Via email: mwiesendanger@mainehousing.org

April 28, 2022

Mr. Mark Wiesendanger
Director of Development
MaineHousing
26 Edison Drive
Augusta, ME 04330

RE: 2023-2024 Qualified Allocation Plan – Final Proposed

Dear Mark,

Thank you for the opportunity to comment on the 2023-2024 Qualified Allocation Plan (QAP) proposed revisions.

Evernorth, a private, non-profit 501(c)(3) formed in 2020, unites Northern New England Housing Investment Fund (NNEHIF) and Housing Vermont (HV) together as a single organization to serve low- and moderate-income people of northern New England with affordable housing and community development equity capital, technical assistance, and consulting.

With Evernorth's combined NNEHIF and HV 30+ year track record and history, we have raised and deployed over $1 billion in equity capital for more than 13,000 affordable homes and apartments for low- and moderate-income people across northern New England – all primarily through the federal Low Income Housing Tax Credit (LIHTC) program.

We submit the following feedback specifically to *Section 5 Threshold Requirements as it relates to Appendix E: Requirements for Purchase Options/Rights of First Refusal.*

Thank you for identifying Year 15 and exits as an issue to be addressed in the next Qualified Allocation Plan. While we very much agree with measures to preserve affordability and keep bad actors from preying on existing properties, we are concerned the proposed language is too prescriptive and does not strike the balance and fairness we believe MaineHousing intends between for-profit and non-profit general partners and limited partner investors and the business considerations negotiated between the two parties.

We have thought heavily about the proposed Appendix, looked over our investments, asked for advice from counsel, and offer the following:

Purchase Options/Right of First Refusal and Partnership Agreement

Maine should consider taking the approach of others including New Hampshire and the New York City Housing Preservation and Development agency, both of which have recently published a new QAP that identifies a number of features which must be included in a right of first refusal to ensure it will be

recognized by the investor without legal ambiguities. The most important provision requires that each right of first refusal agreement include language permitting the non-profit to exercise the right of first refusal either through investor consent, no investor consent where there is a third-party offer, or by a public offer of sale of the property.

A copy of this language as part of a larger document that summarizes various actions states have taken to protect non-profit affordable housing after year 15 is attached to this comment letter.

Other Considerations: Aggregators

We recommend you consider adopting a policy similar to that within the New Hampshire 2023-2024 Qualified Allocation Plan and also utilized in Massachusetts, Virginia, and the District of Columbia. Policies adopted by other states offer good examples of steps that can be taken to protect affordable housing assets in Maine.

New Hampshire and Massachusetts each require credit applicants to use equity providers who have not been "involved in any 'aggregator' activity in New Hampshire, Massachusetts or in other states, seeking to undermine the exercise of a LIHTC right of first refusal/right of first option." Virginia has proposed similar language in its 2022-2023 QAP.

The District of Columbia requires credit applicants "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."

This approach serves **both** to protect future deals **and** discourage equity providers wishing to do business in the state from engaging in aggregator type behavior.

Nevertheless, such an approach, while useful, is limited since most of the worst actors refusing to recognize rights of first refusal do not generate new equity financing; they are simply purchasers of existing investor interests who are in the business of acquiring such interests for nominal amounts and generating profits by demanding general partners pay them off to leave the partnership.

To address those situations, MaineHousing should require approval for any transfer of investor interests on existing properties, a policy that a number of states have instituted.

We strongly support efforts to address Year 15 and bad actor issues and have great concerns about the increasing number of disputes across the country arising from the expected investor exits from LIHTC partnerships in both non-profit and for-profit sponsored properties. While we do not know the extent of this problem in Maine, given the increasing number of disputes across the country we expect that if it is not already a serious problem in Maine, it will soon be.

We support an approach by credit allocators that both attempts to address potential issues with new allocations of Housing Credits and discourages bad actors from preying on existing properties. Policies adopted by other states offer good examples of steps that can be taken to protect affordable housing assets in Maine.

