving notification from the Owner of a third party offer.

The ROFR posting period commences on the date DCA posts the property on the DCA website for purposes of soliciting eligible offers under the ROFR process. DCA will post the property on its website once the maximum allowable price has been established according to the appraisal. The maximum duration of the ROFR posting period is 180 days.

In order to be eligible to make an offer on the property or partnership during the ROFR posting period, a potential buyer must meet the following requirements:

- A nonprofit buyer must conform to the “qualified nonprofit” definition set forth in Section 42(h)(5)(C) of the Code;
- All buyers must have achieved the highest standard for developer qualifications in DCA’s most recent review of a tax credit application from the entity. This qualification determination must have been issued in the five (5) years prior to the commencement of the ROFR posting period.

The Owner may not accept a third party offer on the property until the ROFR requirement is satisfied. The Owner is free to accept or reject any offer from an eligible buyer during the ROFR posting period, and the Owner may, at their sole discretion, accept an offer during the ROFR posting period that is less than the maximum allowable price. However, if the Owner receives an offer from an eligible buyer at the maximum allowable price during the ROFR posting period and the Owner does not accept the offer, then the ROFR requirement is not satisfied and the Owner may not accept a third party offer upon expiration of the ROFR posting period. If the Owner does not receive an offer from an eligible buyer at the maximum allowable price during the ROFR posting period, then following the end of the ROFR posting period the Owner may accept any third party offer.

The ROFR transaction is not required to close by the end of the ROFR posting period. However, if the Owner and eligible buyer fail to close following the end of the ROFR posting period and DCA determines that failure to close was the fault of the Owner, the ROFR requirement is not satisfied. The Owner may accept a third party offer on the property or partnership if DCA determines that failure to close was the fault of the eligible buyer.

## APPENDIX E

### IDAHO

#### 2022 QUALIFIED ALLOCATION PLAN

In addition to the federal requirements listed above, the association requires that prior to the closing of the equity financing, a right of first refusal (rofr) shall be negotiated with the tax credit investor for the benefit of a "qualified nonprofit organization" as defined in irc section 42(h)(5)(c), as the holder of such rofr and to be effective after the end of the 15year tax credit compliance period. The rofr shall be consistent with irc section 42(i)(7).

Changes in ownership and/or property management agent any changes in the ownership entity or the property management agent, subsequent to reservation and throughout the extended use period, must be approved in writing by the association. Failure to secure such approval may result in forfeiture of the tax credit.

## APPENDIX F

### INDIANA

#### 2023-2024 QUALIFIED ALLOCATION PLAN

##### Part 7.5 Changes in Ownership, Section B Nonprofit Right of First Refusal:

IRC Section 42(i)(7) provides nonprofit general partners a Right of First Refusal (ROFR). The ROFR can be used to obtain eventual ownership of the property at a minimum purchase price equivalent to the outstanding debt plus exit taxes. The provision allows nonprofit general partners to gain ownership of RHTC properties as their investors exit after Year 15 of the compliance period.

To ensure that nonprofit general partners have this ROFR, either the Limited Partnership Agreement (LPA) or a separate ROFR Agreement must include specific language acknowledging the nonprofit general partner's ability to exercise the ROFR. The ROFR Purchase Price should be the minimum purchase price permissible under Section 42(i)(7)(B). IHEDA will review the LPA or ROFR agreement prior to issuance of Form 8609 to ensure this requirement has been met.

## APPENDIX G

### MAINE

#### 2023-2024 QUALIFIED ALLOCATION PLAN

##### Ineligible Applicants.

An Application will be deemed ineligible if one or more of the following has occurred:

d) has sought to undermine the exercise of a right of first refusal or purchase option with respect to any LIHTC Project by: (i) refusing to honor a right of first refusal or purchase option; or (ii) involvement in a lawsuit challenging the exercise of a right of first refusal or purchase option.

##### Threshold Requirement for Affordability:

If the Applicant, general partner, managing member, developer, or sponsor of the Project is a Qualified Nonprofit Organization, the Applicant must submit a letter of intent from an investor (and, in the event of any change in investor, the replacement investor) in which the investor agrees to the granting of a right of first refusal ("ROFR") to the Qualified Nonprofit Organization on terms that at a minimum satisfy the threshold requirements set forth in Appendix E. The investor must also agree in the letter of intent that the ROFR complying at a minimum with the threshold requirements in Appendix E will be included in the Project owner's limited partnership agreement or limited liability company operating agreement.

## APPENDIX E

### Threshold Requirements For Purchase Options/Rights Of First Refusal

I. The Purchase Options must:

1) grant to one or more of the general partner, managing member, developer or sponsor an irrevocable option to purchase the Project at a purchase price not more than the greater of: (a) its fair market value as encumbered by the Extended Use Agreement and any other restrictions of record; and (b) the sum of: (i) the outstanding debt secured by the Project, (ii) the amount of the limited partner's or non-managing member's federal, state and local tax liability resulting from the sale of the Project, and (iii) all amounts owed to the limited partner or non-managing member under the limited partnership agreement or limited liability company operating agreement (the "Project Option Price");

2) grant to one or more of the general partner, managing member, developer or sponsor an irrevocable option to purchase the interest of the limited partner(s) or non-managing member(s) in the Project ownership entity ("Ownership Interest") at a purchase price not more than the amount the limited partner(s) or non-managing member(s) would have received on

an after-tax basis if the Project had been sold at the Project Option Price and the proceeds distributed pursuant to the terms of the limited partnership agreement or limited liability company operating agreement;

3) be exercisable beginning at the earlier of: (a) the expiration of the Compliance Period; or (b) the exit of or change of controlling interest in the limited partner or non-managing member occurring after the expiration of the Credit Period;

4) expire no earlier than 36 months after the expiration of the Compliance Period; and 5) give the holder of the option a minimum of 12 months to close on the purchase of the Project or the Ownership Interest after exercise of the option or such longer period required by any lender(s) or other party whose consent to the transfer is required.

