



## Qualified Allocation Plan

*The mission of the Maine State Housing Authority is to assist Maine people to obtain and maintain decent, safe, affordable housing and services suitable to their unique housing needs.*

*In carrying out this mission, the Maine State Housing Authority will provide leadership, maximize resources, and promote partnerships to develop and implement sound housing policy.*

**CHAPTER 16** Allocation of State Ceiling for Low-Income Housing Tax Credit

Summary: The Tax Reform Act of 1986 created the low-income housing tax credit for use by qualifying developers of housing projects which satisfy applicable tenant income and rental targeting requirements. The Maine State Housing Authority has been designated as the housing credit agency for the State responsible for allocation of the annual credit ceiling. This Rule establishes the policies and procedures for the allocation process.

1. Definitions

- A. “Accredited Investor” means an investor with adequate capacity as determined by MSHA.
- B. “Act” means the Maine Housing Authorities Act, 30-A M.R.S.A. §4701 et seq., as amended.
- C. “Affordable Housing TIF” means an affordable housing development program approved by MSHA pursuant to MSHA’s Affordable Housing Tax Increment Financing Program and the Act.
- D. “Applicable Fraction” means the fraction defined in Section 42(c)(1)(B) of the Code.
- E. “Applicable Percentage” means the percentage defined in Section 42(b) of the Code.
- F. “Applicant” means an individual or entity applying for Credit governed by this Rule or its successors and assigns, including without limitation the owner of the Project if the owner is not formed or established at the time of Application.
- G. “Application” means an application to MSHA for a reservation of Credit governed by this Rule.
- H. “Binding Agreement” means a binding agreement executed by MSHA and the Applicant pursuant to which the Applicant elects the Applicable Percentage for a Project pursuant to Section 42(b)(2) of the Code.
- I. “Code” means the Internal Revenue Code of 1986, as amended, including applicable rules and regulations proposed or promulgated thereunder.
- J. “Compliance Period” means the period described in Section 42(i)(1) of the Code.
- K. “Credit” means the low-income housing tax credit established by Section 42 of the Code.

- L. “Credit Period” means the period described in Section 42(f)(1) of the Code.
- M. “Developer Fee” means the compensation to the individual(s) or entity(ies) responsible for the work, costs and risks associated with the development of a Project, including amounts paid to consultants to perform tasks on behalf of such individuals or entities, but does not include compensation for professional services such as environmental assessments, rental market studies, soil tests, and water tests.
- N. “Difficult To Develop Area” means areas of the State which satisfy the requirements of Section 42(d)(5)(C)(iii)(I) of the Code and are designated by HUD as such.
- O. “Eligible Basis” means eligible basis as defined in Section 42(d) of the Code.
- P. “Enterprise Community” means any community that has received a federal designation as an Enterprise Community or empowerment zone as defined by HUD or the United States Department of Agriculture.
- Q. “Extended Low-income Housing Commitment” means an agreement satisfying the requirements of Section 42(h)(6)(B) of the Code.
- R. “Extended Use Period” means the period described in Section 42(h)(6)(D) of the Code.
- S. “Housing Development Costs” means the total of all direct and indirect costs incurred in financing, creating, purchasing or rehabilitating Qualified Low-income Housing Projects except the costs attributable to the acquisition of the land and/or buildings.
- T. “Homeless” means homeless as that term is defined in Section 103 of the Stewart B. McKinney Homeless Assistance Act, as amended, 42 U.S.C. § 11302.
- U. “HUD” means the United States Department of Housing and Urban Development.
- V. “Intermediary Costs” means all Housing Development Costs except the actual construction or Rehabilitation Costs attributable to the development of the units.
- W. “Metropolitan Statistical Area” means an area defined as such by the United States Office of Management and Budget.
- X. “MSHA” means Maine State Housing Authority.
- Y. “Need Market Area” means the analysis of labor markets ranked as very high, high, medium or low. Analysis based upon review of specific populations of Very Low Income households and total subsidized housing units.

- Z. “Owner” means the owner of a Qualified Low-income Building which has been placed in service and has received an allocation of Credit from MSHA pursuant to this Rule or a prior Qualified Allocation Plan.
- AA. “Qualified Allocation Plan” or “Plan” means the plan for allocation of the annual State Ceiling on the Credit adopted by the housing credit agency pursuant Section 42(m)(1)(B) of the Code.
- BB. “Qualified Basis” means qualified basis as defined in Section 42(c) of the Code.
- CC. “Qualified Census Tract” means areas of the State which meet the requirements of Section 42(d)(5)(C)(ii)(I) of the Code and are designated by HUD as such.
- DD. “Qualified Low-income Building” or “Building” means a building as defined in Section 42(c)(2) of the Code.
- EE. “Qualified Low-income Housing Project” or “Project” means a project as defined in Section 42(g) of the Code.
- FF. “Qualified Non-profit Organization” means an organization defined in Section 42(h)(5)(C) of the Code.
- GG. “Rehabilitation Costs” means the expenses incurred or to be incurred which qualify as rehabilitation expenditures under Section 42(e) of the Code.
- HH. “RHS” means the United States Department of Agriculture – Rural Housing Services.
- II. “Section 8” means Section 8 of the United States Housing Act of 1937, as amended.
- JJ. “SRO Housing” means housing that meets the requirements set forth in Section 4.D. of this Rule.
- KK. “State” means the State of Maine.
- LL. “State Ceiling” means the State housing credit ceiling established in Section 42(h)(3)(C) of the Code.
- MM. “Total Construction Cost” means the sum of site costs, structures costs, general requirements, bond premiums, and contractor overhead and profit.
- NN. “Total Development Cost” means the sum of Total Construction Costs; soft costs such as permits, engineering, legal; costs associated with obtaining and carrying financing package; and acquisition costs.

- OO. “Very Low Income” means individuals or families whose income is at or below 50% of the area median income as defined by HUD.

## 2. Overview

The low-income housing tax credit is established pursuant to Section 42 of the Code. As the housing credit agency for the State of Maine, MSHA is responsible for allocating the annual State Ceiling. Each year MSHA must adopt a Qualified Allocation Plan pursuant to which all allocations of Credit will be made. A Qualified Allocation Plan must set forth selection criteria and establish certain preferences and priorities for the allocation process in accordance with Section 42 of the Code.

This Rule comprises the MSHA's Qualified Allocation Plan for the allocation of the 2006 annual State Ceiling of the low-income housing tax credit. The purpose of this Rule is to establish criteria for low-income rental housing projects to which the Credit will be allocated. A process has been established to select those Projects which address the most pressing housing needs of the State. These needs have been assessed and priorities for the allocation of the Credit have been established based on these needs. These needs and priorities are summarized below and have been incorporated into the selection criteria to be used in the selection process. Projects selected under this Rule must be evaluated in accordance with this Rule to determine the amount of Credit to be allocated.

## 3. Housing Needs/Priorities

- A. MSHA annually completes a statewide needs assessment as part of its Consolidated Plan. Based on that annual needs assessment, MSHA determines priorities in its housing delivery programs. MSHA will allocate Credit resources in a manner consistent with the needs assessment and priorities approved through the Consolidated Plan. The following needs are identified:
  - 1. Creation and maintenance of an adequate supply of decent, safe and sanitary rental housing affordable to Very Low Income persons.
  - 2. Rehabilitation of existing housing stock, which does not result in displacement or substantially increased housing costs.
  - 3. Increased availability of housing with services for persons with special needs including, without limitation, the homeless, persons with mental and physical disabilities and the elderly.
- B. In consideration of the housing needs identified above, MSHA has established the following housing priorities for allocation of the Credit:
  - 1. Projects for larger families which reflect the greatest affordability, i.e. rental Projects that offer the lowest total monthly housing costs and are rent-restricted to the lowest income households.

2. Projects involving acquisition and/or rehabilitation, which add to or significantly rehabilitate the existing rental housing stock, and are rent-restricted to the lowest income households.
3. Projects which attract new federal rental subsidies where the Credit is needed to make the Project feasible, including Projects with RHS funding.
4. Projects which meet the housing and service needs of distinct populations of a community including SRO Housing.
5. Projects which provide housing for persons with Very Low Income.
6. Projects located in rural areas of the State.

4. State Ceiling

- A. The State Ceiling for the Credit for each calendar year will be the sum of:
  1. \$1.85 multiplied by (a) the cost-of-living adjustment determined in accordance with Section 1(f)(3) of the Code and (b) the State population as determined by the most recent estimate of the State's population released by the United States Bureau of Census before the beginning of such calendar year, or by such other method as may be authorized or required by the Code;
  2. The unused State Ceiling for the State, if any, for the preceding calendar year;
  3. The amount of the State Ceiling returned in the calendar year; and
  4. The amount, if any, allocated to MSHA by the United States Secretary of the Treasury from the re-pooling of other states' unused housing credit allocations.
- B. Non Profit Set-aside. \$350,000 of the annual available Credit will be set aside for Projects in which a Qualified Non-profit Organization will own an interest (directly or through a partnership) in accordance with Section 42 (h)(5)(C) of the Code and materially participate in the development and operation of the Project throughout the Compliance Period in accordance with Section 42 (h)(5)(B) of the Code. An Applicant must provide evidence that a Qualified Non-profit Organization will own an interest in the Project in accordance with the Code, indicate its desire to compete in this set-aside in its Application and receive the maximum points under Section 7.C of this Rule (Creation of Affordability for Lowest Income Tenants). In the event that the amount of Credit under this set-aside is not sufficient to complete the project proposed by the winning Applicant, additional credit will be allocated to the Applicant up to the maximum credit amount set forth in Section 4.E. of this Rule

regardless of the Applicant's score in relation to the scores of other Applicants.

- C. Rural housing Set-aside. \$350,000 of the annual available Credit will be set aside for Projects that are located in a municipality outside of a Metropolitan Statistical Area and are included in a Qualified Census Tract or Difficult to Develop Area. An Applicant must indicate its desire to compete in this set-aside in its Application and must receive the maximum points under Section 7.C of this Rule (Creation of Affordability for Lowest Income Tenants).
- D. SRO Housing Set-aside. \$400,000 of the annual available Credit will be set aside for Projects that satisfy the following criteria.
  - 1. The Project must contain separate living units which include both cooking and bathroom facilities and may qualify as zero bedroom units under HUD guidelines;
  - 2. A minimum of 75% of the units in the Project must be set aside for persons who are Homeless;
  - 3. The Project may be situated on scattered sites;
  - 4. The Applicant must submit a service plan for the tenants, acceptable to MSHA, and a commitment by a qualified service provider(s) to provide the services described in the plan with its Application; and
  - 5. An Applicant must indicate its desire to compete in this set-aside in its Application and must receive the maximum points under Section 7.C of this Rule (Creation of Affordability for Lowest Income Tenants).

Successful Applicants under this set-aside are eligible to receive, if MSHA makes the resource available, project-based Section 8 rental subsidy through MSHA for at least 25% of the total units in the Project.

- E. Maximum Credit Restriction. The maximum amount of Credits that any single Project may receive is \$500,000, except as provided below.

MSHA, in its sole discretion, may allocate Credit in excess of the Maximum Credit Restriction to the highest scoring Project, for which the Applicant submits a written request for excess Credit in its Application provided that the total Credit awarded to the Project does not exceed 30% of MSHA's annual State Ceiling.

If, at the close of a calendar year, after all current year allocations and carryover allocations have been made, there is a portion of the current per capita State Ceiling remaining, it will automatically be carried over and added to the State Ceiling for the following year to be allocated as part of the State Ceiling for that year.



5. Allocation Process

- A. Applications will be accepted by MSHA on an on-going basis in accordance with the reservation cycles identified in Section 5.D. of this Rule. MSHA may reject any and all Applications.
- B. Upon receipt of an Application satisfying the requirements of Section 6 of this Rule, MSHA will provide notice of the proposed Project to the chief executive officer of the local jurisdiction within which the Project is to be located. Such notice will provide for a fifteen (15) day period in which to comment on the proposed Project. Any comments received will become part of the Application and will be considered by MSHA in the selection process.
- C. All Applications, which meet the requirements of Section 6 of this Rule, will be reviewed and ranked according to the selection criteria set forth in Section 7 of this Rule.
- D. Once ranked, MSHA will determine those Applications to be selected for reservation of Credits. The deadline for submitting all Applications for 2006 Credit, including Applications for the Set-asides in Section 4 of this Rule, is 5:00 PM on Friday, December 2, 2005. A waiting list will be developed for Applications not initially selected. Any unused Credit will be made available to Applicants on the waiting list in rank order of priority. If MSHA issues a notice to proceed under another MSHA program for an Application on the waiting list, said Application on the waiting list will be deemed withdrawn.
- E. Once a Project has been selected for a reservation of Credit, MSHA will determine the amount of Credit to be reserved based on the evaluation procedure set forth in Section 8 of this Rule. Under Section 42 of the Code an Applicant may apply for a Credit reservation based on 130% of Eligible Basis for Projects in Qualified Census Tracts and Difficult To Develop Areas, subject to the overall limitation on Credit allocation described in Section 8 of this Rule.
- F. Once MSHA has determined the amount of Credit to be reserved for a Project, the reservation document will be issued pursuant to Section 9 of this Rule.
- G. Projects holding a valid Credit reservation may receive allocations pursuant to either Section 10 or Section 11 of this Rule.
- H.
  - 1. MSHA shall deem an Application withdrawn or, if a reservation has been issued, the reservation cancelled if one or more of the following events occur after the Application is made or the reservation is issued.
    - a. The Application or reservation is assigned or there is a change of Applicant without MSHA's prior written consent.

- b. There is a change in the location of the Project from the location identified in the Application.
- c. There is any change in the commitments made in the Application, except as provided in Section 7.B.1. and Section 7.E.5. (addressed in the subsection below) of this Rule, which results in a net reduction in the score that the Application received pursuant to the selection criteria set forth in Section 7 of this Rule.
- d. There is a change in the design of the Project or the financing for the Project from the design or the financing described in the Application which MSHA determines, in its sole discretion, would result in a substantial increase in the amount of Credit or other MSHA funding for the Project that the Applicant requested in the Application and MSHA determined the Applicant was eligible to receive.
- e. There is any other material or substantive amendment or change to the Application or reservation without MSHA's prior written consent.

2. Any change in the commitments made in the Application for which the Applicant was awarded points under Section 7.E.5. of this Rule will be handled as follows. At the time an Applicant (or owner of a Project if different from the Applicant) has received construction bids and is selecting a contractor for its Project, MSHA will compare the healthcare coverage achieved in the contractor and subcontractor bid(s) selected by the Applicant to the amount pledged by the Applicant in its Application. If the Applicant fails to fulfill its pledge in its Application, then MSHA will determine, in its sole discretion, whether the Applicant made a good faith effort to fulfill its pledge. If MSHA determines that the Applicant made a good faith effort to fulfill its pledge in the Application, MSHA will not deem the Application withdrawn or re-score the Application. Notwithstanding the foregoing, selected contractors and subcontractors that indicate they provide an eligible group health insurance plan (as defined in Section 7.E.5. of this Rule) for their employees at the time of bid selection will be required to maintain the eligible group health insurance plan during the construction of the Project.

If MSHA determines, in its sole discretion, that the Applicant did not make a good faith effort, MSHA will give the Applicant an opportunity to satisfy the pledge made in its Application. If the Applicant fails to fulfill its pledge, MSHA will not deem the Application withdrawn, but will re-score the Application. If upon re-scoring, the Application does not score high enough to maintain its award of Credits, the Application will be added to the waiting list according to its new score relative to the score of other Applications, and the next project on the waiting list will be awarded the Credits that were originally awarded to the Applicant.

If MSHA awards points under Section 7.E.5. of this Rule to an Applicant (including an Applicant who fails to fulfill the pledge in its Application but whom MSHA

determined made a good faith effort), the contractors and subcontractors selected by the Applicant (or owner of the Project if the owner is different from the Applicant) that indicate they provide an eligible group health insurance plan for their employees at the time of bid selection will be required to maintain the eligible group health insurance plan during the construction of the Project. Applicants (and owner of the Project if the owner is different from the Applicant) and general contractors (or construction managers) will not be responsible for compliance by subcontractors. General contractors (and construction managers) will be responsible for their own compliance. Noncompliance by a contractor (including construction managers and subcontractors) will result in MSHA notifying the contractor of the violation and giving the contractor an opportunity to cure the violation. If the contractor fails to cure the violation, then MSHA will make a formal determination of noncompliance and keep a record of the violation and failure to comply. After three formal determinations of noncompliance by a contractor within any given time period, MSHA may notify the contractor that the contractor is suspended for one year from participating in any of MSHA's programs. The contractor will have an opportunity to request an administrative hearing to challenge the suspension.

- I. An Application for Credit from the State Ceiling for a particular calendar year which is pending on December 31st of that calendar year may, at the discretion of MSHA, be carried over to the succeeding calendar year and, if carried over, may be processed and evaluated in accordance with the Plan then in effect. MSHA reserves the right to require a new Application in the succeeding calendar year if necessitated by changes in this Rule or the Code.
- J. An Application requesting a reservation or allocation of Credit from the State Ceiling for calendar years after 2006 will not be accepted until MSHA adopts such further amendments to this Rule as it determines necessary to continue MSHA's Credit program. MSHA may issue a binding commitment to allocate Credit ceiling available in the subsequent year for any Project placed in service in the current year. Credit from the subsequent year's Credit ceiling may only be committed upon MSHA's determination that the amount of Credit that remains in the current year's State Ceiling is insufficient to ensure the viability or feasibility of the Project. Any binding commitment to allocate subsequent year's Credit authorized pursuant to this section shall be processed and evaluated in accordance with this Rule and shall be subject to the continuation of MSHA's Credit program and applicable law.