Thank you for your attention to these important issues and the opportunity to present our views. We are available to assist you with the further development of these policies if you so desire.

Sincerely,

Beth Boutin
Vice President, Community Investments
bboutin@evernorthus.org

Attachment: Housing Finance Agency Toolkit for Addressing Year 15 Issues

Housing Finance Agency Toolkit for Addressing Year 15 Issues

Troubling changes are sweeping across the Low-Income Housing Tax Credit (Housing Credit) industry as outside capital buys up control of Housing Credit investor limited partnerships with the goal of extracting resources out of affordable housing properties after the end of the initial 15-year compliance period. This is a rapidly growing phenomena that is catching affordable housing advocates, stakeholders, and policymakers unaware, but which will have a profound impact on affordable housing in this country. Essentially, major sources of outside capital have discovered a commercial sector to exploit to reap hundreds of millions of dollars of profits, contrary to the intention of Congress.

This pattern has led to a growing number of troubling legal disputes and litigation that both drains the general partner's resources and threatens the long-term affordability of valuable affordable homes. The challenges to general partner's project-transfer rights involve both nonprofit and for-profit general partners, the nonprofit Right of First Refusal (ROFR) and the for-profit purchase option.

By disputing the transfer of property to a nonprofit through the ROFR, or to a for-profit general partner through a purchase option, private investors can extract unanticipated residual value from affordable housing properties. Recognizing that most general partners, particularly nonprofits, do not have the resources to litigate these issues in court, these private investors often leverage a profitable cash payment or the sale of the affordable property in return for leaving the partnership. This undermines the long-term viability of the affordable housing properties, sometimes leaving them at risk of exiting the affordable housing market. The use of scarce funds for payments from general partners to private investors is contrary to the original intent of the Housing Credit program.

This detrimental process diverts resources that otherwise would be devoted to resident services, building maintenance, and related affordable housing initiatives. In some cases, limited partners take properties through the qualified contract process, ending the affordability restrictions entirely. In high-cost rental markets, rising property values have created an increasing opportunity for investors to profit far beyond the original expectations and congressional intent.

This paper presents a toolkit of policy and regulatory options for state and local Housing Finance Agencies (HFAs) or other Housing Credit allocating agencies to adopt to protect affordable housing assets in their states which can be implemented in a Qualified Allocation Plan (QAP), Consolidated Request for Proposals, or a policy manual.

ACTIONS TO PROTECT FUTURE HOUSING CREDIT DEVELOPMENT BY NONPROFIT DEVELOPERS

1. **Protective Language in ROFR**

Where there is a nonprofit sponsor, the allocating agency could require partnership agreement language with certain features that ensure the ROFR will be recognized on behalf of the nonprofit grantee. The New York City Department of Housing Preservation and Development (HPD) incorporated exemplary language in its 2021 QAP which it finalized in September 2021. Reference:
https://www1.nyc.gov/assets/hpd/downloads/pdfs/services/2021-official-qualified-allocation-plan.pdf

HPD is proposing that as a condition to receiving an allocation of both 4% and 9% Housing Credits, nonprofit applicants must have a Letter of Intent (LOI) from a qualified equity provider that provides for a ROFR with listed features that protect the interests of the nonprofit ROFR grantee within the confines of Section 42(i)(7) of the

Internal Revenue Code. The language in the LOI eventually must be included in the partnership agreement. See Appendix A for the specific features that HPD proposes to require in the ROFR agreement.

The Virginia Housing Development Authority (VHDA) proposed 2022 QAP includes a number of changes to protect the ROFR rights of nonprofits. Utilizing language agreed to by the VHDA Board of Directors, the proposed QAP states: "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." As part of the proposed QAP, VHDA proposes to develop specific ROFR agreement language ("a designated form of right of first refusal document") that must be included in future Housing Credit partnership documents. Reference:
https://www.vhda.com/BusinessPartners/MFDevelopers/LIHTCProgram/LowIncome%20Housing%20Tax%20Credit%20Program/2022-QAP-Proposed-Changes.pdf

2. **Investor Transfer Policies**

For both for-profit and nonprofit sponsored deals, the allocating agency could require agency approval of the transfer of investor interests based on standards designed to discourage the transfer to entities that have a history of engaging in practices that extract resources out of affordable housing.

