June 9, 2021

Nancee Robles, Executive Director
California Tax Credit Allocation Committee
Via Email: Nancee.Robles@treasurer.ca.gov

Re: LIHTC Tenant Bill of Rights

Executive Director Robles and Committee Members,

Taxpayers fund the Low-Income Housing Tax Credit (LIHTC) program at a cost of $10.9 billion annually.[1] California alone awarded over $500 million in federal tax credits and another $581 million in state tax credits[2] in 2020.[3] These tax credits are extremely valuable to private investors.[4] Despite this multi-billion-dollar public investment, LIHTC program rules and regulations fail to provide basic tenant protections. This is in stark contrast to other publicly funded federal housing programs that, for example, offer a grievance process or other administrative procedure for resolving landlord-tenant disputes informally, detailed eviction notice requirements, and an opportunity to cure alleged lease violations.

While federal rules and regulations fail to provide comprehensive tenant protections, California's Tax Credit Allocation Committee (TCAC) has broad authority to administer the program and the attendant power to promulgate California-specific LIHTC regulations that reflect the state's housing needs and priorities.[5] Giving LIHTC tenants more certainty and fairness with respect to their tenancies should be of the highest priority in light of the massive public investment in the program and the millions of LIHTC tenants affected.

Toward this end, we are asking TCAC to adopt the list of proposed tenant protections below, a LIHTC tenants' bill of rights, if you will, that is based on the collective experience of the

[1] Mark P. Keightley, An Introduction to the Low-Income Housing Tax credit, Congressional Research Service (2021) p.1.

[2] State tax credits are not standalone credit but are instead used to supplement the federal tax credits awarded as a way to provide additional equity for LIHTC projects.
[3] California Tax Credit Allocation Committee, 2020 Annual Report (April 2021) at pp. 2-3.

[4] See e.g., *Homeowner's Rehab, Inc. v. Related Corporation V SLP, L.P.* (2018) 479 Mass. 741, 745-748 [describing how a private investor used a combination of LIHTCs, depreciation, and other tax losses to amass $24 million in tax benefits on a $7 million equity investment].

[5] *DeHarder Inv. Corp. v. Indiana Housing Finance Authority* (S.D. Ind. 1995) 909 F.Supp. 606, 613.

undersigned California housing and tenant advocates who understand firsthand the critical need for comprehensive LIHTC tenant protections.

The proposed protections fall into three categories. The first category is eviction protections, which calls for TCAC to further define "good cause" to evict, give tenants a plenary right to cure alleged lease violations, and create a grievance procedure that tenants can use to challenge proposed adverse actions against them before judicial proceedings commence. The second category of protections involves transparency and access to information, under which we propose that TCAC require owners to adopt and follow written admissions policies and criteria and to provide a copy thereof to prospective tenants, make unit income limitations (and the specific percentages and values applied) more readily available to tenants and to require tenant access to their file upon request.

The third category of protections is fair housing protections. Here, we are asking TCAC to prohibit the use of discriminatory tenant screening policies that consider an applicant's criminal history without consideration of mitigating circumstances; take deliberate steps to ensure owner compliance with VAWA; do more to monitor and enforce ongoing owner obligations with respect to unit accessibility for individuals with disabilities; and require meaningful language access for individuals with limited English proficiency at every LIHTC property. Our proposed fair housing protections also include a prohibition on owners requiring a social security number as part of the admission and/or annual recertification process. As further detailed below, many of these reforms have already been adopted by state tax credit agencies in other states.

We recognize that the ultimate form of the proposed regulations will depend on input from various stakeholders, some with diverging views. With that in mind, the purpose of this letter is to begin a dialogue with TCAC that we hope will culminate with the agency's adoption of a comprehensive set of tenant protections, something that is absolutely necessary to protect LIHTC tenants, to protect the significant public investment in the program, and to advance the program's overall goal of providing housing affordability and stability for the long-term.