II. The right of first refusal (ROFR) must:

1) grant to a Qualified Nonprofit Organization an irrevocable and exclusive ROFR to purchase the Project at the lesser of: (a) its fair market value as encumbered by the Extended Use Agreement and any other restrictions of record; and (b) the Minimum Purchase Price as defined in Section 42(i)(7) of the Code but in no event less than the outstanding debt secured by the Project, excluding any indebtedness incurred within the 5-year period ending on the date of the sale pursuant to the ROFR (the "ROFR Price");

2) be exercisable beginning at the expiration of the Compliance Period;

3) expire no earlier than 36 months after the later of: (i) the public offer of the Project for sale by the general partner or managing member; and (ii) the expiration of the Compliance Period;

4) give the holder of the ROFR a minimum of 90 days to exercise its ROFR and a minimum of 12 months to close on the purchase of the Project after exercise of the ROFR or such longer period required by any lender(s) or other party whose consent to the transfer is required; and

5) not require more than a nominal earnest money deposit in order to exercise the ROFR.

III. The Project owner's limited partnership agreement or limited liability company operating agreement must provide that:

1) the holder of the ROFR may assign the ROFR to a governmental unit, tenant organization or resident management corporation of the Project, or another Qualified Nonprofit Organization without the consent of the limited partner(s) or non-managing member(s);

2) the general partner or managing member may elect to do any of the following:

a) subject to the consent of the limited partner(s) or non-managing member(s), which consent shall not be unreasonably withheld, conditioned, or delayed, sell the Project to the holder of the ROFR in connection with the exercise of the ROFR (the limited partner(s) or nonmanaging member(s) may not withhold consent for a non-material breach of the Project owner's organizational documents);

b) at its discretion, without the consent of the limited partner(s) or non-managing member(s), sell the Project to the holder of the ROFR in connection with the exercise of the ROFR following the general partner's or managing member's receipt of a bona fide third party offer to purchase the Project, which offer may be solicited by the general partner/managing member or the holder of the ROFR; or

c) at its discretion, without the consent of the limited partner(s) or non-managing member(s), offer the Project for sale publicly at any time following the expiration of the Compliance Period and thereafter accept an offer from the highest bidder to purchase the Project, as long as the sale price is not less than the ROFR Price, and provided such acceptance is subject to the rights of the holder of the ROFR to exercise the ROFR and purchase the Project at the ROFR Price;

3) the general partner or managing member is directed and authorized to execute all documents necessary to effect the sale of the Project pursuant to the ROFR or Purchase Options;

4) the limited partner(s) or non-managing member(s) affirmatively agree not to challenge: (i) the sale of the Project pursuant to the terms of the ROFR by the general partner or managing member to the holder of the ROFR even if the holder of the ROFR is affiliated with the general partner or managing member; (ii) the general partner's or managing member's acceptance of an offer from the highest bidder in response to the general partner's or managing member's public offer of the Project for sale, provided the offer price is not less than the ROFR Price, and/or the exercise of the ROFR by the holder of the ROFR after any such acceptance; and (iii) the exercise of the Purchase Options by the holder(s) thereof pursuant to the terms of the Purchase Option;

5) in the event Section 42(i)(7) of the Code is amended to permit a Qualified Nonprofit Organization to hold a purchase option after the expiration of the Compliance Period, and only to the extent permitted under such revised Section 42(i)(7) of the Code, the holder of the ROFR shall be entitled to purchase the Project, or at its option, all of the interests in the owner, in either case at the ROFR Price, in lieu of exercising the ROFR;

6) neither the ROFR or Purchase Options will be adversely affected or limited by any other rights of the limited partner(s) or non-managing member(s), or any owner of any interest in any limited partner or non-managing member, such as forced sale rights, and there are no conditions to the exercise of the ROFR or Purchase Options except as explicitly identified in the limited partnership agreement or limited liability company operating agreement; and

7) any amendment that would modify any term or condition related to the ROFR or Purchase Options requires the prior written consent of MaineHousing.

[Chapter 27, Transfer of Ownership regulations](#)

## APPENDIX H

### MASSACHUSETTS

#### 2022-2023 QUALIFIED ALLOCATION PLAN

For projects sponsored by a nonprofit, DHCD expects investors/syndicators to commit to business terms assuring that a qualified nonprofit organization will be permitted to exercise the statutory right of first refusal (ROFR) under Section 42(i)(7) of the Internal Revenue Code at the statutory price and at terms that permit a purchase option at fair market value without any add-on for investor exit taxes. In practice, this means at a minimum that the investor/syndicator LOI must acknowledge that the final transaction documents will allow the general partner/managing member to take all necessary actions to convey the property to a qualified nonprofit holding the ROFR or to a purchaser at market value during a period of at least three years after the end of the 15 year initial tax credit compliance period, without the need for any further consent or approvals by the investor/syndicator or its successor(s) in interest. Without limitation, such actions may include:

- a) soliciting offers to purchase the property,
- b) commissioning an MAI appraisal to determine the fair market value of the property,
- c) in the sole discretion of the general partner/managing member, based on the advice of tax counsel, determine whether an offer to purchase the property is adequate to trigger the ROFR, and
- d) in the sole discretion of the general partner/managing member, either convey the property to the nonprofit holding the ROFR at the statutory purchase price or convey the property to a purchaser, including an entity related to the developer at fair market value (but not less than the total debt secured by the property).

The investor/syndicator LOI must further acknowledge that the ROFR/option are an integral part of the overall business deal contemplated in the LOI and, accordingly, the sale of the property by the general partner/managing member pursuant to the terms of the ROFR/option, as well as actions to trigger the ROFR/option, shall not constitute a breach of fiduciary duty, and the investor's projected return on investment is not dependent on the receipt of any proceeds at the time of exit other than the ROFR statutory purchase price.