VHDA's proposed 2022 QAP would require that provisions be included in a credit applicant's organizational documents limiting transfers of partnership interests, and that the extended use agreement include terms requiring notice and approval by the executive director of transfers of partnership interests. "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;… (iii) terms in the extended use agreement requiring notice and approval by the executive director of transfers of partnership or member interests."

In its "Policies" document, the Washington State Housing Finance Commission (WSHFC) requires agency approval of any transfer of investor interests "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… including by increasing the likelihood the project will continue to serve the lowest income tenants for the longest period of time." Potential grounds for disallowing a transfer include whether the "(t)ransferee 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. Reference:
https://www.wshfc.org/mhcf/9percent/2021application/c.policies.pdf

3. **Investor Eligibility**

In its March/April 2021 Notice of Funds Availability, the Massachusetts Department of Housing and Community Development specifically excluded 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…" Reference:
https://www.mass.gov/doc/nofa-rental-housing-rapid-production-initiative/download?_ga=2.118435722.220054217.1625346619-1034737688.1625346619

The equity provider cannot have refused to honor a ROFR, been involved in a lawsuit against a general partner challenging the exercise of a ROFR or have sought to remove a general partner absent clear evidence of fraud or serious mismanagement. This type of investor disqualification language serves not only to protect the specific

interests of new nonprofit Housing Credit deals in Massachusetts, but also is likely to influence the practices of equity providers for existing deals, at least to the extent the equity provider wishes to conduct business in Massachusetts in the future, because this policy evaluates an investor's eligibility for future deals based on how they have handled the ROFR on existing properties.

Alternatively, this policy objective could be achieved by giving credit applicants extra points for selecting an equity provider who has not engaged in "aggregator" activity to deny ROFR contractual rights of nonprofits.

VHDA's proposed 2022 QAP would debar entities that have "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."

The Department of Housing and Community Development of the District of Columbia in its 2021 QAP approved in October 2021 requires credit applicants to have an investor LOI that includes 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…" Reference:
https://dhcd.dc.gov/publication/2021-dhcd-low-income-housing-tax-credit-qualified-allocation-plan-draft

The Pennsylvania Housing Finance Agency has taken a similar approach in its 2021 QAP approved in November 2020, "The Agency may reject an Application from any Applicant (or related entity) who participates in a transaction… or has actively sought to interfere with or defeat a right of first refusal set forth in Section 42(i)(7), as determined by the Agency in its sole discretion." Reference:
https://www.phfa.org/forms/multifamily_news/news/2020/2021-lihtc-allocation-plan.pdf

4. **Automatic Agreement Changes to Reflect Changes in Federal Law**

The New York City HPD and VHDA QAPs would 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. See references above and appendixes.

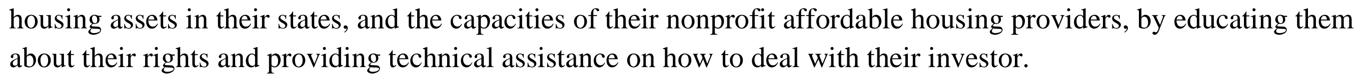
ACTIONS TO PROTECT EXISTING HOUSING CREDIT PROPERTIES

1. **Investor Eligibility**

As noted above, if equity providers who have actively sought to interfere with or defeat a ROFR set forth in Section 42(i)(7) 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 would not be effective with "aggregators" who are acquiring control of investor limited partnerships but are not in the business of originating new financing.

2. **Technical Assistance to Nonprofits**

Some nonprofit general partners in Housing Credit properties who must deal with recalcitrant investors demanding a payoff to leave the property partnership may not be familiar with their rights under the partnership agreement or under Section 42. Faced with an unreasonable demand from their limited partner, and without the resources to mount an uncertain legal challenge to the refusal to recognize the ROFR, 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.