I. Eviction Protections

(a) Further Define "Good Cause" to Evict for Purposes of the LIHTC Program

Good cause is required to evict a person from a LIHTC unit or to terminate a LIHTC tenancy.[6] Guidance from the Internal Revenue Service provides that good cause is determined by applicable state and local law and may include nonpayment of rent; violations of the lease or rental agreement; destruction or damage to the property; interference with other tenants or creating a nuisance; or using the property for an unlawful purpose.[7] But this definition of "good

[6] Rev. Rul. 2004-82, Q&A#5; See Cal. Tax Credit Allocation Committee, Compliance Monitoring Manual (June 2020), Section IV, part 4.1, subsection D, at p. 42 [requiring execution of Good Cause Eviction Lease Rider at initial leasing].
[7] I.R.S. Guide to Completing Form 8823 at 26-3-26-4 available at https://www.irs.gov/pub/irs-utl/lihc-form8823guide.pdf.

cause" is too vague, leaving room for property owners to evict LIHTC tenants on tenuous grounds.[8]

For example, LIHTC property owners often move to evict tenants whose income increases above 140% of the applicable income limitation. When this happens, the LIHTC property owner must apply the Next Available Unit Rule (NAUR).[9] Under the NAUR, an owner can continue to treat an over-income unit as a low-income unit and can thereby continue claiming its tax credits.[10] In other words, the NAUR allows an owner to remain program compliant and safe from financial liability. Accordingly, an increase in a tenant's income beyond 140% of the applicable limit cannot constitute good cause to evict under any reasonable interpretation of the term. Yet, some owners bypass the NAUR and move to evict the tenant instead.

Similarly, LIHTC property owners often move to evict tenants at the end of the lease term without cause. As some courts have noted, to allow a landlord to evict a tenant upon the expiration of a fixed lease term without reason is to enable "secret and silent discrimination" and other wrongful grounds for eviction.[11] The possibility of discriminatory and arbitrary evictions should be eliminated in all instances, but particularly in the context of the LIHTC program given the significant public investment and the program's public purpose.[12]

Some LIHTC owners also move to evict tenants who fail to provide verification documents during non-mandatory recertifications. More specifically, even though owners of 100% tax credit properties are required to recertify a tenant's income only once after initial move in,[13] many of these owners continue to conduct recertifications voluntarily every year. Since such an owner is not at risk of credit recapture or other financial liability as a result of not completing a voluntary recertification, and since the tenant is not legally required to provide information for such voluntary recertifications, the tenant's participation (or non-participation) should not be treated as good cause to evict.

Accordingly, TCAC should specifically define good cause to mean a "substantial and/or repeated violation(s) of the material terms of the lease or occupancy rules" and clarify that:

(1) There is no good cause basis to evict a tenant whose income exceeds 140% of the applicable income limitation.
(2) The end of a lease term alone does not constitute good cause to evict a tenant.

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[8] Furthermore, this definition comes in the form of non-binding IRS guidance and thus it cannot be relied on to protect tenants the way a TCAC regulatory definition can.
[9] 26 C.F.R. §1.42-15(c).
[10] *Ibid*.
[11] *Green v. Copperstone Ltd. Partnership* (1974) 28 Md. App. 498, 511 [citing *Caulder v. Durham Housing Authority* (4th Cir. 1970) 433 F.2d 998; See also *Joy v. Daniels* (4th Cir. 1973) 479 F.2d 1236, 1242 [reiterating that "[t]o allow a quasi-public landlord to evict upon expiration of a fixed term is to enable secret and silent discrimination and would wholly emasculate the procedural safeguards of *Caulder"*].
[12] TCAC's original good cause lease rider implemented this protection, but it has since been revised to eliminate this end-of-term protection.
[13] Cal. Code Regs., tit. 4, 10337(b).

(3) A tenant's failure to either complete or participate in a recertification process not required by law shall not be deemed a violation of the lease nor shall it constitute good cause to terminate the tenancy.