6. Threshold Application Requirements

- A. Applications will be accepted by MSHA only on such form established by MSHA.
- B. An Applicant shall agree to maintain the affordability pledged in its Application pursuant to Section 7.C. of this Rule and to keep the low-income units in the Project rent-restricted in accordance with Section 42 of the Code for a period of ninety (90) years.

- C. An Applicant who receives a reservation of Credit shall enter into an Extended Low-income Housing Commitment with MSHA which contains restrictive covenants that run with the land, are binding on the Applicant and its successors and assigns and are enforceable by MSHA and the low-income tenants of the Project. The Extended Low-income Housing Commitment will obligate the Applicant to comply with the Code, the resident service coordination threshold requirement set forth in Section 6.D.13. of this Rule, specific commitments made by the Applicant in the Application for which the Application was awarded points during the selection process, including without limitation, the additional affordability pursuant to Section 7.C. of this Rule, physical plant amenities, preference for persons with special needs and preference for persons whose names appear on a public housing or Section 8 waiting list.

The Extended Low-income Housing Commitment shall be recorded in the appropriate registry of deeds prior to all mortgage liens and encumbrances on the Project and before MSHA issues an IRS Form 8609. The Extended Low-income Housing Commitment will terminate upon a foreclosure or transfer of the Project in lieu of foreclosure as provided in Section 42(h)(6)(E) of the Code; provided however, that low-income tenants may not be evicted or suffer an increase in gross rent during the three-year period following termination.

- D. An Application must be complete, as determined by MSHA, and must meet the following threshold requirements:
1. Must be for a Qualified Low-income Housing Project.
  2. Must have a complete development team consisting of a legally existing development entity with a taxpayer identification number, a management company and a tax advisor/consultant.
  3. Must include a partnership agreement, articles of incorporation or other evidence of legal existence of the Applicant. If the legal owner of the Project, i.e. the person or entity to whom the Credit will be allocated, has not been formed at the time of Application, the Applicant must establish the legal owner of the Project and submit evidence thereof to MSHA before a reservation of Credit is issued for the Project.
  4. If a Qualified Non-profit Organization will own an interest in the Project and materially participate in the development and operation of the Project, the Application must provide documentation sufficient for MSHA to determine that such organization is a Qualified Non-profit Organization, including without limitation, (a) a Certificate of Good Standing for the organization from the Maine Secretary of State, (b) an Internal Revenue Service letter determining that such organization is an organization described in Section 501(c)(3) or Section 501(c)(4) of the Code and is exempt from taxation under Section 501(a) of the Code, and (c) a certification from the chief executive officer of the organization that (i) the organization has notified the Internal

Revenue Service of all changes to the organization that would affect its status under Section 501(c)(3) or 501(c)(4) of the Code and Section 501(a) of the Code and the determination letter has not been modified, suspended or revoked, (ii) the organization is engaged in and has as one of its charitable purposes the fostering and development of low-income housing, and (iii) the organization is not affiliated with or controlled by any for-profit entity.

5. Must have satisfactory site control consisting of ownership, option, purchase and sale contract, long-term lease or other evidence acceptable to MSHA.
6. Must comply with the requirements under 30-A M.R.S.A. § 4349-A. Projects, which involve new construction, the acquisition of newly-constructed or the creation of multi-family residential rental property, must be located in a locally designated growth area as identified in the applicable municipality's comprehensive plan. If a municipality has not designated growth areas in its comprehensive plan, the Project must be located in an area that is served by a public sewer system with the existing capacity for the Project, an area identified as a census-designated place in the latest Federal Decennial Census, or a compact area of an urban compact municipality as defined under 23 M.R.S.A. § 754. Projects that serve persons identified in 30-A M.R.S.A. § 4349-A(1)(C)(7), including without limitation, persons with disabilities, persons who are homeless and persons who are wards of the State, are excluded from the requirements of 30-A M.R.S.A. § 4349-A.
7. Must demonstrate the financial ability to proceed with the Project by providing current status of applications for construction and permanent loan commitments, or other proof of ability to proceed from existing resources. Providers which deliver services to special needs populations must provide documentation from an identified source of funding.
8. Must include a proposal from an Accredited Investor or experienced tax credit syndicator. Net proceeds made available to the Project should be identified and expressed as a "factor" of the annual Credit dollar amount anticipated.
9. Must provide a comprehensive market study of the housing needs of low-income persons in the area to be served by the Project. The study must be conducted at the Applicant's expense by a qualified professional acceptable to MSHA.

The National Council of Affordable Housing Market Analysts (NCAHMA) has adopted guideline documents detailing its standards for definitions and content in an affordable housing market study. MSHA strongly encourages Applicants to direct their market analyst to produce a market study consistent with the NCAHMA guideline materials and standards. Any deviation from

the guideline materials and standards must be explained in a cover letter submitted by the market analyst with the study.

If, during the course of its review, MSHA determines that the market study submitted is inadequate, MSHA will require the Applicant to submit a new market study. MSHA reserves the right to commission its own market study.

10. Must include schematic designs of the proposed Project which comply with MSHA Construction Guidelines, MSHA's Green Building Standards and all applicable local, state and federal codes, regulations, statutes and ordinances. All construction contractors and subcontractors involved in the construction of a Project must comply with MSHA's Contractor Standards For MSHA-Financed Multifamily Housing.

Applicants (and owner of the Project if the owner is different from the Applicant) and general contractors (or construction managers) will not be responsible for compliance by subcontractors. General contractors (and construction managers) will be responsible for their own compliance. If a contractor (including construction managers and subcontractors) fails to comply with MSHA's Contractor Standards For MSHA-Financed Multifamily Housing, MSHA will notify the contractor of the violation and give the contractor an opportunity to cure the violation. If the contractor fails to cure the violation, then MSHA will make a formal determination of noncompliance and keep a record of the violation and failure to comply. After three formal determinations of noncompliance by a contractor within any given time period, MSHA may notify the contractor that the contractor is suspended for one year from participating in any of MSHA's programs. The contractor will have an opportunity to request an administrative hearing to challenge the suspension.

11. Must provide an acceptable disclosure and certification of the total financing planned for the Project, any proceeds or receipts expected to be generated by reason of the Credit or other tax benefits, the total sources and uses of Project funds and the full extent of all Federal, state and local subsidies which apply or for which the Applicant expects to apply with respect to the Project. This disclosure and certification must include income, operating and development cost projections and methods for satisfying any deficits.
12. Must provide a fifteen year pro forma Project operating statement. In the event the proposed Project has an existing contract for federal assistance which may end or which may terminate within the irrevocable benefit period being pledged by the Applicant, two additional items are required: (a) supplemental written explanation of the impact on the Project's continued operation of such termination or non-renewal, and (b) a pro forma operating statement running five years beyond the anticipated expiration of the

contract which includes the impact of transitioning from the contract rent to applicable tax credit rent.

13. Must provide for a resident service coordinator to be available to the residents of the Project to evaluate service needs and refer residents to appropriate services throughout the Compliance Period. The resident service coordinator must be present on-site at the Project and available to the residents a minimum of one day per week, preferably two days per week, and a minimum of 4 to 6 hours per week for Projects with up to 30 units and a minimum of one hour per week for every 5 residents for Projects with more than 30 units. Services shall be made available to the residents in a private, confidential setting and shall be free of charge to the residents. The Application shall include a detailed service plan which describes the services to be provided by the resident service coordinator, an executed service contract with the resident service coordinator if the services will not be offered by the Applicant, all costs associated with the resident service coordinator (including without limitation, salary, benefits, office space, office equipment and office supplies, travel, orientation and ongoing training or education), where the services will be offered to the residents (e.g. on-site office), how the services will be funded during the Compliance Period and the capacity of the Applicant or service provider (if the services are not being offered by the Applicant).

MSHA will evaluate the service plan and the capacity of the Applicant or the service provider if the services are not being offered by the Applicant. MSHA will identify any deficiencies in the service plan or the capacity of the Applicant or the service provider to comply with this section in the notice to proceed and specify the time period in which the Applicant must correct the deficiencies identified. If the Applicant fails to correct the deficiencies within the specified time period in the notice to proceed, the Application will be deemed withdrawn.

14. Payment of a non-refundable application fee as follows:

Projects of up to 11 units	\$ 250
Projects of 11 to 23 units	\$ 500
Projects of 24 or more units	\$1,000

The non-refundable application fee must be paid for any Application re-submitted or carried over from one tax credit year to the next tax credit year. This subparagraph does not apply to tax-exempt bond financed properties described in Section 12 of this Rule.

- E. MSHA reserves the right to require additional information it deems necessary in order to process an Application.

- F. An Applicant may withdraw an Application at any time by written notice to MSHA; however, the application fee will not be refunded.

7. Selection Criteria

The following criteria have been chosen to establish a framework for the allocation process. Each category has been assigned a maximum point total in order to weigh the selection process towards addressing the highest housing needs. The factors or characteristics MSHA will consider are listed under each category.

- A. Project Characteristics (maximum of 36 points).
1. A Project involving rehabilitation of existing multi-family rental housing stock containing 5 or more units that also provides protection against displacement and substantial increases in housing costs attributable to the rehabilitation will receive 3 points.
  2. A Project that incorporates one or more of the items listed below will receive 1 point for each category of item provided:
    - a. An on-site community room developed as part of the Project.
    - b. Computer(s) for tenant use in a common area.
    - c. All units include the necessary infrastructure for cable, DSL or wireless Internet service and such service is provided to the tenants free of charge.
    - d. Laundry capability provided on-site either in each unit as a washer/dryer hook-up or as a fully accessible facility centrally located within the Project.
    - e. Project located within  $\frac{1}{4}$  mile of municipal transportation route.
    - f. Area(s) for activities either provided on-site at the Project or public access is within  $\frac{1}{2}$  mile of the Project, which areas for activity include but are not limited to ball-fields, basketball courts, tennis courts, playgrounds with equipment, gardening plots, bike trails, walking trails and ice-skating rinks. If there is a fee or membership is required to use the equipment or facility, it is not eligible in this category.
    - g. Separate, lockable storage space assigned to each unit.
  3. A Project that gives preference in at least 20% of the units in a Project to persons who are homeless or displaced, persons with mental or developmental disabilities, or other persons with special housing needs will receive 3 points. The Applicant must commit to maintain a waiting list for the persons for which the preference is given and to provide access to services appropriate to such persons.



4. A family Project with a minimum of 20% of the low income units as 3 or more bedroom apartments and an additional 30% of the low-income units as 2 or more bedroom apartments will receive 6 points.
5. A Project that provides for low-income tenant ownership will receive 1 point. An Applicant shall not transfer ownership of the Project to the tenants until the affordability period required in Section 6.B. of this Rule has expired.
6. A Project will receive 4 points if the Project has all municipal approvals required to proceed with the Project and any timeframe to appeal such approvals has expired with no appellate action being taken. The Applicant must submit evidence thereof in the form of a letter from the appropriate municipal official or body with its Application.
7. A Project that has a letter from the State Planning Office supporting the Project as promoting the principles of smart growth and minimizing the effects of sprawl will receive 2 points. The Applicant must submit the letter of support with its Application.
8. Projects designed to meet a higher level of accessibility to accommodate elderly and disabled tenant populations will receive up to 10 points. Two (2) points will be awarded for each 10% of the total units in the Project that are either Type "A" fully accessible units or Type "A" units with adaptable features. Partial points will not be awarded. The Applicant must submit a certification from an architect that specifically identifies which units in the Project are Type "A" fully accessible and Type "A" with adaptable features.

**B. Leveraged Funds (maximum of 13 points).**

An Applicant that proposes to leverage funds for a Project from a source other than MSHA will receive up to 13 points.

1. Up to 8 points will be awarded to a Project that has below market funding from a source other than MSHA. Tax credit equity, service and operating funds, rental assistance, construction financing and donations or below market purchases of land and buildings are not eligible sources of below market funding under this category. MSHA will give consideration under this category to below market funding that has been committed and below market funding that has been applied for, but notification of a commitment has not yet been received by the Applicant. Funds that have not yet been committed will be evaluated at 10% of the amount applied for by the Applicant. The Applicant must submit evidence of the commitment of below market funding or evidence that the below market funding has been applied for with its Application. The evidence must include the terms of the below market funding, including without limitation, the interest rate, the

amortization period, the loan term and security required, if any.

Eligible below market funding will be evaluated based on a present value or net present value basis using the 10-year Treasury note rate as of December 2, 2005 plus 300 basis points to determine an amount of subsidy per low-income unit. Projects will receive 1 point for every \$5,000 of subsidy per low-income unit provided. Partial points will not be awarded. Funding made possible by an Affordable Housing TIF that directly benefits the Project will be evaluated as if it were a grant for the purposes of the above calculation.

In the event that a below market funding source that the Applicant applied for and MSHA considered in this category is not awarded, the Applicant has 90 days to find alternative financing with similar terms. If after 90 days the Applicant cannot find a replacement source, or the replacement source has different terms MSHA will re-score the Application.

2. A Project, which consists or will consist of donated land or land and building(s) transferred or leased to the owner of the Project for no consideration or nominal consideration, will receive 2 points. If there is an existing building(s) on the land to be leased or transferred, all of the building(s) and the land must be leased or transferred for nominal or no consideration to the owner of the Project to receive points under this category. For purposes of this subsection, nominal means one percent (1%) or less of the value of the land or land and building(s). The Applicant must submit evidence of the transfer or lease for nominal or no consideration, and evidence of the value of the land or land and building(s) if the consideration is nominal, with its Application.
3. Up to 3 points will be awarded based on the percentage of Developer Fee left as a source of funds for the Project:

No Developer Fee loan will receive 0 points

≤ 25% Developer Fee loan will receive 1 point

> 25% Developer Fee loan will receive 3 points

Alternatively, the maximum 3 points will be awarded if the Developer Fee recognized and charged to the Project is less than 75% of the maximum allowable Developer Fee as described in Section 8.E. of this Rule.

- C. Creation of Affordability for Lowest Income Tenants (maximum of 30 points).

1. 30 points will be awarded for a pledge of 60% or more of the total units in a Project to persons with income at or below 50% of Area Median Income.
2. Applicants that are also applying for financing for the Project from RHS will receive 30 points in this category for meeting the affordability of the applicable RHS program.

Applications for any Set-aside in Section 4 of this Rule must maximize points in this category to be eligible for the Set-aside.

D. Project Location (maximum of 28 points).

1. Projects proposed in a VERY HIGH Need Market Area as determined by MSHA will receive 20 points, projects proposed in a HIGH Need Market Area as determined by MSHA will receive 15 points

- a. Statewide Subsidized Housing Ranks for Applicants Not Applying under the SRO Housing Set-aside:

Labor Market	Families Statewide Ranking
Augusta	High
Bangor	High
Bath-Brunswick	Very High
Belfast	Very High
Biddeford	Very High
Boothbay Harbor	Very High
Calais	High
Dexter-Pittsfield	Very High
Ellsworth-Bar Harbor	Very High
Farmington	High
Kittery-York	Very High
Lewiston-Auburn	High
Norway-Paris	High
Outer Bangor	Very High
Portland	High
Rockland	High
Rumford	High
Sanford	Very High
Sebago Lakes Region	Very High
Skowhegan	High

Waterville	High
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Labor Market	Seniors Statewide Ranking
Augusta	High
Bangor	Very High
Bath-Brunswick	Very High
Belfast	Very High
Biddeford	Very High
Boothbay Harbor	Very High
Bucksport	Very High
Calais	High
Dexter-Pittsfield	High
Dover-Foxcroft	High
Ellsworth-Bar Harbor	Very High
Farmington	High
Houlton	Very High
Kittery-York	Very High
Lewiston-Auburn	High
Lincoln-Howland	Very High
Millinocket-East Millinocket	High
Norway-Paris	High
Outer Bangor	High
Portland	Very High
Presque Isle-Caribou	High
Rockland	Very High
Rumford	High
Sanford	Very High
Sebago Lakes Region	Very High
Skowhegan	High
Stonington	High
Waterville	High

b. SRO Housing Set-Aside Housing Ranks:

Region	Ranking
Augusta	very high
Bangor	very high
Bath-Brunswick	very high

Belfast	high
Biddeford	very high
Ellsworth-Bar Harbor	high
Farmington	
Jonesport-Milbridge	high
Kittery-York	very high
Lewiston-Auburn	very high
Machias-Eastport	high
Portland	very high
Presque Isle-Caribou	high
Rockland	high
Rumford	very high
Sanford	very high
Skowhegan	high
Waterville	high

c. Native American tribal lands are considered a Very High Need Market Area regardless of the targeted population or participation in a Set-aside in Section 4 of this Rule.

2. A Project that is part of a community revitalization plan will receive 2 points. Projects that involve the rehabilitation of existing multi-family rental housing containing more than 5 units within a community revitalization area will receive 1 additional point. To receive points, an Applicant must submit either (a) evidence of being an Enterprise Community or (b) a copy of the community revitalization plan adopted by the municipality or tribal government referencing the area in which the Project will be located and evidence of official adoption of the plan by the municipality or tribal government with its Application. Projects that are part of a community revitalization plan and are located in a Qualified Census Tract will be given preference over such Projects that are not located in a Qualified Census Tract.