DHCD will review final investor/syndicator LOIs at the beginning of the closing process for consistency with these principles, and may decide to provide further guidance to sponsor/owners as to requirements for DHCD approval of final investor/syndicator LOIs.

From the Massachusetts LOI:

*Right of First Refusal and Purchase Option*

If the General Partner agrees to maintain the property for low-income use, as defined in Section 42 of the Code, for a total period of at least 30 years, the Project may be disposed of as follows:

Right of First Refusal. If Sponsor is a 501(c)(3) corporation or governmental entity, it will be granted a right of first refusal to purchase the Project at the end of the Tax Credit Compliance Period (the "ROFR") at the statutory minimum price pursuant to Section 42(i)(7). The ROFR shall be exercisable by the Sponsor for up to 36 months after the end of the Compliance Period. ("The ROFR period".) During the ROFR period, the General Partner may solicit offers to purchase the property. The General Partner may, in its sole discretion, based on the advice of tax counsel, determine whether an offer to purchase the property adequate to trigger the ROFR. If the Code is amended at any time to allow for a statutory option to purchase the Project and/or the Limited Partner's membership interest at the statutory minimum purchase price of outstanding Limited Partnership debt plus taxes imposed as a result of the sale, then an option will be granted to Sponsor to purchase the Project and/or the Limited Partner's membership interest for a purchase price equal to such statutory minimum purchase price.

Purchase of the Project or Limited Partner's Interest. If the Sponsor is a 501(c)(3) corporation or governmental entity, at the end of the Tax Credit Compliance Period, the General Partner may elect to purchase the Project or the Limited Partner's membership interest in the Limited Partnership (the "Purchase Option") for a price equal to the fair market value ("FMV") of the Project or the Limited Partner Interest. The Purchase Price under the Purchase Option shall not include exit taxes. The FMV of the Project or the Limited Partner Interest shall be appraised as low-income housing to the extent continuation of such use is required under the use restrictions encumbering the Project. The appraisal shall be made by a licensed MAI appraiser. General Partner may select the appraiser, with the prior consent of Limited Partner, which consent shall not be unreasonably withheld. If the Members are unable to agree upon an MAI appraiser, the fair market value of the Project shall be determined by an MAI appraiser agreed upon by an MAI appraiser selected by General Partner and an MAI appraiser selected by Limited Partner, which appraisal shall be paid for by the Partnership. The Purchase Option shall be exercisable by the General Partner for up to 36 months after the end of the Compliance Period. ("the Purchase Option period"). NEF acknowledges that the ROFR and Purchase Option are an integral part of the overall business deal contemplated in the LOI and, accordingly, the sale of the property by the General Partner pursuant to the terms of the ROFR/Option, as well as action to trigger the ROFR/Option, shall not constitute a breach of fiduciary duty. The agreement by the Limited Partner to enter into the Limited Partnership Agreement will be based upon the limited partner benefits reflected in the projections at the time of closing, which are not dependent upon the receipt of any proceeds at the time of exit.

#### *Limited Partner Transfers*

The Limited Partner will have certain rights to transfer its interest in the Limited Partnership, including the right to withdraw from the Limited Partnership at any time after the Limited Partner has satisfied its obligation to pay Capital Contributions and the right to put its interest to the General Partner upon the expiration of the Tax Credit Compliance Period for a put price of \$1,000. Any expenses incurred by the Limited Partner for the substitution of an investor by the Limited Partner will be borne by the Limited Partner. Voluntary Transfer of Limited Partner interest after all Capital Contributions are paid in would not require General Partner consent

unless it were to a Bad Actor. "Bad Actor" means any party, or their affiliates, who (a) is listed as a prohibited/debarred party by any state finance agency as a result of its interactions with respect to year 15 issues; or (b) the General Partner can provide evidence acceptable to the Limited Partner that the party has attempted to impede, failed to permit, or unreasonably delayed the exercise, pursuant to the terms of the documents as drafted, of the Section 42(i)(7) ROFR in an agreement with a non-profit sponsor/grantee. For the avoidance of doubt, nothing herein shall be construed as limiting the right of the Investor Limited Partner to transfer its Interest in the Partnership, either directly or indirectly, to Affiliates of NEF, Bank, or to any Entity that is otherwise controlled by or under common control with NEF and/or Bank.

## APPENDIX J

### NEBRASKA

#### 2024-2025 QUALIFIED ALLOCATION PLAN

Nebraska awards 2 points to applicants recognize the nonprofit Right of First Refusal and serve the lowest income households for the longest period of time,

##### Right of First Refusal

The Right of First Refusal must be granted for a minimum of one year to a governmental entity (such as a local housing authority) or a non-profit entity with an organizational purpose that includes the development, ownership or operation of affordable housing for low income persons and families. Such non-profit entity must have a track record, acceptable to NIFA, of carrying out such purpose.

Will the owner offer a right of first refusal to a non-profit entity described under IRC Section 501(c)(3) or 501(c)(4), or to a governmental entity?

If Yes, please list to whom the owner intends to offer the right of first refusal:

(Please list the name and contact information of the non-profit or governmental entity.) If a non-profit, attach as Exhibit 200 the Articles of Incorporation and By-Laws or organizational documentation evidencing the 501(c)(3) or (c)(4) status and information regarding the purpose and description of the activities of the non-profit entity relating to affordable housing. In the event the non-profit entity designated by the Applicant ceases to exist, any alternative nonprofit entity proposed by the Owner must, at a minimum, meet the same requirements set forth above and must be acceptable to, and approved in writing by, NIFA.

Code Section 42 (i)(7) references a formula for determining this purchase price, equal to outstanding debt remaining on the development (excluding any debt added in the five years prior to the sale) plus federal, state, and local taxes due as a result of the sale.

The commitment of the Right of First Refusal will be reflected in the LURA.