Several other states already define good cause in a similar way. Washington State's state tax allocation agency advises owners that "[i]ncreases in household income that occur after move-in are not considered 'good cause' unless they are the result of failure to report all income at move-in."[14] Michigan's tax allocation agency advises that LIHTC ". . . owners/management agents are prohibited from evicting a tenant or terminating a tenancy (***including non-renewal of an expiring lease agreement***) . . . other than for good cause."[15] Minnesota's tax credit agency likewise provides that the end of a lease term alone does not constitute good cause and further defines "good cause to be (a) serious or repeated violation(s) of the material terms and conditions of the lease."[16] Nonrenewal of a lease without good cause is also prohibited in Washington State, which, like Minnesota, defines good cause to mean serious or repeated violations of material lease terms.[17]

(b) Provide LIHTC Tenants the Right to Cure Alleged Lease Violations

Subjecting tenants to eviction on the basis of minor lease violations or even a significant yet isolated violation is fundamentally unfair to the tenant[18] and creates undue uncertainty with respect to their tenancy.

To give LIHTC tenants more security and fairness in their tenancies, LIHTC tenants should have the right to cure each distinct alleged lease violation. State law does require a landlord to give a tenant the opportunity to cure lease violations, if the violation can be cured.[19] However, the way this law works in practice is that the landlord decides whether to extend an opportunity to cure, and if the opportunity is not provided, it is the tenant who has the burden of showing that the alleged breach is curable and that he or she should have been allowed to correct it. And some lease violations are per se incurable under state law, even though they can be cured in some instances.[20] State law simply does not offer sufficient protection.

The opportunity to cure requirement we are asking TCAC to adopt would be plenary and available to the tenant as a matter of right. We suggest using the opportunity to cure regulations

[14] Washington State Housing Finance Commission, Tax Credit Compliance Manual (March 2018), ch. 2 at p. 2-7 (emphasis in the original).
[15] Michigan State Housing Development Authority, LIHTC Compliance Manual (April 2013), ch. 6A, part 626 at p. 6-10, emphasis added.
[16] Minn. Housing Finance Agency, Housing Tax Credit Program Compliance Guide (Dec. 2020), ch. 5 at p. 30.
[17] Washington State Housing Finance Commission, *supra*, at p. 2-6.
[18] For example, LIHTC tenants have been subject to eviction for the innocent mischief of a five-year old child, for having a verbal argument with a neighbor, the only such incident during the tenant's five-year tenancy, and for the failure to submit recertification documents before the owner's internal deadline even though the annual move-in anniversary had not yet passed.
[19] Code Civ. Proc. §1161(3).
[20] Code Civ. Proc.§1161(4).

promulgated by the USDA for its Rural Development multi-family housing program. Those regulations provide that "[p]rior to terminating a lease, the borrower must give the tenant written notice of the violation and give the tenant an opportunity to correct the violation."[21] "Subsequently, termination may only occur when the incidences related to the termination are documented and there is documentation that the tenant was given notice prior to the initiation of the termination action that their activities would result in occupancy termination."[22] And this opportunity to cure has no per se limitations.

(c) Give LIHTC Tenants the Right to Grieve Proposed Adverse Actions

Eviction cases are difficult to navigate given that they unfold with breakneck speed. The task is even more difficult where an eviction case turns on the application of complex LIHTC rules and regulations, which even judges sometimes struggle to understand. And since demand for representation in eviction proceedings far exceeds the supply of available lawyers, the vast majority of LIHTC tenants have to navigate this difficult process without the assistance of legal counsel.