3. Projects that demonstrate preferential treatment for low income tenants whose names are on a public housing or Section 8 waiting list will receive 2 points.

4. A Project located in one of the following Service Center Communities will receive 3 points.

Bangor	Lewiston
Portland	Auburn
Biddeford	Brewer
Brunswick	Freeport
Kittery	Orono
Sanford	South Portland
Westbrook	Falmouth

E. Sponsor Characteristics (maximum of 12 points).

1. Applicants, or any principal thereof, who have had prior experience with MSHA and have not been declared in default by MSHA in the last five (5) years, or who have successfully developed Qualified Low-Income Housing Projects in other states will receive 2 points.
2. Applicants, or any principal thereof, who have prior experience with Qualified Low Income Housing Projects and who have not been issued an IRS Form 8823 by MSHA, or have not been a principal of any other entity that has been issued an IRS Form 8823 by MSHA in the last three (3) years will receive 2 points.
3. An Applicant will receive 2 points if a nonprofit organization has an ownership interest in the Project and the nonprofit organization satisfies the following requirements:
  - a. The Internal Revenue Service has determined that the nonprofit organization is an organization described in Section 501(c)(3) or 501(c)(4) of the Code and is exempt from taxation under Section 501(a) of the Code;
  - b. The nonprofit organization must be duly organized and existing or authorized to do business under the laws of the State of Maine and must be in good standing in its state of incorporation (if not the State of Maine) and the State of Maine;
  - c. The nonprofit organization must be engaged in and have as one of its charitable purposes the fostering and development of low-income housing;
  - d. The nonprofit organization is not affiliated with or controlled by any for-profit entity;
  - e. The nonprofit organization must have a general partner interest in the owner of the Project and be the managing general partner of the Project;
  - f. A for-profit corporation will be deemed to satisfy the requirements of this criterion if 100% of the stock of the corporation is held by one or more Qualified Nonprofit Organizations at all times during the period such corporation is in existence in accordance with Section 42(h)(5)(D) of the Code.

- g. A nonprofit corporation will be deemed to satisfy the requirements of this criterion if a single nonprofit organization that satisfies the requirements in subparagraphs (a)-(e) above is the sole member of the nonprofit corporation during the period the nonprofit corporation has an ownership interest in the Project, which period shall not be less than the Extended Use Period.
- h. A limited liability company will be deemed to satisfy the requirements of this criterion if a single nonprofit organization that satisfies the requirements in subparagraphs (a)-(e) above owns 100% of the limited liability company during the period the limited liability company has an ownership interest in the Project, which period shall not be less than the Extended Use Period, and the limited liability company is disregarded as an entity separate from the nonprofit organization for tax purposes under the Code.

An Applicant must submit evidence that a nonprofit organization, which satisfies the requirements in subparagraphs (a) – (e) above, a nonprofit corporation that satisfies the requirements in subparagraph (g) above or a limited liability company that satisfies the requirements in subparagraph (h) above will own an interest and materially participate in operation of the Project with its Application.

- 4. Projects that will be managed by a management company with a) low income housing tax credit training and b) a minimum of three (3) years of successfully managing a Qualified Low-Income Housing Project will receive 2 points. Applicants must submit a binding commitment from the management company to manage the Project and a certificate(s) or other evidence satisfactory to MSHA of the management company's low income housing tax credit training and experience with its Application.
- 5. An Applicant (or the owner of a Project if different from the Applicant) that employs contractors (including general contractors, construction managers and subcontractors) that provide an eligible group health insurance plan to their employees in accordance with the requirements of this criterion will be awarded up to 4 points, based on the percentage of contractors or the percentage of the Total Construction Costs paid to contractors who provide an eligible group health insurance plan, as follows.

If at least 70% but less than 80% of the contractors provide an eligible group health insurance plan **or** at least 70% but less than 80% of the Total Construction Costs are to be paid to contractors who provide an eligible group health insurance plan, the Applicant will receive 1 point.

If at least 80% but less than 90% of the contractors provide an eligible group health insurance plan or at least 80% but less than 90% of the Total Construction Costs are to be paid to contractors who provide an eligible group health insurance plan, the Applicant will receive 2 points.

If at least 90% but less than 100% of the contractors provide an eligible group health insurance plan or at least 90% but less than 100% of the Total Construction Costs are to be paid to contractors who provide an eligible group health insurance plan, the Applicant will receive 3 points.

If 100% of the contractors provide an eligible group health insurance plan or 100% of the Total Construction Costs are to be paid to contractors who provide an eligible group health insurance plan, the Applicant will receive 4 points.

An “eligible group health insurance plan” is a plan that either (a) provides coverage for employees and the contractor pays at least 60% of the premium for employee coverage or, in the alternative, (b) provides family coverage for employees and the contractor pays at least 50% of the premium for employee coverage plus some portion of the premium for the family coverage. Total Construction Costs for purposes of this subsection are determined at the time the owner of the Project enters into a construction contract with the general contractor (or construction manager) for the construction of the Project. The eligible group health insurance plan must be in place at the time the contractors bid on the Project and must be maintained during the construction of the Project.

## 8. Project Evaluation

- A. Once a Project is selected, MSHA will determine the amount of Credit to be reserved. The amount requested in the Application will be the basis on which MSHA will determine the actual reservation, but the amount reserved will not necessarily equal the amount requested. The calculation of the amount of Credit will be based on the Applicable Percentage for the month in which the calculation is made unless there has been a qualified irrevocable election of the Applicable Percentage for a prior month.
- B. The amount of Credit reserved for a Project cannot exceed the lesser of the amount the Project is eligible for under the Code or the amount MSHA determines is necessary for the financial feasibility of the Project and its viability as a Qualified Low-income Housing Project throughout the Credit Period. The evaluation process will be extensive and will require Applicants to provide significant amounts of financial information and Project detail. In making this determination, MSHA will consider:



1. The sources and use of funds and the total financing planned for the Project, including the reasonableness of development costs and operating expenditures;
2. Any proceeds or receipts expected to be generated by reason of tax benefits; and
3. The percentage of the housing credit dollar amount used for Project costs other than Intermediary Costs.

These factors will not be applied so as to impede the development of Projects in hard-to-develop areas.

- C. In order to arrive at the amount of Credit dollars to be reserved for a Project, MSHA must identify the equity gap between development sources and uses which the Credit is designed to fill. In order to fulfill its statutory responsibility to allocate only the amount of Credit necessary for the financial feasibility of a Project and its viability throughout the Credit Period, MSHA reserves the right to limit recognition of Intermediary Costs, re-characterize Project sources and uses and make reasonable assumptions on projected revenues and expenses in the process of calculating the amount of Credit to be reserved or allocated to a Project. When applicable, MSHA will also take into consideration any restrictions imposed by federal laws and regulations imposing limitations on the combining of the Credit with other federal subsidies (“subsidy layering” guidelines).
- D. In order to fully evaluate the proposal’s need for Credit, the expectation exists that availability of the Credit is a necessary incentive for the developer to undertake completion of the Project. Extreme caution should be taken to avoid incurring construction costs prior to the receipt of a reservation of Credit. MSHA reserves the right to cease processing any Application which has incurred construction costs prior to applying for Credit.

In cases providing significant public purpose, when construction costs have been incurred prior to MSHA’s decision to select any Application, developers should be prepared to demonstrate why the absence of Credit presents a serious risk to the overall viability and operation of the Project.

- E. MSHA will limit recognition of Developer Fees. The standard fee, regardless of whether costs used to calculate the fee include compensation paid to consultants, will be based on all aspects of Project development including, without limitation, creation of the Project concept, identification and acquisition of the Project site, obtaining construction and permanent financing, obtaining necessary subsidies, negotiation of syndication of investment interests in the Project, obtaining all necessary regulatory approvals, construction and marketing. Fees paid to consultants do not include fees for professional services such as those for environmental assessments, rental market studies, soil tests, and water tests. Reserves, in the form of cash, expected to return

to the developer from the Project in two or fewer years will be included in the Developer Fee calculation.

The standard Developer Fee to be recognized for purposes of calculating the Credit must separately identify two components: (1) overhead and (2) profit. Together these two components will not exceed an amount equal to 15% of the Housing Development Costs, plus 10% of the costs of acquisition of land, existing buildings and equipment, all determined without regard to Developer Fees.

The level of risk associated with developing the Project will be considered when determining whether the recognized fee should exceed the standard. In extenuating circumstances, as determined by MSHA, the maximum recognized fee may equal up to 20% of the Housing Development Costs plus 15% of the costs of acquisition of land, existing buildings and equipment, all determined without regard to Developer Fees and without regard to Section 42(d)(5)(C) of the Code. Extenuating circumstances might include a difficult local approval process, the overall size of a Project to be undertaken, renovations qualifying for historic tax credits, contribution of Developer Fees to the Project in the form of reserves or equity loans or demonstration that other sources of subsidy are not available.

- F. In reviewing Intermediary Costs, MSHA will limit recognition of certain general contractor costs. Regardless of the geographic location of the Project, the standards for general contractor overhead, general requirements and profit will be an amount not greater than 16% of the Total Construction Cost, within the following ranges:

Overhead	up to 2% of Total Construction Cost
General Requirements	up to 8% of Total Construction Cost
Profit	up to 6% of Total Construction Cost

- G. In reviewing Project costs MSHA will consider the reasonableness of the per unit Total Development Cost. However, the following standards will not automatically be used as a limit when calculating the amount of Credit for which the Project is eligible. Each Project will first be compared with historical data for similar Qualified Low-income Housing Projects, i.e. size, location, funding source, etc. Costs will be evaluated against industry cost standards. Consideration will be allowed for costs associated with tenant service and common area spaces. Otherwise, the per unit cost recognized for Credit allocations should not exceed the HUD 221(d)(3) per unit limits established for the State. MSHA will require additional documentation if MSHA feels the proposed costs are not comparable or reasonable.

- H. The evaluation of each Project to determine the amount of Credit dollars for which it is eligible will be performed as of each of the following dates:

1. The Application.
2. The allocation of Credit.

3. The date each Qualified Low-income Building is placed in service.

Prior to each determination, the Applicant shall certify to MSHA the full extent of all Federal, State and local subsidies which apply with respect to the Qualified Low-income Housing Project and provide such other information MSHA deems necessary in order to complete its evaluation.

- I. PURSUANT TO FEDERAL LAW, ANY DETERMINATION MADE BY MSHA HEREUNDER SHALL NOT BE CONSTRUED TO BE A REPRESENTATION OR WARRANTY AS TO THE FEASIBILITY OR VIABILITY OF ANY PROJECT AND MAY NOT BE RELIED UPON AS A REPRESENTATION OR WARRANTY BY ANY PARTY.

9. Reservation of Credit

- A. Applicants will receive a Notice to Proceed indicating that an evaluation pursuant to Section 8 of this Rule will be undertaken. At the completion of the evaluation, the Authority will issue conditional reservations of Credit. The amount of Credit dollars reserved for a Project shall be the amount determined by MSHA pursuant to Section 8 of this Rule.
- B. Conditions contained in a conditional reservation will be performance-based, taking into consideration the specific circumstances of each Project and may include, without limitation:
  1. Payment of a Credit reservation fee equal to 3% of the amount of the reservation at the time of reservation.
  2. Deadline for final working drawings and specifications.
  3. Deadline for loan closing(s).
  4. Deadline for receipt of information necessary for MSHA to make its determination on allocation or carryover allocation of Credit.
  5. Prohibition against amendments or changes as set forth in Section 5.I. of this Rule.
  6. Termination date.
- C. When reservations of the Credit have been issued in an amount equal to the applicable State Ceiling, standby reservations may be issued in the same manner as described in Section 9.A. of this Rule. Applicants receiving standby reservations will only be allowed to proceed if a sufficient amount of the applicable State Ceiling

becomes available through lapsed or withdrawn reservations, the return of Credits or receipt of Credits from the national re-pooling of unused housing Credit allocations.

- D. An Applicant may cancel or withdraw a reservation by submitting written notice thereof to MSHA.
- E. Reservations and standby reservations of Credit from the State Ceiling for a particular calendar year which are in effect on December 31 of that calendar year may be converted to reservations of Credit from the State Ceiling for the following year upon mutual agreement of the parties.
- F. At the time of issuance of a reservation, and to the extent authorized by the Code, MSHA and the Applicant may enter into a Binding Agreement to fix the maximum Credit dollar amount to be allocated to each Qualified Low-income Building for which Credit has been requested. Any such Binding Agreement must satisfy the requirements of the Code and will contain the same performance-based conditions set forth in the Applicant's conditional reservation. The Applicant may also choose either to fix the Applicable Percentage for each Qualified Low-income Building in the Project by irrevocably electing the percentage for the month in which the Applicant and MSHA enter into such Binding Agreement or to select the applicable percentage for the month the building is placed in service.
- G. Proposals facing increased Project development costs and, therefore, potentially qualifying for less than a substantial amount of additional Credit, may request additional Credit and not be subject to funding rounds. However, such requests will be subject to Credit availability and any decision to favor such requests will be at the sole discretion of MSHA.
- H. Prior to a reservation of Credit, an Applicant must demonstrate proficiency in the area of Credit compliance monitoring by completing a Credit compliance monitoring training approved by MSHA or receiving certification from a Credit trainer approved by MSHA.

10. Allocation of Credit

- A. Provided that an Applicant's Project is placed in service, within the meaning of the Code, in the calendar year for which a reservation of Credit has been issued and such reservation is still in effect, MSHA will allocate Credit to the Applicant, by issuance of IRS Form 8609 or such other form required by the IRS, after receipt of the following:
  - 1. A complete request for allocation of Credit, which must be in a form prescribed by MSHA and must include an audit report on the schedule of project costs prepared by an independent, third party certified public accountant.

2. Certification of the total financing planned for the Project, all proceeds or receipts expected to be generated by reason of the Credit or other tax benefits, the total sources and uses of Project funds and the full extent of all Federal, state and local subsidies which apply or which the Applicant expects to apply with respect to the Project. In addition, the Applicant must identify all costs associated with the sale (i.e. commissions, due diligence, legal, accounting, reserves, etc.). This certification must include income, operating and development cost projections and methods for satisfying any deficits.

3. An allocation fee as follows:

Projects of up to 10 units	\$ 250
Projects of 11 to 23 units	\$ 500
Projects of 24 or more units	\$1,000

This paragraph does not apply to tax-exempt bond financed Projects described in Section 12 of this Rule.

4. A monitoring fee as follows:

An amount equal to \$250 per Credit eligible unit in the Project, not to exceed \$25,000 per Project.

5. Must provide a comprehensive market study of the housing needs of low-income persons in the area to be served by the Project. The study must be conducted at the Applicant's expense by a qualified professional acceptable to MSHA.

The National Council of Affordable Housing Market Analysts (NCAHMA) has adopted guideline documents detailing its standards for definitions and content in an affordable housing market study. MSHA strongly encourages Applicants to direct their market analyst to produce a market study consistent with the NCAHMA guideline materials and standards. Any deviation from the guideline materials and standards must be explained in a cover letter submitted by the market analyst with the study.

If, during the course of its review, MSHA determines that the market study submitted is inadequate, MSHA will require the Applicant to submit a new market study. MSHA reserves the right to commission its own market study.

B. The amount of Credit allocated on behalf of each Qualified Low-income Building shall be the lesser of:

1. The maximum amount for which the Project is eligible under the Code, as determined by MSHA based on information provided by the Applicant;

2. The amount determined by MSHA as the minimum amount necessary for the financial feasibility of the Project and its viability as a Qualified Low-income Housing Project throughout the Credit Period; and
  3. The amount stated in the conditional reservation.
- C. An allocation made by MSHA will be effective only with respect to a Qualified Low-income Building placed in service during the calendar year in which the allocation is made and only to the extent that the Internal Revenue Service gives effect to such allocation. CREDIT RECIPIENTS ARE RESPONSIBLE FOR TAKING ONLY THE AMOUNT OF CREDIT AUTHORIZED UNDER THE CODE AND RECOGNIZED BY THE INTERNAL REVENUE SERVICE AND NO RELIANCE MAY BE PLACED ON MSHA BY ANY PARTY FOR THIS DETERMINATION.

11. Carryover Allocation

- A. If the Project, or individual Qualified Low-income Building within the Project will not be placed in service, within the meaning of the Code, in the calendar year for which a reservation of Credit has been issued, MSHA may issue a carryover allocation to qualifying Applicants or choose to carry over the balance of the State Ceiling as provided in Section 4.A. of this Rule. In order to be considered for a carryover allocation, an Applicant must provide:
1. A complete request for carryover allocation of Credit, which must be in a form prescribed by MSHA and must include an audit report on the schedule of project costs prepared by an independent, third party certified public accountant.
  2. Certification of the total financing planned for the Project, all proceeds or receipts expected to be generated by reason of the Credit or other tax benefits, the total sources and uses of Project funds and the full extent of all Federal, State and local subsidies which apply or which the Applicant expects to apply with respect to the Project. This certification must include income, operating and development cost projections and methods for satisfying any deficits.
  3. Satisfactory evidence that the Applicant's basis in the Project at the end of the calendar year will exceed 10% of Applicant's reasonably expected basis in the Project at the end of the second calendar year following the calendar year in which the carryover allocation is made. Projects receiving a carryover allocation after June 30 of the credit year will have six (6) months from the date of the allocation to provide evidence that the Applicant's basis in the Project will exceed 10% of the Applicant's reasonably expected basis in the Project at the end of the second calendar year following the calendar year in which the carryover allocation is made. The entity satisfying the 10% basis

test set forth in this subsection must be the same entity that receives the allocation of Credit.