##### Owner Member Changes / Transfer / Assumption

NIFA reserves, commits and allocates LIHTC and AHTC to partnerships, corporations, limited liability companies and individuals. Conditional Reservations and commitments of LIHTC and AHTC are non-transferable, and any change in the partners/members of the development owner requires NIFA's prior written approval and payment of the fee described in Appendix A (e.g., addition of a third-party or removal of an individual/entity listed as part of the ownership entity of the development in the LIHTC Application).

Any transfer, sale or other disposal by the owner of a development requires the prior written consent of NIFA (pursuant to the terms of the LURA) and payment of the fee described in Appendix A. NOTE: Upon any such transfer, sale or other disposal of the development, any

existing right of the owner to request, in accordance with Section 42(h)(6) of the Code, that NIFA assist in procuring a qualified contract for the acquisition of the development, shall terminate with respect to the development as of the date of such transfer, sale or disposition of the development. Such termination of the right to proceed through the qualified contract process shall be binding on all subsequent owners of a transferred development.

#### Land Use Restriction Agreement

##### *Section 7. Sale of Qualified Units Upon Expiration of Qualified Project Period.*

For a one-year period after the end of the Compliance Period, the [Grantee/Managing Member/General Partner], if it or an affiliate thereof has continuously served as the [Managing Member/General Partner] of the Owner, shall have the right of first refusal to purchase the Interest of the [Investor Member/Partner/the Project] (as defined in the [Operating Agreement/Partnership Agreement]) for a price equal to the greater of (a) the offer price, (b) \$100, (c) consistent with Section 42(i)(7) of the Code, the sum of (i) all federal, state and local taxes payable by the [Investor Member/Partner] attributable to such sale, (ii) the principal amount of outstanding indebtedness secured by the Project (other than indebtedness incurred within the five (5) year period ending on the date of the sale to the Qualified Tenant) and (iii) [provisions as provided in Operating Agreement/Partnership Agreement].

It is expressly agreed, however, that (a) the Owner, in the event the [Grantee/General Partner/Managing Member] does not exercise its right of first refusal described above, for a period not to exceed three (3) months from the date the [Grantee/General Partner/Managing Member] gives notice to Owner that it will not exercise such right of first refusal, or (b) the [Grantee/General Partner/Managing Member] upon exercising its right of first refusal described above, shall offer to sell each Qualified Unit to any non-defaulting Qualified Tenant then in occupancy for an amount equal to \$[AMOUNT] above the amount determined in accordance with Section 42(i)(7) of the Code, as described under the right of first refusal.

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## APPENDIX J

### NEVADA

#### [2022 QUALIFIED ALLOCATION PLAN](#)

##### Project Reserves for Replacement Requirements.

During the extended use period the project's replacement reserves must be used exclusively for their intended purpose and may not be removed or transferred to any other entity.

## APPENDIX K

### NEW HAMPSHIRE

#### 2023-2024 QUALIFIED ALLOCATION PLAN

##### Year 15 Investor Exit and Aggregators

1. Sponsors must commit to selecting a syndicator and/or investor acceptable to NHHFA. Such syndicator/investor cannot have been involved in any “aggregator” activity in New Hampshire seeking to undermine the exercise of a LIHTC right of first refusal or right of first option, including, without limitation:
  - Refusal to honor a LIHTC right of first refusal or right of first option in favor of a nonprofit sponsor executed with the initial tax credit equity closing for a LIHTC project,
  - Lawsuit against a general partner and/or a non-profit sponsor challenging the exercise of the LIHTC right of first refusal/right of first option, or
  - Lawsuit seeking to remove the general partner or managing member of the LIHTC limited partnership, absent clear evidence of fraud or serious mismanagement on the part of the general partner or managing member. For purposes of this provision, actions taken to preserve affordability of a LIHTC property and/or management in furtherance of the charitable mission of the non-profit sponsor shall not constitute “serious mismanagement.”
2. Sponsors are required to disclose whether any member of the development team, including the investor, has been involved in transfers of ownership or interest, including qualified contract requests, that resulted in affordable housing being converted to market rate prior to the end of the original period of affordability in New Hampshire.
3. Sponsors are required to disclose whether any member of the development team, including the investor, has been involved in litigation related to the transfer of ownership or interest of affordable housing in New Hampshire prior to the end of the original period of affordability.
4. All partnership agreements must contain the following provisions
  - An acknowledgement and agreement from the investor that the right of first refusal permitted by the Internal Revenue Code § 42(i)(7) is different from the common law right of first refusal and is not conditioned upon the consent of the investor or receipt by the owner of a bona fide offer from any party, including any third parties.
  - An acknowledgement and agreement from the investor that its return on investment is primarily in the form of the tax benefits conferred by the Internal Revenue Code and will not, upon the exercise of the nonprofit’s right of first refusal, include any cash proceeds attributable to the project’s appreciation in value;
  - A right of first refusal term of at least 24 months from the end of the compliance period;

- A maximum purchase price of the sum of the principal amount of outstanding indebtedness secured by the building and all Federal, State, and local taxes attributable to such a sale;
- A provision that in the event IRC Section § 42(i)(7) is amended by Congress to permit a nonprofit to hold a purchase option after year 15, the terms of the Right of First Refusal agreement will be converted to a purchase option permitting a transfer through acquisition of partnership interests and including all partnership assets for an amount equal to the statutory minimum purchase price; and,
- A provision requiring the limited partner to obtain the consent of the general partner before there is any transfer of the limited partnership interest.

#### B. Right of First Refusal Compliance

Owners (except ownership entities ultimately controlled by a qualified non-profit or local housing authority) must sign a Right of First Refusal (ROFR) in favor of a qualified non-profit, local housing authority, or NHHFA. The ROFR, a sample of which can be found in Appendix D, shall be executed and recorded in the appropriate County Registry of Deeds prior to final allocation.