This is why TCAC must adopt a regulation giving LIHTC tenants the right to a grievance process (or a similar alternative informal procedure) for resolving landlord-tenant disputes without the need for judicial eviction proceedings. Some state and federal housing programs have a grievance process for challenging a proposed adverse action prior to the initiation of judicial proceedings. (See, e.g., 7 C.F.R. §3560.160 et seq. [outlining the grievance process for RD Section 515 rental properties]; 42 U.S.C.A. § 1437d(k), 24 C.F.R. §§ 966.50-966.57 [requiring a grievance hearing in public housing units]; 42 U.S.C.A. § 12774(a) [requiring a grievance procedure for HOME funded units that are developed, sponsored or owned by community housing development organizations].)

Like these other federal and state housing programs, the LIHTC grievance process should include basic due process protections like the right to written notice of the proposed adverse action[23] that explains the basis; a hearing presided over by a disinterested third party; the right to refute the allegations, including cross-examination of witnesses; a reasonable amount of time to review relevant documents; and written notice of the hearing officer's decision.

And it is essential that the right to grieve be extended to prospective tenants that have been denied admission to a LIHTC property. This would require owners to give written notice to such prospective tenants that explains the basis for the denial. Without this requirement, prospective LIHTC tenants will be kept in the dark about why their rental application was denied which opens the door to discriminatory and arbitrary admissions decisions without accountability. Concerns about the administrative burden that might result from requiring owners to give notice

[21] 7 C.F.R. §3560.159(a).
[22] *Ibid.*
[23] The proposed regulation should define adverse action to include, without limitation, tenancy termination, rent increases, changes to complex rules, denial of admission, and denial of a reasonable accommodation request.

and grievance rights to non-residents should be subordinate to the larger goal of curbing insidious discriminatory admissions decisions.

II. Transparency and Access to Information

(a) Written Tenant Selection Policies and Criteria

LIHTC property owners should be required to adopt and follow written tenant selection policies and criteria and to provide a copy of these polices and criteria to every prospective tenant who applies for admission. This will allow applicants to compare an owner's admission policies to their personal circumstances, which can help applicants make better use of the grievance procedure recommended above and otherwise ferret out often-hard-to-identify bias and discrimination.[24]

Several other federal housing programs already require adoption and use of written tenant selection policies and criteria. This includes the HOME program which requires an owner to adopt and follow tenant selection policies and criteria that ". . . [a]re reasonably related to the applicants' ability to perform the obligations of the lease (i.e., to pay the rent, not to damage the housing; not to interfere with the rights and quiet enjoyment of other tenants); . . . Provide for the selection of tenants from a written waiting list in the chronological order of their application, insofar as is practicable; Give prompt written notification to any rejected applicant of the grounds for any rejection . . .," among several other requirements.[25]

(b) Unit Income Limitation

A particular unit's income limitation serves to determine a tenant's income eligibility[26] and the maximum rent a LIHTC owner can charge[27]. Thus, this information is absolutely critical to tenants subject to an eviction for nonpayment of rent or because of their alleged over-income status.[28] Tenants who are not facing an eviction also need to know their unit's income limitation to, for example, determine the propriety of a proposed rent increase. But figuring out a unit's income limitation is arcane to tenants, advocates, and even judges. This is largely because the variables used to determine a unit's income limitation, i.e., the affordability restriction for the specific unit (e.g., 40% or 50% of AMI) and the AMI value applied, are not readily available.

There is absolutely no reason why a tenant should not have easy access to this information. We are therefore asking TCAC to promulgate a regulation that requires every lease to identify the subject unit's income limitation, including the unit's specific affordability restriction and the

[24] This practice also helps applicants avoid incurring application fees only to be denied admission due to ineligibility under the owner's policies.
[25] 24 C.F.R. §92.253(d).
[26] 26 U.S.C. §42(g)(1).
[27] 26 U.S.C. §42(g)(2)(A).
[28] In theory, a party can obtain this information through public records requests to TCAC and/or discovery. In practice, however, eviction cases move entirely too fast for a party to conduct an adequate pretrial investigation. This information asymmetry makes it very difficult to mount an effective defense, especially when the tenant is self-represented, as is most often the case.