4. Status report on the progress of development of the Project and the likelihood of the Project proceeding to completion.
5. An allocation fee as follows:

Projects up to 10 units	\$ 250
Projects with 11 to 23 units	\$ 500
Projects with 24 or more units	\$1,000

- B. The amount of the carryover allocation for each Qualified Low-income Building shall be the lesser of:
  1. The maximum amount for which the Project is eligible under the Code, as determined by MSHA based on information provided by the Applicant;
  2. The amount determined by MSHA as the minimum amount necessary for the financial feasibility of the Project and its viability as a Qualified Low-income Housing Project throughout the Credit Period; and
  3. The amount stated in the conditional reservation.
- C. A carryover allocation made by MSHA will be effective only if the 10% basis test referred to in Section 11.A.3. of this Rule has been satisfied, the Qualified Low-income Building is placed in service within two (2) years following the calendar year in which the allocation is made and only to the extent that the Internal Revenue Service gives effect to such allocation. **CREDIT RECIPIENTS ARE RESPONSIBLE FOR TAKING ONLY THE AMOUNT OF CREDIT AUTHORIZED UNDER THE CODE AND RECOGNIZED BY THE INTERNAL REVENUE SERVICE AND NO RELIANCE MAY BE PLACED ON MSHA BY ANY PARTY FOR THIS DETERMINATION.**
- D. In order to ensure maximum utilization of the Credit, MSHA may impose performance conditions on developers receiving carryover allocations and may terminate or cancel the allocation for failure to comply with such conditions.
- E. MSHA may, in its sole determination, convert a carryover allocation of Credit from the State Ceiling for a particular calendar year to a reservation of Credit from the State Ceiling for the year in which the carryover allocation is terminated or the following year subject to the requirements of this subsection. The carryover allocation must be rescinded by the mutual consent of MSHA and the Applicant. At the time the carryover allocation is rescinded, there shall not have been any changes in the Project design or financing which, in the sole determination of MSHA, would substantially affect the score that the Applicant received pursuant to the applicable

selection criteria or result in a cost increase which would render the Project withdrawn pursuant to Section 5.H. of this Rule. There must be extenuating circumstances, which result in the Applicant's likely failure to meet the 10% basis test in Section 11.A.3. of this Rule or the likely failure of the Project to be placed in service within two (2) years following the year in which the allocation was made. The Project will only be required to meet the requirements of the Plan in effect at the time the Project received the original allocation of Credit. If the Applicant has entered into a Binding Agreement and elected to lock the Applicable Percentage, then the Applicant is bound by the Applicable Percentage elected under the original Binding Agreement.

- F. Credit returned to MSHA as a result of the termination or cancellation of a carryover allocation prior to September 30 in a particular calendar year shall be added to the State Ceiling for the calendar year in which is returned. Credit returned as a result of a termination or cancellation of a carryover allocation after September 30 shall be added to the State Ceiling for the calendar year in which it is returned or the following year.
- G. MSHA may carry over the entire unallocated portion of the State Ceiling and deny all requests for Project-specific carryover allocations.

12. Tax-Exempt Bond Financed Projects

- A. A Qualified Low-income Building which is financed with the proceeds of tax-exempt bonds subject to the State volume cap on such bonds qualifies for the Credit on the portion of the Eligible Basis of the building financed with such bond proceeds without an allocation from the State Ceiling. If 50% or more of the Eligible Basis of a Qualified Low-income Building is financed with the proceeds of tax-exempt bonds subject to the state volume cap on such bonds, all of the Eligible Basis of the building qualifies for the Credit without an allocation from the State Ceiling.
- B. Except as otherwise provided in the Code, Qualified Low-income Buildings financed with the proceeds of tax-exempt bonds subject to the state volume cap on such bonds which are placed in service after 1989, in order to qualify for the Credit without an allocation from the State Ceiling, must satisfy the requirements for application and allocation set forth in Section 6 of this Rule (other than the resident service coordinator threshold requirement set forth in Section 6.D.13.) and Section 10 of this Rule (other than the requirement for issuance of a conditional reservation) and be evaluated by the issuer of the bonds according to the evaluation procedures set forth in Section 8 of this Rule to determine the proper amount of the Credit.
- C. Developers of properties financed with tax-exempt bonds and seeking Credit without an allocation from the State Ceiling may, to the extent the Project is not yet placed in service and is otherwise authorized by the Code, elect to fix the Applicable Percentage for each Qualified Low-income Building in the Project by irrevocably electing the percentage for the month in which the bonds are sold, as opposed to the



Applicable Percentage for the month the building is placed in service. Such an election must be made on forms provided by MSHA and must be made by the fifth day of the month following the month in which the bonds are issued.

- D. Developers of properties seeking Credit without an allocation from the State Ceiling must request the issuance of an IRS Form 8609 for each Qualified Low-income Building in the year the Project is placed in service. Such request must be made on forms provided by MSHA. This request must also include an audit report on the schedule of project costs prepared by an independent, third party certified public accountant.
- E. MSHA will make tax-exempt financing available to Projects that are financed under the RHS 515 Program to enable the Projects to receive 4% Low-Income Housing Tax Credits without an allocation from the State Ceiling.
- F. Once MSHA has reviewed the Project in accordance with this Section 12 and deemed the Project eligible to receive Credit, a determination letter will be issued.

13. Monitoring and Notification of Noncompliance

MSHA is required by Federal law to monitor Qualified Low-income Housing Projects for noncompliance with the provisions of Section 42 of the Code and to notify the Internal Revenue Service when it becomes aware of any such noncompliance. Compliance with the monitoring procedures is a requirement of the Extended Low-income Housing Commitment. MSHA reserves the right to impose a reasonable fee for the administrative burden resulting from this on-going monitoring requirement. Owners must comply with the following requirements:

- A. Recordkeeping and record retention. Owners must keep on file and available to MSHA upon request, records for each Qualified Low-income Building in the Qualified Low-income Housing Project, including without limitation, the following information.
  - 1. The total number of residential rental units in each Qualified Low-income Building (including the number of bedrooms and the size in square feet of each residential rental unit).
  - 2. The number of residential rental units in each Qualified Low-income Building that are designated low-income units.
  - 3. The rent charged on each residential rental unit in each Qualified Low-income Building (including any utility allowances).
  - 4. The number of occupants in each low-income unit.

5. The low-income unit vacancies in each Qualified Low-income Building and information that shows when, and to whom, the next available units were rented.
6. The annual income certification of each low-income tenant per unit or a copy of the waiver from the annual income certification requirement which is available to 100% Credit eligible properties.
7. Documentation to support each low-income tenant's income certification (for example, a copy of the tenant's federal income tax return, Forms W-2, or verifications of income from third parties such as employers or State agencies paying unemployment compensation). Tenant income is calculated in a manner consistent with the determination of annual income in accordance with Section 8 of the United States Housing Act of 1937, not in accordance with the determination of gross income for federal income tax liability. In the case of a tenant receiving Section 8 housing assistance payments, the documentation requirement is satisfied if the public housing authority provides a statement to the Owner declaring that the tenant's income does not exceed the applicable income limit under Section 42(g) of the Code.
8. The Eligible Basis and Qualified Basis of each Qualified Low-income Building at the end of the first year of the Credit Period.
9. The character and use of the nonresidential portion of a Qualified Low-income Building included in the Qualified Low-income Building's Eligible Basis (for example, tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities or facilities reasonably required by the Project).

These records shall be maintained for each Qualified Low-income Building throughout the applicable Extended Use Period. These records shall be retained for at least six (6) years after the due date (with extensions) for filing the federal income tax return for that year. The records for the first year of the Credit Period, however, shall be retained until the later of the end of the applicable Extended Use Period or six (6) years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the Qualified Low-income Building. First year quarterly reports shall be filed with MSHA.

10. A determination of the student status of the resident household.

B. Certification and review. Owners must certify compliance with the requirements of Section 42 of the Code as follows:

1. All Owners must certify to MSHA annually throughout the Extended Use Period of the Qualified Low-income Housing Project for the calendar year preceding certification that:
  - a. The Project met the minimum low-income set-aside test applicable to the Project and complies with the additional low-income targeting pledged by the Owner as set forth in the Extended Low Income Housing Commitment on which the allocation was based, (e.g. 40% AMI and 50% AMI);
  - b. There was no change in the Applicable Fraction of any Qualified Low-income Building or that there was a change and a description of the change;
  - c. The Owner has received an annual income certification from each low-income tenant and documentation to support that certification or in the case of a tenant receiving Section 8 housing assistance payments, the statement from a public housing authority described in Section 13.A.7. of this Rule;
  - d. Each qualified low-income unit in the Project was rent-restricted under Section 42(g)(2) of the Code;
  - e. All units in the Project were available for use by the general public and used on a nontransient basis, except for transitional housing for the homeless provided under Section 42(i)(3)(B)(iii) of the Code;
  - f. Each Qualified Low-income Building was suitable for occupancy under applicable health, safety and building codes;
  - g. There was no change in the Eligible Basis of any Qualified Low-income Building or if there was a change, the nature of the change (for example, a common area has become commercial space, or a fee is now charged for a tenant facility formerly provided without charge);
  - h. All tenant facilities included in the Eligible Basis of any Qualified Low-income Building, such as swimming pools, other recreational facilities and parking areas, were provided on a comparable basis without charge to all tenants in the Qualified Low-income Building;
  - i. If a low-income unit in the Qualified Low-income Building became vacant during the year, that reasonable attempts were or are being

made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the Qualified Low-income Building were or will be rented to tenants not having a qualifying income;

- j. If the income of tenants of a low-income unit in the Qualified Low-income Building increased above the limit allowed under Section 42 of the Code, the next available unit of comparable or smaller size in the Qualified Low-income Building was or will be rented to tenants having a qualifying income;
- k. The Project complies with the Extended Low-income Housing Commitment for Qualified Low-income Buildings subject to Section 7108(c)(1) of the Revenue Reconciliation Act of 1989;
- l. The Project complies with the requirements of all applicable Federal and State housing programs (e.g. RHS, Federal HOME, HUD Section 8, or Tax-Exempt Bonds);
- m. The Project has not received notice of any violation of applicable building codes. In the event a violation occurs the owner must report all violations to MSHA including a summary of or copies of violations issued. The Owner must indicate whether the violations have been corrected and must retain all original reports of violation;
- n. No findings of discrimination under the Federal Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Amendments Act of 1988 (42 U.S.C. § 3601 *et seq.*) or the Maine Human Rights Act (5 M.R.S.A., Chapter 337, Subchapter IV) have occurred at the Project. A finding of discrimination includes an adverse final decision by HUD, an adverse final decision by a substantially equivalent State or local fair housing agency, or an adverse judgment from a Federal or State court;
- o. No applicant for tenancy in possession of a Section 8 voucher was refused housing solely because of their status as a Section 8 voucher-holder;
- p. If the Owner received its Credit allocation from a portion of the State Ceiling set-aside for a Project involving a Qualified Non-Profit Organization under Section 42(h)(5) of the Code, then a Qualified Non-profit Organization materially participated in the operation of the Project within the meaning of Section 469(h) of the Code; and
- q. There has been no change in the ownership or management of the Project.

2. Annually throughout the Extended Use Period applicable to the Project, Owners must complete and submit to MSHA a tenant status report on a form prescribed by MSHA. The tenant status report shall accurately reflect tenant income, rent data and other occupancy information required by MSHA for each Qualified Low-income Building in a Project for the prior calendar year.
3. MSHA will review the tenant files of at least 20% of the low income units in each Project at least once every three (3) years. For new Projects placed in service, MSHA will complete a review of tenant records of 20% of the low income units at the Project within two (2) years following the year the last Qualified Low-income Building is placed in service. The tenant records to be reviewed, will be selected randomly by MSHA. Notice of Project selection, as well as the required timeframe for submission of details, will be provided by MSHA to the Owner in writing.
4. Owners of Qualified Low-income Buildings financed under the RHS 515 program or Qualified Low-income Buildings of which 50% or more of the aggregate basis is financed with the proceeds of tax-exempt bonds are not required to submit, and MSHA is not required to review, the tenant income certifications, supporting documentation and rent records if RHS or the bond issuer, as applicable, has entered into an agreement with MSHA to provide information concerning the income and rent of the tenants in the Qualified Low-income Building to MSHA. If the information provided by RHS or the bond issuer is not sufficient for MSHA to make the required determinations, MSHA shall request the necessary additional income or rent information from the Owner.
5. MSHA shall review all certifications and supporting documentation submitted hereunder for compliance with the requirements of Section 42 of the Code.
6. The annual owner certifications, an executed Form 8609 with Schedule A attachments for each Qualified Low-income Building and the tenant status report required hereunder must be submitted to MSHA on or before a date established by MSHA, but in no event, later than May 1 of each year. The certification must cover the preceding calendar year and must be made as of December 31 of the prior year. The Form 8609 with Schedule A attachments is required only during the period that the Owner is claiming Credit.  
The certifications shall be made on forms prescribed by MSHA and shall be made under penalty of perjury.

- C. Inspections. MSHA will perform property inspections on a one-to-three year cycle, and shall have the right, at any time upon thirty (30) days notice to the Owner, to review all records referred to in Section 13 of this Rule.

- D. **Monitoring Fee.** All Applications shall be required to remit a one-time monitoring fee equal to \$250 for each Credit eligible unit in the Project, not to exceed \$25,000 per Project. This fee must be paid prior to the issuance of the IRS Form 8609.

MSHA reserves the right to waive all or part of the fee in the event the partnership enters in a compliance monitoring agreement acceptable to MSHA, and agrees to provide sufficient annual documentation to enable MSHA to perform its required oversight.

- E. **Notification of noncompliance.** In the event MSHA does not receive the certifications required hereunder when due or they are incomplete or insufficient, MSHA shall notify the Owner in writing of the missing, incomplete or insufficient certification. In the event MSHA discovers through audit, inspection, review or some other manner that the Project is not in compliance with the provisions of Section 42 of the Code, MSHA shall notify the Owner in writing of the nature of such noncompliance. In either case, such notice shall provide the Owner with a reasonable correction period, not to exceed ninety (90) days, in which the Owner must supply the completed certifications and/or bring the Project into compliance with Section 42 of the Code. If MSHA determines there is good cause, it may extend the correction period for up to six (6) months. Within forty-five (45) days after the end of the correction period, including any permitted extensions, MSHA shall file the required Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance, with the Internal Revenue Service regardless of whether the noncompliance or failure to certify has been corrected.
- F. **LIABILITY. COMPLIANCE WITH THE REQUIREMENTS OF SECTION 42 OF THE CODE IS THE RESPONSIBILITY OF THE OWNER OF THE QUALIFIED LOW-INCOME BUILDING FOR WHICH THE CREDIT IS ALLOWABLE. MSHA'S OBLIGATION TO MONITOR FOR COMPLIANCE WITH THE REQUIREMENTS OF SECTION 42 OF THE CODE DOES NOT MAKE MSHA LIABLE FOR AN OWNER'S NONCOMPLIANCE.**

14. Additional Requirements

- A. Applicant's eligibility for use of the Credit after allocation of the Credit is conditioned on Applicant's continued compliance with certain tenant income and rental restrictions. Failure to comply with such restrictions can result in forfeiture and recapture penalties being imposed upon Applicant by the Internal Revenue Service. **MSHA ACCEPTS NO RESPONSIBILITY AND NO RESPONSIBILITY SHALL BE IMPLIED BY THE ISSUANCE OF A RESERVATION, ALLOCATION OR CARRYOVER ALLOCATION OF CREDIT ON BEHALF OF A PARTICULAR PROJECT, FOR ENFORCEMENT OF, OR COMPLIANCE WITH, ANY OF THESE RESTRICTIONS NOW OR HEREAFTER IMPOSED.**

- B. Any provision of applicable Federal or State law, including without limitation, the Code and the Act, shall take precedence over this Rule in the event of any inconsistency.
- C. This Rule does not preclude such additional or alternative requirements as may be necessary to comply with the Code or the Act.
- D. This Rule establishes a pool of eligible Applicants but does not preclude additional reasonable criteria and does not confer any automatic right or entitlement to Credit on any person or entity eligible hereunder.
- E. The Director of MSHA, individually or by exercise of the delegation powers contained in the Act, shall make all decisions and take all action necessary to implement this Rule. Such action of the Director shall constitute final agency action.
- F. Upon determination of good cause, the Director of MSHA or the Director's designee may, subject to statutory limitations, waive any provision of this Rule. Each waiver shall be in writing and shall be supported by documentation of the pertinent facts and grounds.