[APPENDIX D SAMPLE RIGHT OF FIRST REFUSAL on page 31](#)

## APPENDIX L

### NEW JERSEY (PROPOSED AMENDMENTS)

#### PROPOSED AGENCY REGULATIONS

##### Eligibility Requirements

The Agency proposes new N.J.A.C. 5:80-33.12(c)21 to, among other things, codify the right of first refusal (ROFR) authorized by Section 42(i)(7) of the Code, which allows a qualified nonprofit organization the first opportunity to acquire an LIHTC project upon the termination of the affordability compliance period. The proposed new paragraph would otherwise preclude and/or disincentivize efforts to bring about the early termination of affordability controls on LIHTC units

21. NJHMFA is committed to the long-term affordability of developments for the benefit of tenants and full compliance by applicants and principals with the provisions of the Code, the extended use agreement, and other program requirements. NJHMFA similarly has an interest in preserving the right of first refusal (ROFR) by a qualified nonprofit organization at the close of the compliance period, as authorized at Section 42(i)(7) of the Code. NJHMFA reserves the right to require any or all of the following from applicants, as applicable:

- i. Provisions to be included in the applicant's organizational documents limiting transfers of partnership or member interests or other actions detrimental to the continued provision of affordable housing;
- ii. Terms in the extended use agreement requiring notice and approval by NJHMFA of transfers of partnership or member interests;
- iii. A designated form of ROFR document as produced by NJHMFA;
- iv. An ROFR agreement, including specific language that acknowledges the right of the qualified nonprofit organization to exercise the ROFR, provides that consent to execution of the ROFR may not be unreasonably withheld by the investor, and provides that the ROFR is not conditioned upon receipt by the owner of a bona fide offer from any party, to be reviewed by NJHMFA prior to issuance of IRS Form 8609;
- v. A letter of intent from a tax credit investor that clearly grants to a qualified nonprofit organization a right of first refusal to purchase the project for not less than the minimum purchase price as set forth at Section 42(i)(7)(B) of the Code following the expiration of the tax credit compliance period;
- vi. Written acknowledgement from any or all potential investors or syndicators that they have never sought to undermine the exercise of a right of first refusal or option to purchase in prior transactions, that they understand that return on investment is primarily in the form of tax benefits and not dependent on the

- project's appreciation in value, and that the ROFR as authorized at Section 42 of the Code is distinct from a right of first refusal pursuant to State statutory, courtinterpreted, or common law;
- vii. Negative points for applications involving sponsors, investors, syndicators, or lenders that, in NJHMFA's determination, have demonstrated a history of conduct detrimental to long-term compliance with extended use agreements, whether in New Jersey or another jurisdiction, and the provision of affordable tax credit units;
  - viii. Provisions to implement any amendments to the Code or any future Federal or State legislation, rules, or administrative guidance; and
  - viii. The decision whether to institute, and the terms of any such requirements shall be made by NJHMFA as reasonably determined to be necessary or appropriate to achieve the goals stated at this subsection and in the best interests of the QAP.

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## APPENDIX M

### NEW YORK

#### [NEW YORK HOMES AND COMMUNITY RENEWAL; REQUEST FOR PROPOSAL FALL 2022](#)

HCR shall now require that LIHTC-assisted projects request and obtain consent from HCR prior to the transfer. To ensure compliance, HCR is revising its LIHTC Regulatory Agreement template to incorporate this requirement and to allow for the agency to assess financial penalties for failure to seek such consent. In addition, LIHTC Applicants will secure investor/syndicator Letters of Interest, credit commitment letters and Partnership or Operating Agreements which include language stipulating this requirement, subject to HCR approval.

## APPENDIX N

### NEW YORK CITY

#### DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT; RIGHT OF FIRST REFUSAL SECTION OF 2021 QUALIFIED ALLOCATION PLAN

Not-for-profit credit applicants must submit a letter of intent from a tax credit investor that clearly grants to a qualified not-for-profit organization a right of first refusal to purchase the project for a below-market purchase price, following the expiration of the tax credit compliance period, in accordance with Section 42(i)(7) of the Code (the "ROFR").

The letter of intent must specify the ROFR purchase price and identify any amounts due in excess of the minimum purchase price permissible under Section 42(i)(7)(B) of the Code.

In addition, the letter of intent must provide that the operating or partnership agreement (the "Agreement") of the owner of the project (the "Owner") will:

- a) grant the not-for-profit organization the ROFR at the ROFR purchase price and provide that all amounts to be included in the ROFR purchase price will be calculated in accordance with the agreement;
- b) provide that the general partner of the owner (the "General Partner") may elect to do any of the following:
  - (i) subject to the consent of one or more limited partners of the owner (each, a "Limited Partner"), which consent may not unreasonably be withheld, conditioned or delayed, sell the project to the ROFR grantee in connection with the ROFR grantee's exercise of the ROFR;
  - (ii) at its discretion, without the consent of any Limited Partner, sell the project to the ROFR grantee in connection with the ROFR grantee's exercise of the ROFR following the General Partner's receipt of a bona fide third party offer to purchase the project; or
  - (iii) offer the project for sale publicly at any time following the expiration of the tax credit compliance period and thereafter accept an offer from the highest bidder to purchase the project, as long as the sale price is not less than the minimum purchase price permissible under Section 42(i)(7)(B) of the Code, and provided such acceptance is subject to the ROFR grantee's rights to exercise the ROFR and purchase the project at the ROFR Purchase Price;
- c) authorize and direct the General Partner to execute all documents necessary to effect the sale of the project pursuant to the ROFR;