AMI value in place at the time. Because this information is equally important to existing LIHTC tenants, TCAC should also require owners to provide this same information in writing to their residents at least once a year.

(c) Access to Tenant Files

LIHTC tenants need access to additional information in order to understand and challenge a variety of adverse actions that an owner can potentially take. Accordingly, TCAC should require owners to give tenants access to their tenant files[29] within 24 hours of a request by the tenant or the tenant's authorized agent.

III. Fair Housing Protections

(a) Prohibit Discriminatory Criminal History Tenant-Screening Policies

Individuals who have had contact with the criminal legal system face significant barriers in trying to reintegrate into society, which perpetuates the cycle of poverty and incarceration decimating communities throughout the state.[30] One such barrier comes in the form of tenant screening policies that exclude applicants with a criminal record without consideration of relevant mitigating circumstances such as the nature of the crime involved and the timing and circumstances surrounding an arrest and/or conviction.[31] Because African-American and Hispanics are arrested, convicted and incarcerated at disproportionate rates when compared to their share of the general population, these policies disproportionately exclude African-American and Hispanic applicants from LIHTC properties in violation of the federal Fair Housing Act (FHA).[32]

To mitigate the discriminatory impact of such policies, California's Department of Fair Employment and Housing (DFEH) recently adopted a comprehensive set of regulations that limit the use of criminal history screening policies. (Cal. Code Regs., tit. 2, art. 24, §§ 12264-12271.)[33] These regulations apply to all rental housing, including tax credit projects. They prohibit the categorical exclusion of applicants with a criminal history. The regulations also prohibit the use of certain types of information in admissions decisions, including juvenile criminal system records, expunged records, and outdated information. Where an owner is allowed to consider criminal history, owners must also consider mitigating information, including but not limited to

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[29] Tenant files should be defined to include any materials discussed in Section VII, part 7.2 of TCAC's Compliance Manual and all of the documents required thereunder.

[30] Bernadette Rabuy and Daniel Kopf, Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned, Prison Policy Initiative (July 9, 2015).

[31] U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016) pp. 1-2 (federal guidance calling for an individualized assessment of an application's criminal history that considers mitigating circumstances).

[32] *Ibid.*

[33] All subsequent references are to the California Code of Regulations unless otherwise indicated.

the amount of time that has passed since the applicant was arrested and/or convicted, evidence of rehabilitation efforts, and consideration of whether the conduct arose from a disability or the applicant's status as a survivor of domestic violence. And, where criminal history is used to deny admission, these regulations require notice to the tenant and an opportunity to respond.

TCAC can significantly further the state's goal of limiting the use of discriminatory criminal history admissions policies by simply amending sections 103225 and 10337 to require LIHTC property owners to adopt tenant screening polices that comply with DFEH criminal history regulations.

And although owners are required to give notice to an applicant when he or she is denied admission based on criminal history, this safeguard depends entirely on an owner's willingness to admit that its decision was based on the applicant's criminal record. Many owners will not admit to this since it has fair housing implications and because it might require further administrative steps. This highlights the need for LIHTC property owners to give a copy of their tenant screening policies and criteria to every prospective tenant prior, as suggested above. This gives prospective tenants and advocates way, beyond the information an owner is willing to divulge, to monitor compliance with DFEH criminal history regulations.

Other state tax credit allocation agencies have adopted policies that significantly limit the use of an applicant's criminal history in the admissions process. For example, Georgia's qualified allocation plan provides that based on HUD's guidance on criminal background checks, "[e]ach property's screening policy should at a minimum, include the following:

- Arrests records are not a valid reason to deny an applicant housing.
- Applicants with a criminal conviction may be denied housing only if the reason for their conviction clearly demonstrates that the safety of residents and/or property is at risk.
- Blanket terms in screening criteria that say "Any criminal conviction will be denied" are now considered discriminatory and violation of the Fair Housing Act.
- The annual Owner's certification will monitor each property's compliance with this provision."[34]