**STATUTORY AUTHORITY:** 30-A MRSA §§4741(1) and 4741(14), Section 42 of the Internal Revenue Code of 1986, as amended

**EFFECTIVE DATE:**

**BASIS STATEMENT:** The Rule (also referred to herein as the “Qualified Allocation Plan” or “QAP”) is being amended to (i) establish the qualified allocation plan for allocation of the 2006 State ceiling of low income housing tax credits pursuant to Section 42 of the Internal Revenue Code; (ii) more clearly define SRO Housing and modify the SRO Housing Set-aside to require that a minimum of 75% of the units in the SRO Housing be set-aside for persons who are homeless; (iii) reduce the amount of the Non-profit Set-aside, but allow the winner of the set-aside to receive credits in excess of the set-aside amount up to the maximum credit restriction; (iv) eliminate certain requirements from the provision that allows one tax credit project to receive tax credits in excess of the maximum credit restriction; (v) clarify and expand the circumstances under which an application for tax credits or a reservation of tax credits will be deemed withdrawn or cancelled; (vi) require applicants to submit a market study at the time of application for tax credits, to adopt the National Council of Affordable Housing Market Analysts (NCAHMA) Market Study Standards as the guideline for preparation of market studies and to reserve the right to reject and commission market studies; (vii) require tax credit projects to meet MSHA's Green Building Standards; (viii) require construction contractors and subcontractors involved in the construction of tax credit projects to comply with MSHA's Contractor Standards; (ix) establish a new threshold requirement that tax credit project owners make a resident service coordinator available on-site to evaluate resident needs and refer residents to appropriate services at no charge to the tenants during the tax credit compliance period; (x) clarify that the rehabilitation of existing housing selection criterion is limited to multi-family rental housing; (xi) replace the previous general physical plant amenities and services selection criteria with a menu of specific amenities from which tax credit applicants can chose based on the

design and location of the project and the needs of the residents to be served; (xii) eliminate the requirement for services and funding under the special needs housing selection criterion, because of the new resident service coordinator threshold requirement; (xiii) relax the family project selection criterion to allow more 2-bedroom units and fewer 3 or more bedroom units; (xiv) modify the previous municipal zoning selection criterion to better achieve the purpose of rewarding projects for readiness by requiring an applicant to have all necessary municipal approvals to proceed with a project and all appeal periods expired with no challenge; (xv) encourage a greater level of accessibility in tax credit projects than is required by federal and state law by creating a selection criterion that rewards projects with more than 10% of the units in the project as Type A fully accessible and adaptable units; (xvi) modify the below market funding selection criterion to (a) reward projects that have applied for below market funding but have not yet received a commitment, albeit at a discounted value relative to below market funding that is committed to a project, (b) detail how commitments of below market funding will be evaluated and scored, (c) clarify that construction period financing will not be considered under the criterion, (d) treat approved Affordable Housing TIF funding that directly benefits a project as a grant for purposes of determining the value of the below-market funding, and (e) give applicants a grace period to replace any funding that the applicant applied for but did not receive and was awarded points under the criterion before re-scoring the application; (xvii) clarify the donated property and property acquired for a project at a nominal value selection criterion to include leased property and to define nominal value; (xviii) update the housing need rankings selection criterion to (a) reflect the most recent demographic data available for family and elderly housing, (b) to reflect changes in the methodology used to develop the need rankings such as using relative rather than absolute housing need in the calculation, narrowing the population considered to persons with incomes between 30% area median income and 60% area median income which is the population that can be served with the tax credits and narrowing the economic growth period considered in the calculation, (c) eliminate the market areas with medium and low need rankings for family, senior and SRO housing and any associated points from the selection criteria, (d) increase the maximum points awarded to projects located in market areas ranked very high need and high need, and (e) eliminate the provision allowing applicants to challenge the housing need ranks; (xix) give projects in community revitalization areas that involve the rehabilitation of existing multi-family housing an extra point under the community revitalization selection criterion in accordance with the Code; (xx) establish a new selection criterion that awards points to projects located in Tier 1 Service Center Communities as established by the State Planning Office; (xxi) limit the sponsor characteristics selection criterion relating to 8823 history to those projects that have experience developing tax credit projects; (xxii) increase the points awarded under the non-profit participation selection criterion and to clarify that general partners that are limited liability companies, the sole member of which is a qualified non-profit corporation, will receive consideration under the criterion; (xxiii) establish a new selection criterion to create an incentive for applicants to employee contractors that provide a certain level of health insurance coverage to their employees and to establish a process for determining that an applicant fulfills its pledge under the selection criterion for which the applicant was awarded points and for ongoing monitoring of contractors to ensure that they maintain the health insurance coverage during the construction of the project; (xxiv) modify the provision that allows MSHA to convert credit allocated in a particular calendar year to a reservation of credit in a subsequent year to clarify that projects only have to comply with the qualified allocation plan in effect in the year the credit was originally allocated to the project; (xxv) modify the provisions relating to tax-exempt bond financed projects to exempt “automatic” tax credit projects from the new resident service coordinator



threshold requirement; and (xxvi) make updates, clarifications and grammatical changes.

### **Summary and Response to Comments**

MSHA held a public hearing on July 19, 2005 to receive comments on the proposed changes to the 2006 Qualified Allocation Plan and associated standards, including the Green Building Standards, the Contractor Standards and the NCAHMA Market Study Standards. Maurice A. Selinger, III, Chairman of the Southern Maine Affordable Rental Housing Coalition (“SMARHC”), William E. Shanahan, Vice President of Northern New England Housing Investment Fund (“NNEHIF”), Dana Totman, President of Avesta Housing (“Avesta”), Kenneth H. Goodwin, Human Resources Director of CCB, Inc. (“CCB Construction”), Ashley Richards, owner of Richards & Company and a cellulose insulation company (“Richards & Company”), Betsy Sawyer-Manter, Housing Director at People’s Regional Opportunity Program (“PROP”), Aaron Shapiro of the City of Portland, and Beth Nagusky, the Governor’s Director of Energy Independence and Security testified at the public hearing. The comment period was held open until July 29, 2005. MSHA received numerous written comments on the Rule from persons and organizations who testified at the hearing and from other persons and organizations after the hearing. A summary of the testimony and comments and MSHA’s response to the comments follows.

### **Section 4. Set Asides**

Avesta commented that the QAP has a slight bias toward family housing because of points offered under Section 7.A.4. of the QAP and suggested that MSHA should have an elderly set-aside as in previous years. Avesta supports accessibility and disability adaptation selection criteria in Section 7.A.8. of the QAP, but encouraged MSHA to address the increasing need for affordable elderly housing more directly.

**Response.** From 1999 to 2003 MSHA had an assisted living set-aside specifically for proposals that had a commitment of assisted living service funds. In the 2004/2005 QAP the set-aside was eliminated due to a lack of assisted living service funding and partner feedback. To date there has been no replacement for the service funds which would precipitate re-instating the assisted living set-aside. MSHA did not decrease the points specifically awarded under Section 7.A.4. of the QAP. However, the relative weight of that selection criterion has been reduced due to an increase in the total possible points available under the selection criteria in Section 7 of the QAP.

NNEHIF expressed support for the changes MSHA made to minimize the set-asides and MSHA’s decision to keep maximum credit capability.

**Response.** The Non Profit set-aside was reduced to approximately 10% of the annual State ceiling of low income housing tax credits, which is consistent with the requirements under the Code.

MSHA elected not to institute a credit per low-income unit cap in addition to the overall cap of \$500,000 per project. This was in recognition of the fact that a large portion of the State is designated as a difficult to develop area (DDA) and instituting a cap on credit per low-

income unit might put a project in a DDA at a financial disadvantage by limiting the amount of credit it is eligible to receive by being located in a DDA.

Robert Nadeau, Multi-Family Housing Specialist, USDA/Rural Development (“RD”) expressed appreciation and support for the rural housing set-aside. He commented that RD no longer has the resources necessary to stabilize RD’s portfolio on its own.

**Response.** MSHA considers RD a vital partner in producing and preserving affordable rental housing in Maine. It is important for MSHA to encourage multiple financing sources whenever possible.

#### **Section 6.D.9. and 10.A.5.                   Market Study Standards**

NNEHIF commented that it supports the addition of the NCAHMA Market Study Standards as the guideline for preparing market studies required under the QAP.

**Response.** An analysis of the housing needs in the area to be served by the project is required by the Internal Revenue Code. It is MSHA’s desire to create a set of standards that can be consistently applied across all analyses for comparison purposes and for overall data collection performed by MSHA.

#### **Section 6.D. 10.                   Green Building Standards**

MSHA received numerous comments on the Green Building Standards, most of which were supportive of the standards. Some supporters offered technical changes to the standards. Three of the commenters expressed concern about the cost of the standards. A summary of the comments follows.

Ms. Beth Nagusky testified that the State of Maine is approximately 80% dependent on oil and has one of the oldest housing stocks, so we should build more energy efficient homes and weatherize existing homes. The Green Building Standards are consistent with the Governor’s Executive Order requiring all new and renovated state buildings to incorporate Green Building Standards. She also commented that efficient lighting, compact fluorescents and energy lamps and fixtures may have an incremental upfront cost, but result in significant energy savings in under a year.

State Representative Lawrence Bliss, House Chair of the Legislature’s Utilities and Energy Committee, and State Senator Philip Bartlett, Senate Chair of the Legislature’s Utilities and Energy Committee, and State Representative Ted Koffman, House Chair of both the Legislature’s Natural Resources Committee and Community Preservation Advisory Committee, and State Senator Scott W. Cowger, Senate Chair of the Legislature’s Natural Resources Committee, commented that the Green Building Standards will result in energy conservation, preservation of natural resources and savings to residents and developers of affordable housing, create a healthy and comfortable living environment for residents, and insulate owners and residents from sudden increases in energy costs.

Karen Geraghty, the Chair of the Housing Committee, Portland City Council commented that affordable housing projects will benefit from reduced energy costs and improved comfort and health

of residents and the communities in which they are located will benefit from sustainable design and site planning which places less stress on local infrastructure and the environment.

According to Deborah A. Deatrick, Vice President of Community Health of MaineHealth (“MaineHealth”), the State of Maine has the second highest rate of adult asthma in the country and asthma is the most common chronic condition among children in the State. Ms. Deatrick commented that the Green Building Standards contain measures that are effective in preventing or remediating indoor allergens, such as mold and mildew, which will improve indoor air quality and assure better outcomes for children and adults with asthma, a significant public health concern for the State of Maine.

Richards & Company testified that the Green Building Standards do not necessarily have to increase the cost of constructing projects if those involved in the development of housing look at the design and construction of projects differently than they have historically.

PROP testified that although there may be an upfront cost, there is a payback over time.

Thomas Wright, principal of Wright-Ryan Construction, Inc. (“Wright-Ryan Construction”), commented that the Green Building Standards are within reasonable building expectations and will only improve MSHA’s building performance and quality over time.

Denis Lachman, a principal of Holt & Lachman Architect and Planners, commented that the Green Building Standards are a responsible approach, both economically and environmentally, to provide decent housing, and like the energy codes will become a standard throughout the construction industry.

Christopher Spruce, Executive Director of Island Housing Trust, commented that the building design and building envelope requirements in the Green Building Standards are low-cost, practical solutions to two major barriers to health and energy-efficient buildings – poor indoor air quality and poor construction design.

Several supporters of the Green Building Standards offered technical changes as follows.

1. Ms. Nagusky testified that the standards should be changed to require projects to comply with the Maine Public Utilities Commission Rule Chapter 920 which adopts the 2003 ICC Code as the State’s model energy code, rather than requiring the more restrictive of the ICC Code or State law.
2. Richards & Company testified that the standards should (1) measure air changes per hour (ACH) in selected units, which is important for air quality, and (2) specify use of bathroom exhaust fan venting, which is critical in the prevention mold and mildew.
3. Henry Whittemore, Director of the Governor’s Forest Certification Initiative, Department of Conservation – Maine Forest Service, recommended that MSHA replace the requirement of 38% sustainable lumber with a “percentage claims” approach to certification and offered suggested

language.

4. Christy Crocker of the Maine Indoor Air Quality Council, through Danuta Drozdowicz, a LEED Accredited Professional with Fore Solutions, commented that the requirements in Section 4R2 of the standards should be replaced with ASHRAE 62.2 concerning bathroom exhaust fans, adopted as part of the State's model building code.

**Response:** MSHA appreciates the technical suggestions with respect to the Green Building Standards. MSHA incorporated all of the suggestions, except the suggestion made by Ms. Nagusky to require projects to comply with the 2003 ICC Code. Although Ms. Nagusky points to several good reasons to adopt the 2003 ICC Code, the 2004 ICC Code has higher insulation values, except with respect to crawl space R, and the 2003 ICC Code does not have a requirement concerning air leakage. MSHA will explore the development of an integrated standard with the Maine Public Utilities Commission.

Other members of the public, including SMARHC and NNEHIF, expressed support for the green standards, but are concerned about the potential increase in construction costs resulting from implementation of these standards. They requested that MSHA track the costs of these standards and indicated that they would like to work with MSHA to establish a methodology for tracking costs.

David Caron, 2005 President, and Drew Sigfridson, 2005 President-Elect, of the Maine Commercial Association of REALTORS ("MCAR") expressed concern about the cost impact of the Green Building Standards.

Loren Clarke, Chair of the Building Committee and John Sturgeon, 2005 President, of the Associated Constructors of Maine ("ACM") commented that the Green Building Standards should be an interim standard until the LEED standards for housing are finalized, at which point, MSHA should select a minimum level of LEED certification, such as the Bronze level, that achieves a certain degree of environmental benefit and allows design creativity.

**Response:** The comments from supporters summarized above present the numerous environmental, societal and economic benefits of the Green Building Standards. MSHA's Green Building Standards are the culmination of a significant amount of work by internal staff and external partners. MSHA appreciates everyone's dedication and efforts to establish these groundbreaking standards. MSHA strongly believes and the studies show that any incremental upfront cost will result in significant long-term and, in some cases, short-term savings. MSHA will establish a working group to develop a methodology for tracking costs. Further, MSHA will consider adopting an appropriate level of LEED certification once the LEED standards for housing are finalized.

#### **Section 6.D. 10. Contractor Standards for MSHA Financed Multi-family Housing**

CCB Construction, Richards & Company, Sharkey Construction Company, Inc. ("Sharkey Construction"), and Beth Edmonds, President of the Senate of Maine, and Jane L. Gilbert, Deputy Commissioner of the State of Maine Department of Labor ("Department of Labor"), and Jack

Comart of Maine Equal Justice Partners (“MEJP”), and Clifford Ginn of the Maine Center for Economic Policy (“MCEP”) and Joseph Ditre, Executive Director of Consumers for Affordable Health Care (“CAHC”) expressed support for the Contractor Standards.

ACM, MCAR, and Kathleen M. Newman, President of Associated Builders and Contractors, Inc. (“ABC”), and Jim McGregor, Executive Vice President of the Maine Merchants Association (“MMA”), and Tobin Malone, 2005 President of the Maine Association of REALTORS (“MAR”), Jeffrey W. Ohler, President of H E Callahan Construction Co. (“Callahan Construction”), and Christopher Pinkham, President of the Maine Association of Community Banks (“MACB”), and SMARHC, NNEHIF, PROP expressed opposition to the Contractor Standards.

Some of the comments and testimony received in connection with the Contractor Standards were general in nature and other comments and testimony targeted particular requirements within the Contractor Standards. A summary of the comments and testimony on the Contractor Standards follows.

**1. General.** CCB Construction, Richards & Company, and Sharkey Construction commented that they meet or exceed the Contractor Standards. According to them, the construction industry nationwide is struggling to recruit and retain people in the construction trades and the proposed Contractor Standards will help with recruiting by improving the image of the construction industry; paying low wages, not providing health insurance, not properly classifying employees and employing untrained workers does not.

The opponents, including ACM, ABC, MAR, MCAR, MACB, Callahan Construction, MMA, SMARHC, NNEHIF, PROP, commented that the Contractor Standards will result in increased construction costs. ACM, ABC and Callahan Construction further commented that the Contractor Standards will deter contractors from bidding on MSHA multi-family projects, resulting in even higher construction costs because of the lack of competition. According to ACM, ABR and MAR, the increased construction costs will result in fewer MSHA multi-family projects being constructed. MAR commented that MSHA should not be creating barriers to the development of and increasing the cost of construction of MSHA multi-family projects at a time when there is an affordable housing and workforce housing crisis in the State. MACB, MAR and MCAR commented that MSHA should have conducted a fiscal impact study before proposing to adopt the Contractor Standards.

MAR commented that MSHA should not be imposing self-created labor standards on the development of MSHA multi-family housing (when all state and federal laws for employers working on construction projects are already being met) - the housing agenda is not a labor agenda and if MSHA wants to get involved in labor policies of the State, it should make that a clear policy of the organization. ABC commented that MSHA’s mission is to assist Maine people to obtain decent, safe and affordable housing, and maximizing their resources (tax dollars) toward that end, and increasing the cost of construction contradicts that mission. ACM commented that these standards go well beyond what is considered normal public construction bidding standards.

ABC and Callahan Construction commented that the Contractor Standards create an unfair advantage for union contractors by making it more expensive for open-shop contractors to do business with MSHA.

MAR expressed concern that MSHA may seek to impose the Contractor Standards on other MSHA programs, such as the single family programs, or the partners that are involved in MSHA's programs.

**Response:** MSHA proposed the adoption of the Contractor Standards to be more responsive to the laws and social needs of the State of Maine. The standards will ensure that contractors who benefit from public funding used to construct affordable housing in the State pay workers the prevailing wage (which is the "average" wage for the State), provide workers adequate health care benefits and workers compensation coverage, properly classify workers as employees (and not independent contractors) so they receive these benefits and protections, and give women and minorities equal access to jobs with decent pay and benefits in an industry that historically has not been open to them. These standards do not seem excessive for MSHA to require of contractors benefiting from the public dollars that fund MSHA's multi-family programs.