- d) provide that, unless prohibited by binding legal precedent, the Limited Partners waive all legal rights to challenge (i) the sale of the project by the General Partner to the ROFR grantee even if the ROFR grantee is affiliated with the General Partner and (ii) the General Partner's acceptance of an offer from the highest bidder in response to the General Partner's public offer of the project for sale and/or the exercise of the ROFR by the ROFR grantee after any such acceptance;
- e) provide that the term of the ROFR shall expire not less than 36 months after the General Partner's public offer of the project for sale;
- f) provide that in the event that Section 42(i)(7) of the Code is amended to permit a qualified not-for profit organization to hold a purchase option after the expiration of the tax credit compliance period, and only to the extent permitted under such revised Section 42(i)(7), the ROFR grantee shall be entitled to purchase the project, or at its option, all of the interests in the owner, in either case at the ROFR purchase price, in lieu of exercising the ROFR;
- g) provide that the ROFR will not be adversely affected or limited by any other rights of the Limited Partners, or any owner of any interest in any Limited Partner, such as forced sale rights, and there are no conditions to the exercise of the ROFR except as explicitly identified in the Agreement or required by binding legal precedent applicable to Section 42(i)(7) of the Code; and
- h) prohibit, without the prior written consent of HPD, any amendment that would modify any term or condition related to the ROFR. A true and complete copy of the Agreement shall be provided to HPD as of both the closing of the financing for the construction of the project and the submission of an application for a Form 8609, in each case for HPD's review to confirm the Agreement includes the terms set forth in the letter of intent or terms that HPD determines are equivalent.

A true and complete copy of the operating or partnership agreement of the owner of the project shall be provided to HPD as of both the closing of the financing for the construction of the project and the submission of an application for a Form 8609, in each case for HPD's review to confirm that such agreement includes the terms set forth in the letter of intent or terms that HPD determines are equivalent.

## RIGHT OF FIRST REFUSAL ("ROFR") FAQ, EXPLAINING ROFR LANGUAGE IN PARAGRAPH 8 OF QAP

1. Q. To satisfy the requirement in Section (C)(8)(b) under the Competitive Criteria (9% Projects Only) in Section VI, must the Agreement include all of the three options described in clauses (i) –(iii)?
  - A. Yes, all three options must be included in the Agreement and the General Partner must have the right to choose (in its sole discretion) to exercise any of them. In addition, the Agreement cannot limit the General Partner to choose only one course of action from among the three described in Section (C)(8)(b). For example, if, as described in clause (i), the General Partner elects to seek the consent of the Limited Partner to sell the project to the ROFR grantee in connection with the ROFR grantee's exercise of the ROFR and the Limited Partner refuses to give its consent, the General Partner may then elect to offer the project for sale publicly as described in clause (iii).
  
2. Q. Can the General Partner offer the project for sale publicly as described in clause (iii) of Section (C)(8)(b) without first attempting to utilize the options described in clauses (i) and/or (ii)?
  - A. Yes, the Agreement cannot require the General Partner to utilize options (i) or (ii) prior to offering the property for sale publicly in accordance with clause (iii).
  
3. Q. What types of activities would constitute offering the project for sale publicly?
  - A. A public offer to sell the project must be conducted in a manner consistent with the reasonable efforts that a willing seller would take to attract competitive offers to purchase property similar to the project. For example, such efforts may include:
    - (i) listing the project for sale for a reasonable period of time in any local, regional or national newspaper, and/or online with any third-party listing service that is in the business of listing real property for sale to the general public; and/or
    - (ii) Engaging a real estate broker to solicit bids from the general public for the purpose of selling the project.The existence and terms of the ROFR may be disclosed in connection with any such public offering.
  
4. Q. If the General Partner offers the project for sale publicly but no party other than the ROFR grantee makes an offer to purchase it, what would the ROFR grantee then be entitled to do?
  - A. The ROFR grantee would be entitled to purchase the project at the price it offered, which may be equal to the ROFR Purchase Price, as long as such price is not less than the minimum purchase price permissible under Section 42(i)(7) of the Code.
  
5. Q. What is meant in Section (C)8(b)(i) that the consent of one or more Limited Partners "may not unreasonably be withheld, conditioned or delayed"?

- A. If the General Partner is required under the Agreement to obtain the consent of one or more Limited Partners to a sale of the project to the ROFR grantee in connection with the ROFR grantee's exercise of the ROFR, such Limited Partner or Limited Partners, as applicable, must have a reasonable non-pretextual basis for withholding its/their consent to such sale, consistent with the actual reasonable expectations of the parties at the time of the execution of the Agreement, and any conditions to such consent and any delay in either giving or withholding consent must similarly be reasonable in light of the actual reasonable expectations of the parties at the time of the execution of the Agreement.
6. Q. What is meant in Section (C)8(b)(i) by consent of "one or more limited partners of the owner (each, a 'Limited Partner')"?
- A. The course of action described in clause (i) is subject to the consent of one or more limited partners of the Owner if the Agreement so provides. HPD does not take a position as to whether the Agreement should expressly require such consent or whether the General Partner should be required to obtain such consent from all or fewer than all such limited partners. The reference to "one or more" of such limited partners is intended only to reflect that Agreements may expressly require the General Partner to obtain such consent from any number of limited partners, may not require any such consent or may be silent with respect to such consent and is not intended to change the percentage of limited partners required to consent to a sale in connection with the ROFR grantee's exercise of the ROFR.
7. Q. What is meant by "bona fide third party offer to purchase the project" offer in Section C(8)(b)(ii)?
- A. HPD encourages the parties to define the term "bona fide third party" in both the letter of intent and the Agreement. At a minimum, the letter of intent and Agreement should provide that an offer will not cease to be a bona fide third party offer merely as a result of such offer having been solicited by the GP or ROFR grantee.