(b) Take Deliberate Steps to Ensure Compliance with the Violence Against Women Act

In a letter to TCAC dated August 14, 2019, we noted regular reports of LIHTC property owners not complying with the federal Violence Against Women Act (VAWA) requirements, particularly the requirement that housing providers create and implement an emergency transfer plan that allows survivors to transfer to another available and safe unit if: (1) a survivor tenant expressly requests the transfer and (2) either the requesting survivor "reasonably believes there is a threat of imminent harm from further violence if the tenant remains" in the unit, or the tenant is a victim of sexual assault on the premises within 90 days of the transfer request.[35] As our 2019 letter recounts in more detail, instances of noncompliance include outright denial of transfer

[34] Georgia Housing and Finance Authority, 2021 Qualified Allocation Plan, section 20(M) at p. 33.
[35] 34 U.S.C. §12491(e)(1); 24 C.F.R. §5.2005(e).

requests, allowing an abuser to remove the victim from the lease because the victim has temporarily fled the unit for her safety, and owners refusing to assist male survivors based on their gender. Widespread noncompliance with this mandated protection continues, putting at risk the safety of countless California domestic violence and sexual assault survivors.

TCAC should condition program compliance determinations on VAWA compliance. Specifically, TCAC should develop a model emergency transfer plan, with the assistance of advocates, and condition program compliance determinations on an owner's adoption of and compliance with the model plan, with variations as necessary to meet specific building needs. Alternatively, TCAC can condition program compliance on the owner preparing and submitting its own emergency transfer plan that will be subject to TCAC review and approval.

(c) Ensure Owner Compliance with Ongoing Accessibility Obligations

TCAC regulations contain several provisions aimed at making the LIHTC program more accessible to individuals with disabilities. However, these provisions all impose ongoing owner obligations that TCAC must rigorously monitor and enforce so that disabled individuals truly have meaningful access to LIHTC units.

(1) Accessible Unit Waivers

TCAC regulations require that 15% of the units in every newly constructed LIHTC project contain mobility features and that 10% of the units contain communication accessibility, and 50% mobility in senior housing.[36] Rehabilitation projects must have 10% mobility and 4% communication accessibility.[37] However, TCAC regulations provide that TCAC's executive director can exempt an owner from these accessibility construction standards in rehabilitation projects provided the owner can show that full compliance would be impractical or create an undue financial burden.[38] Terms like "undue burden" and "impracticability" are too vague and, thus, they do not sufficiently protect against improper accessibility waivers. Accordingly, we urge TCAC to adopt clearer standards for determining when an accessibility waiver is appropriate.

Furthermore, TCAC does not track the number of waivers requested and how many are granted. Without this information, there is no way to know how many accessible units are actually being constructed as a result of TCAC's accessibility construction standards. It is also difficult to know whether TCAC is granting waivers on a proper basis. Thus, we urge TCAC to track and publicly report how many projects are approved annually for full or partial waivers, and the scope and grounds for each waiver. These reports should also track whether the owner provided for

[36] Cal. Code Regs., tit. 4, 10325(f)(7)(K) and 10325(g)(2)(B).
[37] *Ibid.*
[38] Federal and state law limit this waiver authority. Specifically, TCAC cannot waive the minimum requirements for 5% mobility and 2% communication accessible units that are required under the ADA and California Building Code Chapter 11B.

increased accessibility in some other way to compensate for the accessible units lost to the waiver, *e.g.*, by building additional mobility units at another site.

(2) Prioritizing Accessible Units.