In fact, some of the standards merely require contractors to comply with the law, such as requiring contractors to properly classify their workers as employees (and not independent sub-contractors) and to provide workers compensation insurance for their workers. The misclassification of workers is a growing problem in the construction industry that has a substantial negative financial impact on the State in the form of lost taxes and unemployment payments. The effect is that taxpayers and responsible employers who comply with the law subsidize employers who do not comply through higher taxes and increased unemployment premiums.

MSHA heard from many contractors throughout the process, including two contractors who testified at the public hearing, that they currently meet or exceed the Contractor Standards. Most of the standards, particularly those that require contractors to comply with the law, should not materially increase costs. There may be some minor increased costs for the health insurance requirement for smaller contractors who do not currently offer health insurance to their employees. However, from a public policy perspective, contractors who benefit from the public dollars used to fund MSHA multi-family projects should provide health insurance to their employees. Otherwise, MSHA is giving public funds to contractors whose bids are lower, because they do not offer health insurance to their employees. The result is that taxpayers and the businesses that do provide health insurance pick up the health care costs of uninsured workers through increased uncompensated care, Medicaid, welfare and the State's health care costs and health insurance premiums. Any additional costs associated with the Contractor Standards will result in long-term public health and welfare savings for the State, and consequently, the taxpayers.

MSHA will collect data on costs associated with the Contractor Standards from projects developed under this QAP. The construction budgets and other information submitted to MSHA on MSHA-financed projects in MSHA's portfolio and development pipeline do not

itemize labor costs; therefore, adequate data does not exist, and the data that exists is not in a readily available format to analyze the potential cost impact of the Contractor Standards. MSHA expects to meet with developers and contractors to develop a methodology for collecting data on costs, if any, associated with these standards.

MSHA received comments suggesting that MSHA is acting outside of its mission. MSHA has a fairly broad mission. MSHA's mission is *to assist Maine people to obtain and maintain decent, safe, affordable housing and services suitable to their unique housing needs. In carrying out this mission, MSHA will provide leadership, maximize resources and promote partnerships to develop and implement sound housing policy.* MSHA is one of the largest sources of funding for the development of affordable housing in the State, but we are also charged with helping low and moderate income people to rent apartments and buy their first homes. Instituting standards that require contractors to comply with the law and pay their workers decent wages and benefits and that promote equal opportunity for women and minorities helps these workers to obtain decent, safe and affordable housing, and not doing so harms the low and moderate income people that we serve. Furthermore, the development of affordable housing is economic development; MSHA's programs and funding creates jobs. It would be wrong to spend public money to create jobs that do not pay prevailing wages or provide health care, unemployment and workers compensation coverage.

One commenter accused MSHA of favoring labor unions. It is not MSHA's intent to give union contractors an advantage over non-union contractors. MSHA received comments from non-union contractors, not just union contractors, that they meet or exceed the Contractor Standards and support MSHA's adoption of the standards.

Finally, the Contractor Standards only apply to MSHA's multifamily programs. MSHA does not intend to apply the standards to any of MSHA's other programs at this time.

## **2. Prevailing Wages.**

Ms. Edmonds commented that requiring contractors to pay the higher of the State's prevailing wages and Davis-Bacon wages will provide for greater consistency among projects that are and are not subject to Davis-Bacon.

ACM and ABC commented that the contractor standard requiring the higher of Davis-Bacon wages and benefits and the State's prevailing wages and benefits is unique and a first of its kind. They both referenced legislation considered this year which would have adopted a similar standard for all state construction contracts, but failed because it would have increased the costs of highway construction projects by \$10.5 million in FY '06. They commented that the increased costs would have resulted in fewer or delayed highway construction projects and fewer construction-related jobs and suggested that imposing the standards on multi-family housing would have a similar effect. Callahan Construction commented that the prevailing wage standards should be consistent with the standards to which state construction contracts are subject.

**Response:** MSHA heard from many contractors and subcontractors, including contractors who testified at the public hearing, that they currently pay the State prevailing wages and

benefits or more. MSHA's own informal analysis confirms the anecdotal information and testimony we received. MSHA disagrees with ACM and ABC that the impact on MSHA-funded multi-family projects would be similar to highway construction projects, mostly because administering the benefit and wage rates under the classifications relating to highway projects is much more difficult than the rates under the Building 2 classification.

In response to comments received, MSHA revised this standard as follows. For projects that are not subject to the Davis-Bacon Act, all contractors and subcontractors are required to pay their employees wages at least equal to the wage rates (not including the benefit rates) established annually by the Maine Department of Labor pursuant to the State's Prevailing Wage and Benefit law; contractors will not be required to comply with the benefit rates under State law. Projects subject to the Davis-Bacon Act shall comply with the Davis-Bacon Act.

MSHA has recently developed new programs for and promotes the development of affordable workforce housing in the State. MSHA asserts that it builds affordable housing for teachers and firefighters. The people who build the affordable housing, like framers, the roofers and the dry-wallers, should be paid enough to be able to live there too.

### **3. Proper Classification of Employees.**

Ms. Gilbert of the Department of Labor commented that the misclassification of employees is a growing problem in Maine, particularly in the construction industry. She cites a recently-released Harvard University study which estimated that 14% of Maine construction employers have misclassified employees as independent contractors. She commented that this practice adversely impacts (a) workers by denying them access to financial and safety protections for persons classified as employees, (b) the programs in place to protect employees because of lost revenues and taxes to fund the programs, and (c) other responsible employers who end up subsidizing benefits paid to employees who have been misclassified in the form of increased taxes.

Ms. Edmonds commented that MSHA should not only expect contractors to comply with regulations governing the proper classification of employees, but should actively enforce it.

CCB Construction commented that proper classification of employees is important, because employees improperly classified as independent contractors do not have the protections under unemployment and workers compensation programs and other employee protections.

Most of the opponents of the contractor standard requiring the proper classification of employees commented that the standard is unnecessary because the proper classification of employees is required by state and federal law. ACM and MMA commented that there are many different standards imposed by various state and federal agencies and that some of the standards, including the ABC test, are not clear. MMA commented that the Governor's office has established a working group to examine misclassification of employees, because of growing concern in the industry about the ABC Test, particularly as it relates to the Department of Labor's recent public statements flooring/carpeting retailers cannot subcontract product installation. MMA suggested MSHA should coordinate any activity or rulemaking concerning employee classification with the working group's



efforts, as the group may be asking the Legislature to clarify the meaning and intent of the test. ACM commented that the agencies charged with enforcing these laws and standards (and not MSHA) should handle enforcement. Callahan Construction commented that general contractors and construction managers should not act as the enforcement agent for the State. ACM suggested that MSHA should just require contractors to comply with all federal and state laws.

**Response:** According to the Department of Labor, the misclassification of workers is a growing problem in the construction industry. The Harvard Study that Ms. Gilbert cited in her comments reported that the State is losing an estimated \$15,000,000 in taxes and unemployment payments. MSHA requires developers, and contractors and subcontractors who work on MSHA-financed projects, to comply with all applicable federal and state laws. However, MSHA has not been actively monitoring and enforcing policies and laws requiring the proper classification of employees. Opponents commented that monitoring and enforcing laws requiring the proper classification of employees will increase the cost of affordable housing. Regardless, the cost of affordable housing is increasing astronomically. MSHA can no longer continue to subsidize affordable housing units at an average cost of \$175,000 per unit and also expect the workers who build the housing to subsidize the units in the form of lower wages or no benefits. The proper classification of employees is the law. Contractors who misclassify their workers should not have an unfair advantage over contractors who comply with the law when competing for public dollars.

The opponents suggested that MSHA should just require contractors to comply with applicable law. In response to these concerns, MSHA will monitor to ensure that contractors and subcontractors are properly classifying their workers according to applicable state and federal employee classification laws.

MSHA will continue to work closely with the Department of Labor and the Governor's office on the misclassification issue.

#### **4. Healthcare Coverage.**

CCB Construction and Richards & Company commented that contractors, like them, who pay for health insurance coverage for their employees are sharing in the financial burden of the uninsured. MEJP commented that contractors who provide health insurance coverage are effectively subsidizing employers who do not provide health insurance to their employees by paying increased insurance premiums due to uncompensated care costs and bad debt of the uninsured employees. MEJP, MCEP and CAHC commented that the requirement will level the playing field for all contractors to compete for construction contracts for MSHA-financed projects; currently, contractors who provide health insurance are at a distinct competitive disadvantage.

MCEP commented that Maine small businesses are either dropping coverage or shifting costs to their employees, either by paying a lower share of premiums or choosing health insurance plans with less attractive benefits, such as higher deductibles, primarily because of the growing burden of insurance costs. MEJP, MCEP and CAHC commented that increasing the availability of health care coverage will help to reduce uncompensated care costs. MEJP commented that increased availability will stabilize and perhaps decrease health care costs over time. According to MCEP,

increasing the availability will lower health care costs overall, likely resulting in lower insurance premiums and increased employer-provided health coverage.

MCEP commented that the health insurance requirement is consistent with good public health policy and MEJP commented that the health insurance requirement is consistent with the State's health policy, which resulted in the creation of the Dirigo Health Plan.

MEJP commented that the incremental cost associated with the health insurance requirement is minor relative to the scale of multi-family projects. MCEP estimates, based on the average health costs per employee quoted in *Maine Small Business Health Insurance: A 2004 Survey* and the average total per unit cost of MSHA's multi-family projects, that the health insurance requirement will add roughly 0.4% to per unit building costs. MCEP commented that this minor increase will have little, if any, impact on the housing construction industry, but the resulting increased level of health insurance coverage will lower costs for government and businesses.

Three of the supporters suggested changes to the health insurance requirement. CAHC suggested that MSHA should increase the percentage of premium paid by large employers to 100% and the percentage of premium paid by smaller employers to 75%, citing a polling conducted by Anthem BCBS in 2003 that found 75% of small employers (with 2 to 50 employees) paid at or over 75% of the premium costs for their employees. MEJP suggested that the requirement should include a maximum individual and family out-of-pocket limit (i.e. maximum deductible) and establish separate requirements for full and part-time employees (e.g. employer would be required to pay a lesser percentage of the premium for a part-time employee). MCEP made similar suggestions such as (1) increasing the percentage of premium that employers are required to pay, citing *Maine Small Business Health Insurance: A 2004 Survey* which found that small business pay an average of 84% of the premium and only one out of three small businesses pay 60% or less of the premium, (2) prescribe a maximum individual and family out-of-pocket limit, and (3) the standard should distinguish between full and part-time employees with respect to the percentage of premium paid by the employer, the concern being that there will be an incentive for an employer to create more part-time positions. MCEP also suggested that the family coverage alternative in the health insurance requirement should read, "at least 50% of the premium for employee coverage, plus at least a sufficient portion of the premium for family coverage so that the employer's overall premium payment is equal to 60% of the premium for employee coverage."

SMARHC and PROP expressed concern about smaller subcontractors being able to comply with the health insurance coverage requirement and increased construction costs. ACM expressed concern that this requirement may be problematic for all contractors. ACM cited a 2005 Maine Chamber of Commerce survey finding that 60% of its membership, which consists mostly of larger employers, recently altered or reduced health insurance coverage for employees; 80% of the 60% considered requiring employees to pay a greater share of premiums and 83% of which considered switching to plans with higher deductibles. MACB commented that it is not aware of any mandated minimum health insurance coverage in any other area of State government and asked about the basis for the percentage of premium to be paid by the contractor and about the industry's practice. MMA commented that the Legislature unanimously rejected legislation this year that would have required businesses that do business with a State agency or that participate in a State program to provide health care benefits to their employees and suggested that the health insurance requirement in the

Contractor Standards circumvents legislative intent.

**Response:** The State's policy is to increase health care coverage for all citizens of Maine, and MSHA is part of that effort. According to the Governor's Office of Health Policy and Finance, the State's policy on health care is as follows: *Maine is committed to achieving access to quality and affordable health care for all Maine people. To do so, the State promotes policies that increase access to health coverage and is committed to using its resources to that end. Maine has the highest rate of uninsured in New England and the lowest rate of employer sponsored coverage. We lead New England states in rates of chronic illness and disease and we pay more of our incomes on health care than 45 other states. To reverse these trends, all Maine people, businesses and providers, must work collaboratively to reduce escalating health care costs, ensure the best possible quality of health care services, and increase access to health coverage. This approach reflects the State's commitment to ensuring all Maine people have access to quality and affordable coverage.* Requiring contractors who benefit from the public dollars that fund MSHA's programs to provide health insurance for their employees is consistent with, and promotes the State's policy on health care. Continuing to give public funds to contractors who are able to submit lower bids on MSHA-funded projects because they are not paying for health care coverage for their employees is in direct conflict with the State's policy.

Awarding contracts on MSHA-funded multi-family projects to contractors who do not provide health care insurance to their employees also has an adverse financial impact on the State. Taxpayers and the businesses in the State that do provide their employees health care coverage subsidize employers who do not provide health care for their employees through increased uncompensated care, increased welfare costs, increased health insurance premiums paid by the State for State employees and increased private health insurance premiums. Taxpayers are not only subsidizing the development of affordable housing; they are also subsidizing the contractors who build it by paying for the health care costs of the uninsured workers of these contractors.

MSHA heard from many contractors, including contractors who oppose the health insurance requirement, that they meet or exceed the requirement set forth in the Contractor Standards. MSHA's own informal survey shows that on average 70% of all contractors and subcontractors who regularly bid on MSHA-funded projects meet the requirement.

In response to concerns raised by developers and contractors that some of the smaller contractors, such as the framers and the roofers, cannot comply with this requirement, MSHA re-opened the public comment period to accept comments on this requirement and two other options, a requirement that only 70% of contractors provide such health insurance coverage and a selection criterion rewarding applicants who hire contractors who provide such health insurance coverage. A summary of the comments and MSHA's response are set forth below in the section entitled, "Healthcare Coverage Requirement – Substantial Change."

## 5. On-the-job Training (“OJT”).

Ms. Edmonds commented that OJT for women and minorities will have a positive impact for our society and workplaces.

ACM commented that they are not aware that HUD requires on-the-job training for women and minorities, but if it does, the OJT requirement should only apply to federally-funded projects.

ACM commented that the OJT requirement will be problematic for contractors, particularly smaller contractors, who are not accustomed to actively recruiting enough women and minorities to meet the requirement. Callahan Construction represented that it has an excellent record of recruiting and training women and minorities, but the subcontractors lack the size and competition to comply.

ACM asked whether contractors and subcontractors are allowed to consider all women and minorities in their employment to determine whether the contractor meets the affirmative action goal, which exempts them from the OJT requirement.

**Response:** MSHA is subject to both Federal and State affirmative action laws which require MSHA to develop an affirmative action plan that includes procedures designed to increase the number of women, minorities at all levels and in all segments of the workforce where imbalances exist. According to the Department of Labor, a manifest imbalance exists in the construction industry. Although women constitute 47% of the State’s workforce and pay approximately half of the taxes, only 2% to 3% of the workers on publicly-funded construction projects are women. On-the-job training and targeted outreach are standard approaches to achieving affirmative action. In particular, on-the-job training is a strategy that has been successfully used by the State of Maine Department of Transportation to implement affirmative action in the highway construction industry.

To address ACM’s question about meeting the affirmative action goal, the contractors can only consider those women and minorities who are currently employed in the skilled trades, and not women and minorities, who for example, provide clerical support for the contractor. MSHA’s Equal Opportunity and Affirmative Action Plan referenced in and attached to the Contractor Standards addresses this question.

MSHA has modified the Plan to allow the OJT hours to be performed on other construction projects, provided that they are located within the State and to clarify how the OJT requirements will be satisfied and how persons receiving on-the-job training will be paid.

MSHA has heard from contractors that there is a shortage of skilled workers in many of the skilled trades involved in housing construction. The on-the-job training requirement will help contractors to recruit and retain a well-qualified and diverse workforce to an industry that has a manifest imbalance and is in desperate need of a skilled, dependable workforce.

**6. Job Listings.** No one opposed this requirement. Callahan Construction commented that it and its subcontractors currently comply with this standard. ACM is not opposed to the requirement, but asked if the requirement applies only during the construction of a MSHA-financed project.

**Response:** MSHA expects that contractors will post job listings with Women Unlimited and Careers Centers regardless of whether the contractor is bidding on or is in the process of constructing a MSHA-financed multi-family project. MSHA will require a certification of compliance with this requirement from contractors and all subcontractors who bid on a MSHA-financed multi-family project. MSHA realizes that its ability to verify compliance with this requirement is limited unless a contractor is actively working on a project. A good faith effort, which is the standard in the industry, is expected.

**7. Workers Compensation.** Most of the opponents of the contractor standard requiring contractors to provide appropriate workers compensation coverage for their employees commented that it is unnecessary because it is required by state law. ACM suggested that MSHA should just require contractors to comply with all federal and state laws.

**Response:** MSHA currently monitors compliance with this requirement, so this requirement is not new. As indicated above, MSHA will use the applicable employee classification law to determine compliance with this requirement.