## APPENDIX O

### OREGON

#### 2022 QUALIFIED ALLOCATION PLAN

##### Minimum Thresholds for Applications, Section (xii) Right of First Refusal (ROFR):

OHCS hereby reserves the right to require any and/or all the following with respect to applications:

- (i) Provisions to be included in the Applicant's organizational documents limiting transfers of partnership or member interests or other actions detrimental to the continued provision of affordable housing.
- (ii) A letter of intent from a tax credit investor that clearly grants to a qualified not-for-profit organization a right of first refusal to purchase the project for a below-market purchase price (the "ROFR Purchase Price"), following the expiration of the tax credit compliance period, in accordance with Section 42(i)(7) of the Code (the "ROFR")
- (iii) Terms in the extended use agreement requiring notice and approval by OHCS of transfers of partnership or member interests.
- (iv) Debarment from the program of Project sponsors, investors, syndicators, or lenders having demonstrated a history of conduct detrimental to long-term compliance with extended use agreements, whether in Oregon or another state, and the provision of affordable tax credit units; and;
- (v) Provisions to implement any amendment to the IRC or any future federal or state legislation, regulations, or administrative guidance.

The decision whether to institute, and the terms of, any such requirements shall be made by OHCS as reasonably determined to be necessary or appropriate to achieve the goals stated in this paragraph and to be in the best interest of the Plan.

## APPENDIX P

### PENNSYLVANIA

#### [RESTRICTIVE COVENANT AGREEMENT AND RIGHT OF FIRST REFUSAL SECTION OF THE 2022 QUALIFIED ALLOCATION PLAN](#)

##### 2.11 Restrictive Covenant Agreement

Each owner of a Tax Credit development must execute an agreement setting forth allowable occupancy and use restrictions, owner responsibilities and continuing qualified development characteristics (the "Restrictive Covenant Agreement"). No Tax Credits may be claimed unless the Restrictive Covenant Agreement is in effect and is appropriately recorded against the property in the county land records. The Agency requires the Restrictive Covenant Agreement to run for a period of at least forty (40) years. The Restrictive Covenant Agreement must include a provision to waive any rights to pursue a Qualified Contract under the terms of the Code. Certain Selection Criteria will be incorporated into the Restrictive Covenant Agreement and monitored during the compliance period. Changes in any of the Selection Criteria subsequent to issuance of an IRS Form 8609 may result in noncompliance, may lead to specific enforcement action against the development and may result in the loss of Tax Credits to the development and its investors, and disqualification for program participation in the future. The Restrictive Covenant Agreement includes provisions that provide the Agency with the right to approve or disapprove of the transfer of any interest in a general partner or member or limited partner or investor member in the ownership entity at any time during its term. These provisions also include the Agency's rights to enforce Right of First Refusal purchase options granted to nonprofit organizations under the terms of the Code.

##### 3.2.11 Commitment to Upholding Right of First Refusal Agreements

The Agency may reject an Application from any Applicant (or related entity) who participates in a transaction or program to achieve early termination of a Restrictive Covenant Agreement (or other document(s) evidencing long term restrictions applicable to the Tax Credit Program) or has actively sought to interfere with or defeat a right of first refusal set forth in Section 42(i)(7) of the Code, as determined by the Agency in its sole discretion. Such action may include rejection of the Application, termination of processing, recapture of Tax Credits (if an IRS Form 8609 has not been issued) or, if applicable, issuance of an IRS Form 8823 or notification to the appropriate governmental authorities. As evidence of such finding of violation, the Agency may rely upon its own investigations or may rely upon any order of a court with jurisdiction or upon notice of such a finding from any federal or state agency with investigative or regulatory jurisdiction regarding the subject matter, such as the Internal Revenue Service, U.S. Department of Justice, U.S. Department of Treasury, U.S. Department of Housing and Urban Development, Pennsylvania Human Relations Commission or Pennsylvania Office of Attorney General or may make a determination based upon the failure to report or affirmatively disclose information to the Agency. Provisions of this section apply to any entity who by written

agreement may significantly affect, in the opinion of the Agency, the development or operation of the property. Such written agreement may include ground leases, operating subsidies, partnership agreements, management contracts or operating regulatory agreements.

### 3.2.14 Tax Credit Equity Investor

Applications must include evidence, satisfactory to the Agency, that an equity investor has been secured for the development at a market pay-in value and the terms and conditions related to the investment are reasonable. If the Agency determines the proposed equity investor has participated in a transaction or program to achieve early termination of a Restrictive Covenant Agreement under a Qualified Contract (as more fully described above in Section 2.12) or has actively sought to interfere with or defeat a right of first refusal (as more fully described above in Section 3.2.11), the Agency reserves the right to require a substitute equity investor.

## APPENDIX Q

### RHODE ISLAND

#### 2022 QUALIFIED ALLOCATION PLAN

##### Non-Profit Right of First Refusal

RIHousing is committed to the long-term affordability of developments for the benefit of tenants and full compliance by applicants and principals with the provisions of the IRC, the extended use agreement and other program requirements. RIHousing similarly has an interest in preserving the right of first refusal by a qualified nonprofit organization at the close of the compliance period, as authorized in § 42(i)(7) of the IRC. RIHousing will therefore require the following with respect to all applications:

- a) Provisions to be included in the applicant's organizational documents limiting transfers of partnership or member interests or other actions detrimental to the continued provision of affordable housing;
- b) A designated form of right of first refusal document;
- c) Terms in the extended use agreement requiring notice and approval by the executive director of transfers of partnership or member interests;
- d) Debarment from the program of principals having demonstrated a history of conduct detrimental to long-term compliance with extended use agreements, whether in Rhode Island or another state, and the provision of LIHTC in general; and
- e) Provisions to implement any amendment to the IRC or implementation of any future federal or state legislation, regulations, or administrative guidance.

The decision whether to institute, and the terms of, any such requirements shall be made by the executive director as reasonably determined to be necessary or appropriate to achieve the goals stated in this subsection and in the best interest of the plan. Any such requirements will be indicated on the application form, instructions, or other communication available to the public.

Any application submitted by an applicant containing a principal that was a principal in an owner that has, in RIHousing's determination, previously participated, on or after January 1, 2019, in a foreclosure in Rhode Island (or instrument in lieu of foreclosure) that was part of an arrangement a purpose of which was to terminate an extended low-income housing

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commitment (regardless whether the extended low-income housing commitment was terminated through such foreclosure or instrument) shall be rejected from further consideration for low-income housing tax credits and shall not be eligible for any reservation or allocation of credits.