California Code of Regulations section 10337(b)(2) requires LIHTC owners to give priority for vacant accessible units to existing tenants in need of the vacant unit's accessibility features and then to qualified applicants with disabilities on the owner's prospective tenant waiting list. To ensure that owners properly prioritize accessible units, TCAC should require owners to prepare and regularly update the following documents for each project:

- A written plan for effecting unit transfers as required by section 10337(b)(2).
    - Where an accessible unit is leased to someone who does not need the accessibility features, this plan should include the use of a lease addendum wherein the tenant agrees to transfer to a non-accessible unit when necessary and that outlines the steps necessary for effecting the transfer.
- A list of all units with mobility accessibility.
- A list of all units with communication accessibility.
- A waiting list and transfer list for all accessible units.
- A report indicating whether each accessible unit is currently occupied by tenants who need the unit's accessibility features.
- A written plan for marketing accessible units to the public.

(3) Marketing Accessible Units

Pursuant to section 10337(b)(2)(B), owners of LIHTC projects must ". . . adopt suitable means to assure that information regarding the availability of accessible units reaches eligible individuals with handicaps,[39] and shall take reasonable nondiscriminatory steps to maximize the utilization of such units by eligible individuals whose disability requires the accessibility features of the particular unit."

Owners can neither disseminate information about available accessible units nor maximize the utilization of these units by eligible individuals without a focused marketing strategy. That is why TCAC should require owners to develop a marketing plan, subject to TCAC review and approval, that is designed to reach people with disabilities and organizations that serve this population. Such organizations include Regional Centers, Centers for Independent Living, legal services organizations, fair housing organizations, and disability rights organizations like Disability Rights California. Further, this marketing plan should be added to the list of documents required in every tax credit application under section 10322(h). Furthermore, the marketing plan must be used every time an accessible unit is vacated and there is no one in the project or on the waiting list who needs the features, and it must be implemented before an accessible unit is leased to someone who does not need the unit's accessibility features.

[39] The word "disabilities" should be substituted for the word "handicaps" wherever it is used in TCAC regulations. The term "handicap" is archaic and is considered offensive by people with disabilities

To aid in marketing to people with disabilities, TCAC should also add information on the number of accessible units at each LIHTC project to TCAC's project mapping site. This site already includes unit-specific information, thus adding accessible unit information can be easily done without much administrative burden.

(4) Procedures for Reasonable Accommodation and Modification Requests, and Requests for Auxiliary Aids and Services for Effective Communication.

In accordance with state and federal fair housing laws and state regulations at Cal. Code Regs., tit. 2, sections12176 through 12185, and particularly section 12176(c)(5), TCAC should require owners to adopt formal procedures to assist owners in responding lawfully to tenants making reasonable accommodation and reasonable modification requests. These procedures should also outline how the owner will evaluate and respond to those requests. Formal procedures help ensure compliance with applicable state and federal law and add certainty, fairness, and transparency to the reasonable accommodation and reasonable modification process, thereby ensuring that each request gets due consideration and that no request is denied on an arbitrary or erroneous basis.[40]

Owners should also adopt formal procedures to aid tenants in requesting communication auxiliary aids and other services required under Titles II and III of the ADA that comply with ADA implementing regulations.[41] These auxiliary aids and services are essential to a tenant's ability to communicate with the management and to otherwise make use of and enjoy their dwelling.

And to ensure compliance, owners must retain a copy of all requests and of their response to each, at least for some period.

(5) Compliance Monitoring

To ensure owner compliance with these proposed accessibility regulations and compliance with an owner's overall fair housing responsibilities, TCAC should, at a minimum, do the following.

First, owners should be required to certify, pursuant to section 10337(c)(3), that "the subject project has complied with the requirements of all applicable fair housing laws including, without limitation, TCAC fair housing regulations (including those proposed herein), the Americans with Disabilities Act, the federal Fair Housing Act, the California Fair Employment and Housing Act, the Unruh Act, Government Code Section 11135, Section 504 of the Rehabilitation Act, and regulations promulgated pursuant to those statutes." This serves the purpose of further incentivizing owner compliance with their fair housing obligations by subjecting an owner to

[40] This includes a policy for allowing "service animals" and requesting reasonable accommodations for "support animals" that conforms to Cal. Code Regs., tit. 2, §§ 12005(d) and 12185.