**8. Monitoring and Compliance.** Some of the opponents inquired or commented about monitoring and enforcement of the Contractor Standards. NNEHIF requested that MSHA clarify the consequences of noncompliance with the Contractor Standards. MACB asked if MSHA will issue a certification to contractors prior to developers seeking construction financing for the projects. MACB also asked if construction lenders will be responsible for monitoring contractor compliance with the standards and if compliance with the standards will be a condition of MSHA's permanent financing. Callahan Construction commented that general contractors (and construction managers) should not be responsible for monitoring and enforcing the standards, specifically the proper classification of employees and the health insurance requirement. ACM specifically asked how MSHA will monitor the health insurance requirement, i.e. assurance in the bidding documents that the general contractor (or construction manager) and the subcontractors comply with the requirement. ACM asked about the penalties for noncompliance with the health insurance requirement. Specifically, ACM asked if a contractor would be given an opportunity to comply, and if the contractor didn't comply, whether the contractor would no longer be able to work on the project.

**Response:** MSHA will be responsible for monitoring compliance with the standards. MSHA will be hiring one or more consultants with expertise in the areas covered by the Contractor Standards, to monitor compliance and provide technical assistance to contractors. MSHA acknowledges that these are new requirements, some of which may not be familiar to construction contractors, and that there is a learning curve. MSHA's intent is not to punish contractors for noncompliance, at least initially, but rather to educate and assist contractors to comply with the requirements. The standard for determining compliance will be a good faith effort, which MSHA understands is the standard in the industry.

Neither developers nor investors nor financial institutions will be responsible for monitoring and enforcement of the Contractor Standards. Compliance will not be a condition of

MSHA's permanent financing of multi-family housing. Nor will general contractors (and construction managers) be responsible for compliance by subcontractors with the requirements. General contractors (and construction managers) will be responsible for their own compliance with the standards. If MSHA determines that a contractor does not comply with any of the standards, MSHA will notify the contractor of the violation and give the contractor an opportunity to cure the violation. If the contractor fails to cure the violation, then MSHA will make a formal determination of noncompliance and keep a record of the violation and failure to comply. After three formal noncompliance determinations by a contractor within any given time period (and which can span more than one project), MSHA may notify the contractor that the contractor is suspended for one year from participating in any of MSHA's programs. The contractor will have an opportunity to request an administrative hearing to challenge the suspension.

MACB asked about a certification from MSHA prior to seeking construction financing. We are not sure of the form of certification referred to by MACB. If MACB is inquiring about some type of pre-certification of compliance with the Contractor Standards, MSHA will not be pre-qualifying or pre-certifying contractors at this time. MSHA's monitoring and enforcement will occur during the bidding and construction process. However, as mentioned above, financial institutions will not be responsible for monitoring and compliance with the Contractor Standards.

#### **Section 7.A.1. Rehabilitation of Existing M/F Housing**

AVESTA commented that historically MSHA has cited the preservation of Maine's aging housing stock when defending the selection criterion favoring the rehabilitation of existing multi-family housing over the construction of new multi-family housing. But yet, MSHA continues to finance new construction despite purporting that rehabilitating Maine's existing housing stock is more cost efficient. AVESTA commented that the only means by which to decrease the average age of Maine's housing stock is to create new housing stock. With respect to the former argument, AVESTA commented that if the selection criterion is continually disregarded, then MSHA should abolish it. Finally, AVESTA commented it is not convinced the rehabilitation of existing multi-family housing is indeed more cost efficient and requests statistics supporting MSHA's assertion. AVESTA urged MSHA not to reward 5 extra points for the rehabilitation of existing multi-family housing and to instead award 5 points toward the construction of new housing.

RD expressed support for the selection criterion as RD does not have sufficient resources to preserve and stabilize its own portfolio.

**Response:** MSHA rewards applications for the rehabilitation of existing multi-family housing with the possibility of earning up to 4 additional points. Three points are awarded under Section 7.A.1. of the QAP if the existing multi-family rental property slated for rehabilitation consists of more than five units. An additional 1 point is awarded under Section 7.D.2. to prospective properties located in designated community revitalization areas. Encouraging the rehabilitation of existing multi-family housing is consistent with the consolidated plan MSHA submits to HUD annually; it is in keeping with MSHA's desire to minimize sprawl and encourage green construction; and it also serves to promote the upkeep of neighboring buildings. Furthermore, rehabilitation allows tenants to continue inhabiting

their current residences, sparing them the expense and inconvenience of relocating, while benefiting from an improved living environment. MSHA has recently been involved with several multi-family rehab projects, all of which yield greater savings than constructing new units would have. MSHA will continue to offer this marginal number of points to encourage developers to consider rehabilitating existing multi-family rental housing instead of building anew, thus maintaining Maine's aging housing stock.

### **Section 7.A.2. Amenities Selection Criteria**

Dawn R. Gallagher, Commissioner of the Maine Department of Environmental Protection ("DEP"), commented that MSHA should provide incentive points for projects that present residents with the opportunity to utilize alternative means of transportation, in turn reducing vehicle emissions—a principal source of air pollution. DEP recommended that MSHA establish a new selection criterion; awarding 2 points to projects that are "walkable to public transit or walkable/bikeable to essential services."

**Response:** The current selection criteria awards one point to projects located within ¼ mile of public transit. Under Section 7.A7., the QAP also awards 2 points to projects that promote smart growth and minimize sprawl, and obtain a letter for the State Planning Office ("SPO") verifying the fact. The SPO has developed smart growth guidelines that specifically address the issues raised by DEP regarding proximity to public transit and essential services.

DEP also suggested that MSHA (1) reward projects, both rehab and new construction, that minimize sprawl by connecting to existing municipal sewer and water systems, or extensions thereof; and (2) equally reward projects that do not have the advantage of being located in a community with a centralized water and sewer system, but do provide for adequate water and sewer systems in compliance with all state and local requirements.

**Response:** Section 6.D.6. requires MSHA to comply with the State's Growth Management Law which requires newly-constructed and newly-created multi-family housing to be located in locally designated growth areas or areas served by a public sewer system with sufficient capacity to accommodate additional housing. MSHA also requires projects to comply with all applicable federal, state and local laws and ordinances, including laws relating to sewage and water supply to multi-family projects. As mentioned above, the QAP contains selection criteria that promote smart growth and minimize sprawl. The selection criteria proposed by the DEP are already threshold requirements for multi-family projects developed under the Program and rewarded through smart growth selection criterion.

PROP commented that the QAP encourages the duplication of amenities, e.g. developing a community room on-site when there is an existing community space nearby, particularly in urban areas. PROP suggested that projects should be rewarded for utilizing nearby, pre-existing amenities rather than being required to develop amenities on-site.

**Response:** The QAP does not require projects to develop a community room on-site. The QAP rewards projects for being located within ½ mile of community and recreational amenities and activities. The QAP also equally rewards projects, which are not located near

an existing amenity but develop a community room on-site. Developers should incorporate amenities that are appropriate for the project, but in instances where a community center is already located nearby they should not unnecessarily construct a community room on-site, for the sole purpose of earning a single additional point. The amenities selection criteria are weighted toward projects in urban areas that have access to existing community activities and amenities and municipal transportation.

### **Section 7.B.1. Leveraged Funds – TIF**

NNEHIF commented that the Affordable Housing TIF is a powerful new instrument to create affordable housing. They support treating a MSHA-approved Affordable Housing TIF that directly benefits the project as a grant under the leveraged funds scoring criterion.

**Response:** MSHA agrees that the Affordable Housing TIF is a powerful tool to help foster affordable housing across Maine and is committed to facilitating the implementation of such districts whenever possible.

### **Section 7.D.1. Project Location – Need Rankings**

Several organizations expressed concern at the public hearing that transitioning from an absolute to a relative analysis of need will cause the Statewide Subsidized Housing ranks to incorrectly prioritize areas of need.

SMARHC commented that (1) most economic activity is in the southern part of State; (2) housing costs are most staggering in York and Cumberland Counties; (3) the absolute number of families needing housing is greatest in York and Cumberland Counties; and (4) the QAP results in the development of a large number of units that should be concentrated where the absolute need is the greatest. SMARHC requested that MSHA use absolute need rather than relative need in its analysis. SMARHC also referenced a Planning Decisions Report which makes several technical suggestions concerning MSHA's need ranking analysis and requested that MSHA establish a working group to address the suggestions made in the report.

AVESTA commented that the proposed shift from rankings derived by an analysis of absolute need to those derived by an analysis of relative need may result in MSHA funding projects in areas where the need is marginal, such as Dexter, and in areas that contribute to sprawl, such as Outer Bangor and Sebago Lake. AVESTA commented that Portland and Bangor seem to have the greatest need for more apartments and that these locations foster the smartest growth.

PROP commented that there is a greater need for rental housing in urban areas with close proximity to amenities such as public transportation, shopping and medical care. PROP commented that the QAP should be an exclusively urban program and that other MSHA programs are better suited to govern rural development.

NNEHIF commented that the QAP is designed to address issues unique to more urban areas and is not the best tool for meeting the needs of rural areas.



The City of Portland commented that the use of a relative need factor minimized the affordable housing need in larger Service Center Communities such as Portland. The City of Portland supports striking markets with an absolute need less than 150 from the list and ranking the remaining markets' need as either high or very high, but maintains that the underlying formula based on relative need is still flawed. According to the City of Portland, the speed at which new affordable rental housing projects in Portland reach maximum occupancy demonstrates that extremely high demand persists.

**Response:** The underlying housing needs analysis model that was used to set the Statewide Subsidized Housing Ranks within the QAP was first established in 2001 for use in the 2002 QAP. This is the first time since 2001 that MSHA has reexamined that model and made changes enabling MSHA to better target the areas of the State best served by housing developed as a result of tax credits allocated under the QAP, changes which include the following:

1. Redefining the target market for new multi-family housing, produced as a result of tax credits allocated under the QAP, as households with incomes between 30% and 60% of the Area Median Income ("AMI"). The previous calculations account only for those households with incomes below 50% of the AMI. This change was made to capture households eligible to occupy the units and with incomes sufficient to pay anticipated rents.
2. Improving estimates of the number of subsidized housing units available to the target population by excluding subsidized housing units that typically reserved for lower-income households and people with special needs, and including units that are in the process of being developed through MSHA financing.
3. Responding more quickly to reflect changes in market conditions by considering area job growth over a shorter, 3 year period, when conducting the family analysis.

These changes in the analysis better reflect the program market and serve to level the playing field among Maine's labor markets. By measuring relative need rather than absolute need, the revised model removes a previous bias favoring large population centers. This is critical since MSHA serves the entire State, rural and urban. While MSHA recognizes that this category provides significant opportunities for urban areas to gain points, it is not the only area in which they can attain points. MSHA has specifically added a new 3 point category (Section 7.D.4.) to reward projects being planned in Service Center Communities.

MSHA appreciates SMARHC providing the before mentioned report by Planning Decisions and intends to develop a working group to further evaluate the utility and accuracy of the current model in the upcoming year.

## **Process - Public Notice and Input**

SMARHC, NNEHIF and PROP commended MSHA for the open process, the numerous opportunities for public comment, the willingness of staff to listen, and the energy and efforts by staff to address public concern about the rule, including the Green Building Standards and Contractor Standards.

MAR and MACB, on the other hand, criticized the process. MAR commented that the speed of the process is unwarranted and that far more study of the issues, the costs, the relation of the issues to MSHA's mission and involvement of the stakeholders should have occurred. MACB commented that it would have testified at the public hearing had it known about the hearing. MACB further commented that MSHA's interested party list does not appear to include any Maine financial institutions or representatives and that, unlike other state agencies, the information is not on the website. Finally, MACB suggested that MSHA should have a separate rulemaking on the Contractor Standards.

**Response:** This Rule, including the Green Building Standards and the Contractor Standards, is the product of an intensive public process that began on April 1 of this year, when MSHA held a daylong meeting with external partners with various interests in affordable housing, including developers, contractors, attorneys and design professionals, to discuss proposed changes to the QAP, Green Building Standards and Contractor Standards. Everyone on MSHA's QAP Partner List (the interested party list for MSHA's multifamily programs) was invited to the April 1 meeting. In response to a comment by MACB, the QAP Partner List includes four financial institutions who regularly provide financing for affordable multi-family projects, including TD Banknorth, NA, Bangor Savings Bank and Key Bank, and two attorneys who regularly represent these and other financial institutions in connection with MSHA-financed multi-family housing projects. As a result of that meeting, two working groups were established to gather further input on the Green Building Standards and the Contractor Standards. The working groups met throughout the month of April. Representatives of ABC and ACM also met with the Director of MSHA in April. As a result of those meetings, changes were made to the Green Building Standards and the Contractor Standards. In early May, MSHA sent the revised Green Building Standards and Contractor Standards and the draft 2006 QAP to persons on the QAP Partner List, including financial institutions and lender attorneys, for comment. As a result of comments on the standards and the draft QAP, MSHA held another public meeting on June 8, 2005 to discuss major areas of concern. Again, persons on the QAP Partner List were invited. MSHA made further changes to the Green Building Standards, the Contractor Standards and the draft QAP based on concerns expressed at the June meeting. This was the most inclusive QAP process since 2001. We appreciate the input, feedback and involvement of all parties that participated in the process, including without limitation, developers such as PROP and other members of SMARHC, investors such as NNEHIF, contractors, attorneys and design professionals.

On June 21, 2005 MSHA presented this Rule, the Green Building Standards, the Contractor Standards and the NCAHMA marketing guidelines to the MSHA Board of Commissioners, which members include a bank representative and a realtor representative, for approval to commence the rulemaking process. With the Board's approval, MSHA sent notice of the public hearing to the Maine Secretary of State (for publication in the appropriate newspapers), persons on the QAP Partner List and the Legislature in accordance with the

Maine Administrative Procedures Act (“MAPA”). The public hearing notice appeared in the June 29, 2005 editions of the Bangor Daily News, Portland Press Herald, Lewiston Sun Journal, Kennebec Journal and Waterville Morning Sentinel. The public hearing was held on July 19, 2005 and the public comment period was held open until July 29, 2005 in accordance with the MAPA.

MACB, or at least some of its members who regularly do business with MSHA, had notice; the QAP Partner List includes interested financial institutions and lender attorneys who received notice of all public meetings and the public hearing and the various drafts of the QAP and the associated standards and the notice of public hearing was published in the regular “Notice of Agency Rulemaking” section of the major newspapers in the State of Maine. A second public hearing on the Contractor Standards is not warranted under these circumstances.

Regardless of whether persons and organizations who commented on the Rule have requested to be added to MSHA’s interested party list, MSHA will be adding all of those persons who testified or made comments (and are not already on the list) to the interested parties list. Interested parties will receive all notices of public meetings and rulemaking hearings on the QAP, the Contractor Standards and the Green Building Standards. As per the responses to the comments, a number of working groups will be established to collect data and study the housing needs analysis. All interested parties will be invited to participate in these working groups.

### **Substantial Change to Proposed Rulemaking – Health Insurance Requirement**

In response to testimony and comments received on the health insurance requirement set forth in the originally proposed Contractor Standards (Option 3 below), MSHA considered two other options. One of the options (Option 2 below) would reduce the percentage of contractors and subcontractors that must provide health insurance coverage to their employees from 100% to 70%. Option 2 and Option 3 are threshold program requirements. Another option (Option 1 below) would create a selection criterion which would reward applicants who use contractors and subcontractors that provide health insurance coverage to their employees. Option 1 would affect the scoring process under the QAP. MSHA determined that Option 1 is a substantial change to the originally proposed rulemaking and re-opened the comment period for 30 days to receive public input on the three options. MSHA notified interested parties on August 23, 2005 and published a notice in the Secretary of State’s rulemaking ad on August 24, 2005 that it was re-opening the comment period and would accept comment until September 26, 2005 on the following options:

#### **Option 1 (Selection Criterion):**

##### **Selection Criterion 7.E.5 Contractor-sponsored Group Health Insurance Coverage**

An Applicant (or the owner of a Project if different from the Applicant) that employs contractors (including general contractors, construction managers and subcontractors) that provide a qualified group health insurance plan to their employees in accordance with the requirements of this criterion will be awarded up to 4 points, based on the percentage of

contractors or the percentage of the total construction costs paid to contractors who have a qualified group health insurance plan, as follows.

If at least 70% but less than 80% of the contractors have a qualified group health insurance plan **or** at least 70% but less than 80% of the total construction costs are to be paid to contractors who have a qualified group health insurance plan, the Applicant will receive **1 point**.

If at least 80% but less than 90% of the contractors have a qualified group health insurance plan **or** at least 80% but less than 90% of the total construction costs are to be paid to contractors who have a qualified group health insurance plan, the Applicant will receive **2 points**.

If at least 90% but less than 100% of the contractors have a qualified group health insurance plan **or** at least 90% but less than 100% of the total construction costs are to be paid to contractors who have a qualified group health insurance plan, the Applicant will receive **3 points**.

If 100% of the contractors have a qualified group health insurance plan **or** 100% of the total construction costs is to be paid to contractors who have a qualified group health insurance plan, the Applicant will receive **4 points**.

A qualified group health insurance plan is a plan that either (a) provides coverage for employees and the contractor pays at least 60% of the premium for employee coverage or, in the alternative, (b) provides family coverage for employees and the contractor pays at least 50% of the premium for employee coverage plus some portion of the premium for the family coverage. The qualified group health insurance plan must be in place at the time the contractors bid on the Project and must be maintained during the construction of the Project.