## APPENDIX R

### TENNESSEE

#### HOUSING DEVELOPMENT AGENCY 2023 QUALIFIED ALLOCATION PLAN

##### Change in Ownership Entity, General Partner, or Managing Member.

In the event of a sale, transfer, or exchange of a Housing Credit Development or any change with respect to the general partner/managing member of the ownership entity (including, without limitation, sale of any or all general partner interests, removal of any general partner/managing member, or admission of any general partner/managing member), the Owner shall:

1. If the property is a TCAP or 1602 property, obtain THDA's permission before such action occurs;
2. If the property is not TCAP or 1602, notify THDA in writing at least 30 days prior to the closing of such a transaction;
3. Complete THDA's Organizational Breakdown Form;
4. Provide a new Organizational Chart;
5. Provide notarized THDA Disclosures Forms for every new individual added to the structure;
6. THDA may require the proposed new Owner or proposed new general partner/managing member of the ownership entity to meet with THDA staff. This is in addition to the training requirements above;
7. Depending on the change, attend compliance training. These requirements do not apply when a development is sold following the completion of the QCP when THDA has not identified a purchaser; and
8. If the change is a change in the Ownership Entity, execute and record an Assignment & Assumption Agreement for the LURC (and all loan documents for TCAP and 1602).

## APPENDIX S

### VERMONT

#### [2022-2023 QAP](#)

##### 3.4. Extended Use Period

All projects receiving Ceiling Credits or state Rental Housing Tax Credits must agree to perpetual affordability through an Extended Use Agreement. The applicant may, at its option, agree to provide a Right of First Refusal to sell the property to a nonprofit at the end of the 15 year Compliance Period.

##### Definitions

Right of First Refusal: A separate legal document that entitles an entity to purchase the property from the owner (which will generally be a limited partnership or limited liability company) for a specified price and under specified conditions. The Right of First Refusal price must be the highest of:

- 1) the same terms and considerations contained in an offer of a third party;
- 2) the minimum purchase price as described in Section 42(i)(7)(B); or
- 3) the target return provided in the Borrower's Limited Partnership Agreement or other document provided to the Agency in a satisfactory form. The Right of First Refusal must allow the holder of the right to make the offer on the property that triggers the Right of First Refusal.

## APPENDIX T

### VIRGINIA

#### 2023 QUALIFIED ALLOCATION PLAN

The Authority is committed to the long-term affordability of developments for the benefit of tenants and full compliance by applicants and principals with the provisions of the IRC, the extended use agreement and other program requirements. The Authority similarly has an interest in preserving the right of first refusal by a qualified nonprofit organization at the close of the compliance period, as authorized in Section 42(i)(7) of the IRC.

The executive director is hereby authorized to require any or all of the following with respect to applications: (i) provisions to be included in the applicant's organizational documents limiting transfers of partnership or member interests or other actions detrimental to the continued provision of affordable housing; (ii) a designated form of right of first refusal document; (iii) terms in the extended use agreement requiring notice and approval by the executive director of transfers of partnership or member interests; (iv) debarment from the program of principals having demonstrated a history of conduct detrimental to long-term compliance with extended use agreements, whether in Virginia or another state, and the provision of affordable tax credit units; and (v) provisions to implement any amendment to the IRC or implementation of any future federal or state legislation, regulations or administrative guidance.

The decision whether to institute, and the terms of, any such requirements shall be made by the executive director as reasonably determined to be necessary or appropriate to achieve the goals stated in this paragraph and in the best interest of the plan. Any such requirements will be indicated on the application form, instructions or other communication available to the public.

Virginia's required ROFR template, which must be included in every partnership agreement with a nonprofit developer, can be found below and also on page 221 of the Virginia Housing Low Income Housing Tax Credit Manual, [found here](#).

## APPENDIX U

### WASHINGTON

#### [WASHINGTON STATE HOUSING FINANCE COMMISSION; 2021 9% COMPETITIVE HOUSING TAX CREDIT POLICIES](#)

##### Chapter 9: Project Transfer or Assignment Requirement

Pursuant to the Commission's rules (WAC 262-01-130), Policies, and Regulatory Agreements, a transfer of an interest in a project requires Commission approval. A stated goal of the Commission's Tax Credit Program is to prefer projects that are affordable to the lowest income tenants for the longest period of time. Toward that end, the Commission will decide whether to approve a proposed transfer based on whether the proposed transfer will (1) promote satisfaction of all applicable regulatory and contractual obligations, and (2) further the Commission's priorities for LIHTC projects as set forth in WAC 262-01-130, including by increasing the likelihood the project will continue to serve the lowest income tenants for the longest period of time. This will be determined based on the totality of circumstances, including but not limited to the characteristics of the project, existing partners, and transferee.

Transferees are required to submit a short paragraph explaining how the proposed transfer satisfies the Commission's approval criteria and to complete a Financial Solvency and LIHTC History (FSLH) form as part of the transfer process. This form is designed to help the Commission determine whether or not the transferee is positioned and likely to support the Commission's stated goals. The Commission may pause, require additional certifications or information from a transferee, or disallow the transfer depending on what the FSLH or other documents reveal. Potential grounds for disallowing the transfer include but are not limited to:

- Transferee has been part of a LIHTC ownership/project that subsequently was found by a court or administrative body to be in violation of a LIHTC statutory or regulatory requirement or covenant;
- Transferee has been part of a LIHTC ownership/project that subsequently reduced the project's associated financial resources such that the project was not able to meet its planned capital needs;
- Judicial or administrative finding against the Transferee of causing actionable harm to a LIHTC project or partner; committing fraud; or violating a LIHTC requirement or covenant.