[41] 28 C.F.R. §§ 35.160 through 35.164; 28 C.F.R. § 36.303.

possible credit recapture and tax credit penalties, on top of the liability risk imposed by the laws themselves.[42]

Second, owners should be required to retain every document required by the proposed policies above, pursuant to section 10337(c)(1), and each document should be subject to the TCAC audit process outlined in section 10337(c)(4). The purpose of this mechanism is to monitor whether the required procedures and plans are up to date and whether they are being implemented properly. Where an audit reveals missing updated documents and/or a lack of implementation, the owner must be subject to credit recapture pursuant to the certification above.

Third, pursuant to section 10337(c)(4), physical inspections should include checking for ongoing compliance with accessibility requirements.

(d) <u>Provide Meaningful Language Access for Limited English Proficiency (LEP) Tenants</u>

For LEP tenants, the lack of meaningful language access represents a significant barrier to accessing and maintaining housing. For example, LEP tenants may not understand the terms of their lease or the house rules that apply, and they may not understand a property owner's proposed adverse action, giving them little chance of successfully challenging the decision. A lack of meaningful language access may also constitute national origin discrimination under the Fair Housing Act.[43]

Therefore, we are asking TCAC to require LIHTC property owners to provide *meaningful* language access to LEP tenants and applicants.[44] At a minimum, this requires a written language access plan that provides for the translation of notices and other written documents touching on a person's tenancy rights and the provision of interpretive services to facilitate communications between tenant and owner or the owner's management agent. TCAC should add this type of language access plan to the list of standard application documents required under section 10322(h).

(e) <u>Prohibit an Owner from Requiring a Social Security Number as Part of the Admission and Recertification Process</u>.

Many LIHTC property owners require social security numbers for the purpose of verifying a person's income, credit information, and rental history. However, individuals born outside of the

[42] These fair housing laws can only be enforced through litigation, which low-income tenants are generally not able to pursue. Thus, the risk of liability under this fair housing laws (and the attendant incentive to comply) is very low.
[43] See *U.S. v. Maricopa County, Ariz.* (9th Cir. 2012) 915 F.Supp.2d 1073, 1079-1080 (citing *Lau v. Nichols* (1974) 414 U.S. 563 and other cases establishing the link between language discrimination and discrimination on the basis of national origin).
[44] There are approximately 19 million LEP individuals in California. Given that LEP individuals make up a significant portion of the state's overall population, it is safe to say that a significant number of LEP individuals either live at or will one day apply to live at a LIHTC property, making language access at LIHTC properties that much more important.

United States are unlikely to have a social security number. Consequently, a policy that requires a person to provide a social security number as part of the rental application and/or annual recertification process almost certainly has a disproportionate adverse impact on individuals born outside of the United States, a potential violation of the FHA and California's FEHA based on national origin discrimination.

Therefore, TCAC should prohibit LIHTC owners from requiring a person to submit a social security number as part of the admission and recertification process. An exception to this prohibition is reasonable where information cannot be obtained otherwise, but this should be a rare deviation from the rule, since Taxpayer Identification Numbers and other government issued documents can be used to obtain relevant information.

This protection is particularly necessary in California, where approximately 10.6 million individuals—27% of the population—are foreign-born.[45]

We thank TCAC for its consideration of these proposals. We would like to request a meeting with you so that we can discuss a path forward on these reforms. Should you have any questions regarding this letter in the meantime, please feel free to contact Marcos Segura at msegura@nhlp.org.

Sincerely,

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Carolyn Reilly, Elder Law & Advocacy
Lolita Fernandes, Asian Americans Advancing Justice – Asian Law Caucus

[45] American Immigration Council, Fact Sheet: Immigrants in California (Aug. 6, 2020), available at https://www.americanimmigrationcouncil.org/research/immigrants-in-california.