3. **Early Intervention to Identify Properties Approaching Year 15**

Ideally, allocating agencies should be in contact with nonprofits 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.

4. **Support Creation of Entity to Make Offers, Triggering ROFR**

Some 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 an offer that will invariably be 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 could 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.

APPENDIX A

New York City Department of Housing Preservation and Development
Right of First Refusal Section of Proposed 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 Section42(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;

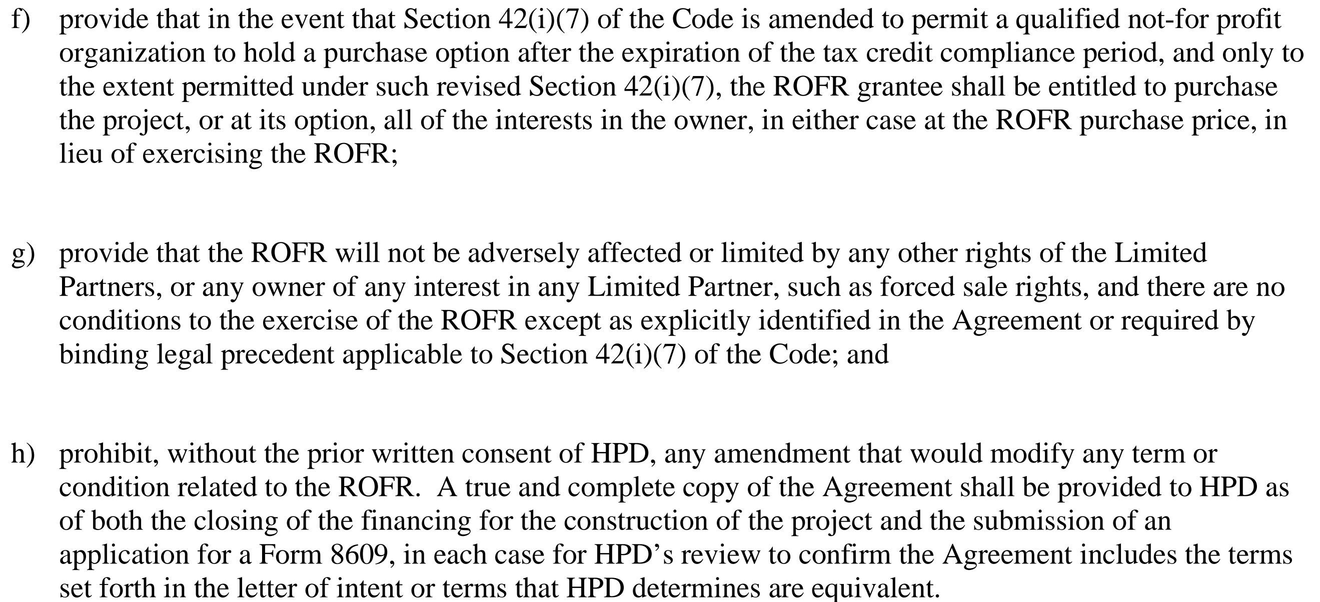
    (ii) at its discretion, without the consent of any Limited Partner, sell the project to the ROFR grantee in connection with the ROFR grantee's exercise of the ROFR following the General Partner's receipt of a bona fide third party offer to purchase the project; or

    (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.

Appendix B

District of Columbia, Department of Housing and Community Development
Right of First Refusal Section of 2021 Proposed Qualified Allocation Plan

Non-profit Participation and Right of First Refusal

Projects in which a qualified non-profit organization is the managing member of the general partner or managing member of the Ownership Entity, as applicable, are required to hold 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. 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 nonmanaging 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 DHCD 2021 Qualified Allocation Plan, Page 20 of 45 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.

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 C

Virginia Housing Development Authority
Aggregators and Right of First Refusal Section of Proposed 2022 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.