**Option 2 (Threshold Requirement):** At least 70% of all contractors (including general contractors, construction managers and subcontractors) shall provide a qualified group health insurance plan to their employees or at least 70% of the total construction costs shall be paid to contractors (including construction managers, construction managers and subcontractors) that provide a qualified group health insurance plan to their employees in accordance with the requirements of this paragraph. A qualified group health insurance plan is a plan that either (a) provides coverage for employees and the contractor pays at least 60% of the premium for employee coverage or, in the alternative, (b) provides family coverage for employees and the contractor pays at least 50% of the premium for employee coverage plus some portion of the premium for the family coverage. The qualified group health insurance plan must be in place at the time the contractors bid on the construction of a MSHA-financed multi-family housing project and must be maintained during the construction of the project.

**Option 3 (Threshold Requirement):** All contractors (including general contractors, construction managers and subcontractors) shall have a group health insurance plan in place

at the time they bid on the construction of a MSHA-financed multifamily housing project and shall maintain the plan during the construction of the project. Contractors shall at a minimum (a) provide coverage for their employees and pay at least 60% of the premium for employee coverage or, in the alternative, (b) provide family coverage for their employees and pay at least 50% of the premium for employee coverage plus some portion of the premium for the family coverage.

The following is a summary of the comments received during the second comment period and MSHA's response to the comments.

MSHA received requests for a public hearing on the healthcare coverage options from Loren Clarke, Chair of the Building Committee and John Sturgeon, 2005 President of the Associated Constructors of Maine, Inc. ("ACM"), and Kathleen M. Newman, President of Associated Builders and Contractors of Maine ("ABC"), and Tobin Malone, President of the Board of Maine Association of REALTORS ("MAR"), and David R. Clough, State Director of the National Federation of Independent Business – Maine the National Federation of Independent Business ("NFIB"), and Jim McGregor of Maine Merchants Association, Inc ("MMA"), and the Home Builders and Remodelers Association of Maine. After MSHA notified these organizations that MSHA would not hold a second public hearing on September 14, 2005, NFIB further commented that MSHA erred in not holding an additional public hearing on the health insurance standard and risks having the rule invalidated.

**Response:** MSHA has already held a public hearing on the Contractor Standards on July 19, 2005. The most restrictive of the three health insurance options was subject to comment at the public hearing. MSHA was happy to extend the comment period on the health insurance options for 30 days to receive additional public input. A second public hearing will further delay the application deadline for the 2006 Low Income Housing Tax Credit Program, and any further delay could be detrimental to the developers applying to the program. Accordingly, MSHA decided not to hold a second public hearing on the health insurance options and, when notifying those organizations of this decision, reminded them that they could provide written comments by September 26, 2005. The Attorney General's office concurred with MSHA that the Maine Administrative Procedures Act does not require MSHA to hold a public hearing on the health insurance options.

Jack Comart of Maine Equal Justice Partners ("MEJP"), and George Bertini of the United Brotherhood of Carpenters and Joiners of America-Local 1996 Augusta, Maine ("Carpenters Union"), and Jack Cashman, Commissioner of the Department of Economic and Community Development ("DECD"), and Nathan S. Szanton and Robert C.S. Monks of Maine Workforce Housing, LLC ("Maine Workforce Housing"), and John R. Hanson, President of Maine State Building and Construction Trades Council, and Lisa Pohlmann, Associate Director of the Maine Center for Economic Policy ("MECEP"), and Joseph P. Ditre, Executive Director of Consumers for Affordable Health Care Foundation ("CAHC") expressed support for the Health Insurance Standard within the Contractor Standards.

Maurice A Selinger, III, Chairman of the Southern Maine Affordable Rental Housing Coalition ("SMARHC"), Betsy Sawyer-Manter, Director of Housing Development at People's Regional

Opportunities Program (“PROP”), and James M. Whelan, President of the Board of Directors of Maine Real Estate and Development Association (“MEREDA”), expressed opposition to including the Contractor Standards (specifically addressing the Health Insurance Standard) in the 2006 QAP and requested they be deferred until further research could be done.

John Anton, President of Northern New England Housing Investment Fund (“NNEHIF”) commented that of the three choices, they support Option A, but also expressed some concerns.

John Applin of Bread of Life Ministries, and Bruce C. Gerrity of Preti, Flaherty, Beliveau, Pachios, and Haley, LLC, representing the Mid-Coast Builders Alliance (“Mid-Coast Builders”), and Dana Totman, President of Avesta Housing (“Avesta”), and Denis R. Landry, President of Payton Maine Corporation (“Payton Construction”), and Peter M. Gore, Senior Governmental Affairs Specialist at Maine State Chamber of Commerce (“Chamber of Commerce”), and James A. Langford, President of Langford and Low, Inc. (“Langford & Low”), and State Representative R. Kenneth Lindell, and David Caron, President and Drew Sigfridson, President-Elect of Maine Commercial Association of REALTORS (“MCAR”), NFIB, ABC, MMA, MAR and ACM expressed opposition to the Health Insurance Standard.

MEJP, MECEP, and CAHC commented that contractors who currently provide health insurance are subsidizing those that don’t through higher premiums. They also commented that contractors who provide health insurance are at a competitive disadvantage. By sharing the health insurance burden equally, no one employer will be at an economic or competitive disadvantage. MEJP commented that while there may be a minor initial cost, the initial up-tick will subside as the market stabilizes. MEJP and MECEP also commented that public dollars should not be spent at cross purposes and this standard advances a public policy of the state. CAHC noted that MSHA’s proposal is in line with the official state position on health care and health insurance matters.

MECEP further commented that the trend toward including standards in projects with public funding is growing. In 2003, 29 out of 43 states that have standards for public projects had some type of health benefit or significantly higher wages in place of health coverage as a part of their standards.

MEJP, MECEP, and CAHC commented that the Health Insurance Standard should include a maximum individual and family out-of-pocket limit; and MEJP and CAHC further commented that the Standard should address full and part-time employees and the required coverage for each.

The Carpenters Union commented on the need to stabilize the construction industry and the healthcare crisis in Maine, which will lower the cost of housing and costs borne by taxpayers over the long-term. The Carpenters Union also believes the proposed Health Insurance Standard has caused both their members and several open shop companies to have renewed interest in bidding on MSHA jobs.

DECD commented that the Health Insurance Standard is in line with requirements for tax breaks under the Pine Tree Zone and ETIF programs, which have similar health insurance requirements.

Maine Workforce Housing commented on the contractor standards, and the health insurance standard in particular, based on actual experience. Maine Workforce Housing recently received bids from contractors for Walker Terrace, a project that is complying with the contractor standards in the 4% Walk-In Program. Maine Workforce Housing commented that they consulted with Portland Builders, whose bid was low and was selected to build the project. Portland Builders noted that initially the new rules did keep some bidders away, but MSHA's addendum in response to input from contractors directly, brought many of them back into the process. Portland Builders feels that each bid process will be easier going forward as companies understand how this affects them. In Walker Terrace, Portland Builders was able to accept the lowest bids in each sub-trade and meet the 70% requirement for health insurance.

Maine State Building and Construction Trades Council commented that the expenditure of public resources should occur in the most beneficial and responsible way so as to be in the best public interest. National and state policies should not only achieve the intended public purpose (for example, building schools and hospitals to provide for health and education), but also improve the overall social and economic health of the nation by setting standards for construction of the projects and the workers who construct them. The goal is to enhance the private sector's means, through public sector assistance, to expand access and coverage to health care and housing for a more solid future.

SMARHC, MacDonald Associates, PROP, and MEREDA commented on the unknown implementation and enforcement plans related to the health insurance standard. Avesta commented that Option 1 is laudable in concept, but that they see problems in practice in that the good faith effort required of developers is somewhat subjective and could be challenged legally.

**Response:** MSHA will determine whether the developer fulfilled the pledge the developer made in its application for which it was awarded points under the health insurance selection criterion at the time of bid selection. If the developer fails to fulfill its pledge in its application, then MSHA will determine, in its sole discretion, whether the developer made a good faith effort to fulfill its pledge. Due to the fact that the health insurance standard is new and MSHA wants to work with developers to ensure its success, MSHA will not re-score an application if the developer made a good faith effort to fulfill its pledge. If MSHA determines, in its sole discretion, that the developer did not make a good faith effort, MSHA will give the developer an opportunity to satisfy its pledge made in the application. If the developer fails to fulfill its pledge, then MSHA will re-score the developer's application. If upon re-scoring, the application does not score high enough to receive an award of tax credits, the application will be added to the waiting list based on its new score relative to the score of other applications, and the next project on the waiting list will be awarded the tax credits. This entire process is completed prior to the construction loan closing and prior to approval of any MSHA financing for the project.

If MSHA awards points under the health insurance selection criteria to a developer (including a developer who fails to fulfill the pledge in its application but whom MSHA determined made a good faith effort), the contractors and subcontractors selected by the developer that indicate they provide an eligible group health insurance plan for their employees at the time of bid selection will be required to maintain the eligible group health

insurance plan during the construction of the project. Developers and general contractors will not be responsible for compliance by subcontractors. General contractors will be responsible for their own compliance. Noncompliance by a contractor (including construction managers and subcontractors) will result in MSHA notifying the contractor of the violation and giving the contractor an opportunity to cure the violation. If the contractor fails to cure the violation, then MSHA will make a formal determination of noncompliance and keep a record of the violation and failure to comply. After three formal determinations of noncompliance by a contractor within any given time period, MSHA may notify the contractor that the contractor is suspended for one year from participating in any of MSHA's programs. The contractor will have an opportunity to request an administrative hearing to challenge the suspension.

There will be no adverse impact on the project, the developer, the construction lender, other lenders, the investor or the general contractor (except for its own noncompliance) as a result of noncompliance after the bid process.

Tom MacDonald of MacDonald Associates asked for further clarification on the following issues: A definition of "total construction costs paid to contractors;" in the case of a small sub-contractor, the way in which MSHA will calculate the health insurance offering if all employees are covered by a spouse's policy; and, how MSHA will treat an employer who pays the health insurance allowance to employees rather than offering a health insurance plan.

**Response:** "Total construction costs paid to contractors" is the amount of the original construction contract entered into between the developer and the general contractor. The standard is that health insurance must be offered to all employees of contractors (including construction managers) and sub-contractors. Employees need not utilize the benefit (if they are covered under another plan, for example) but must be aware coverage is offered through their employer should they decide to use that coverage. Contractors (including construction managers) and sub-contractors must offer a qualified health insurance plan in order to be counted toward the pledged amount of contractors providing coverage. A health insurance allowance is not a health insurance plan.

Bread of Life Ministries' comments incorporated remarks from contractors that, according to Bread of Life Ministries, work on MSHA-funded projects and complain that the existing regulatory requirements of MSHA's programs are overly burdensome. They further commented that health insurance is not affordable in Maine, because there is no competition, and that MSHA should let the market drive whether contractors provide their workers health insurance coverage.

**Response:** The sources of funding available to MSHA for affordable housing development are subject to regulatory restrictions imposed at the federal and state level. However, a benefit of these regulated funding sources is that MSHA can make these funds available to developers in the form of grants and no-interest forgivable or deferred payment loans, and often these regulated sources are the only means for developing certain types of affordable housing.



The low income housing tax credit program is among MSHA's most complex and federally-regulated programs because of the funding sources available for the program. Yet, contractors have continuously bid on MSHA-funded tax credit projects.

MSHA would appreciate hearing from the contractors referred to so that we can better understand their concerns and begin to address them. MSHA is willing to meet directly with any contractor to discuss any concerns, provide assistance and education, and brainstorm ways to streamline the regulatory process.

The State's policy is to increase healthcare coverage for all Maine citizens. MSHA is part of this effort. By increasing the availability of healthcare coverage, healthcare costs will decrease and this will likely result in lower insurance premiums.

MMA, Mid-Coast Builders, NFIB, ABC, the Chamber of Commerce, and Representative R. Kenneth Lindell commented that the selection criterion option circumvents legislative intent because the State Legislature rejected legislation last session that would have penalized companies who do not provide employee healthcare coverage in the State bidding process. They suggested that affordable healthcare coverage should be addressed at the legislative level and not by individual State agencies.

**Response:** MSHA's decision to require or incent developers to hire contractors who provide health insurance for their employees is not a circumvention of legislative intent. Legislative intent cannot be inferred from the Legislature's failure to enact legislation on this matter. As per MSHA's draft response to the initial comments on the healthcare coverage requirement, all of the proposed options are consistent with the State's policy on health care.

NNEHIF prefers the selection criterion option, which would reward developers in the scoring process for hiring contractors that provide employee healthcare coverage. They expressed concern that developers who are awarded points under this selection criterion may be treated differently than developers who are not because MSHA may make additional subsidy available to offset any after-the-fact cost increases associated with the selection criterion.

Bread of Life Ministries, SMARHC, Mid-Coast Builders, PROP, ABC, Payton Construction, Representative R. Kenneth Lindell, MCAR, MAR, and ACM commented on the increase in costs associated with health insurance and the effect it would have on project budgets. Payton Construction and ACM commented that MSHA's cost estimates were understated. ACM further commented that labor costs are closer to 30-40% and that health insurance as a percentage of total labor costs are 10-15%. This would mean that the cost per rural unit is \$1,500 and the cost per urban unit would be \$2,100. Avesta commented in opposition to Options 2 and 3 due to a lack of data to fully assess the cost of the options. Avesta also commented that if housing development costs increase, municipalities will likely be asked to contribute more through local sources, TIFs, or CDBG. In addition, municipalities that sell former schools or other municipal buildings may receive less for them if the development costs increase.

**Response:** Developers who experience cost increases after submission of applications to the program will be treated equally. MSHA's research shows that there should be little or no

cost increase due to health insurance. The research is based on the percentage of contractors already offering health insurance and an estimate of the cost for those who don't. The increase in cost to a project – using the most aggressive of the options (100% of contractors providing health insurance) – is no more than .41%. This is less than the cost of one unit. MSHA is not imposing any fiscal mandates or expecting any cost burden to municipalities. The price at which a municipality sells a building is their decision and cannot be connected to this MSHA standard.

ABC commented that the data gathered for MSHA's cost estimates came from a MECEP report, which states that 80% of construction companies offer health insurance. ABC finds it ironic that MSHA is singling out an industry that is making great strides. MAR and MEREDA expressed concern about what other MSHA partners this standard may affect in the future and MAR further commented that they believe a significant portion are likely uninsured.

**Response:** MSHA is beginning with the construction industry as this is where the vast majority of our funds are spent. MSHA believes this is the most logical place to start and is pleased that the industry is making great strides already.

Mid-Coast Builders asked if MSHA will look further into the scope of the health insurance plan offered-beyond being a group health insurance plan where the employer, at a minimum, pays at least 60% of the premium for employee coverage plus some portion of the premium for family coverage. Mid-Coast Builders further commented on the details of scrutinizing health-care plans and MSHA's inexperience in doing so.

**Response:** The proposed health insurance standard is a first step. MSHA is not attempting, at this time, to further define health insurance plan requirements. Should this standard not further the state's goal to broaden health insurance coverage, MSHA may re-evaluate the standard. The Governor's office of Health Policy and Finance has provided guidance and resources to us. Any further work on health insurance will be done with experts in that area.

Mid-Coast Builders commented on each of the 3 options under consideration. The comments read as though MSHA were measuring the percentage of premium paid by the employer rather than measuring the number of contractors meeting the stated standard.

**Response:** The percentage pledged by the developer is the percentage of contractors offering at least the minimum required coverage, which will be measured at the time of bid. It is not a pledge of a percentage of premiums paid (all contractors must meet the minimum employer-covered premium: 60% for employee-only coverage or 50% for the employee if some level of family coverage is provided).

NFIB and the Chamber of Commerce commented that each health insurance option has the potential to disadvantage small businesses. Representative R. Kenneth Lindell commented that small start-up women and minority-owned firms could be at a disadvantage to larger established firms. NFIB further commented that it is more difficult for small businesses to obtain health

insurance than it is for larger ones and that the standard adds a layer of complexity and creates a disincentive for firms.

**Response:** MSHA conducted two telephone surveys of contractors and sub-contractors that had recently worked on MSHA-funded projects. One survey was dedicated solely to sub-contractors, many of them small businesses, so MSHA could understand the current levels of coverage in order to ensure the standards were not too onerous for businesses of any size. These surveys revealed that close to 70% of the contractors and sub-contractors currently offer health insurance.

NFIB commented that they are not aware of anything that supports the level of employer-paid premium and therefore believe the percentages are arbitrary.

**Response:** MSHA's required level of employer-paid premiums is based on Dirigo Health and industry standards.

NFIB commented that there is no state or federal law mandating that contractors and subcontractors on MSHA-funded projects provide health insurance coverage to their workers and that MSHA's health insurance requirements are an invalid exercise of the agency's rulemaking power.

**Response:** 30-A MRSA § 4741 (14) authorizes MSHA, as the housing credit agency for the State, to receive and allocate low income housing tax credits pursuant to an allocation process (referred to as the qualified allocation plan) established by rulemaking. Section 42 of the Internal Revenue Code requires housing credit agencies to include certain selection criteria in allocation plans, but otherwise, gives housing credit agencies discretion to establish other selection criteria in their allocation plans to address local priorities and policies. The state and federal laws authorizing adoption of the allocation plan do not mandate that contractors provide employer-sponsored health insurance, but they give MSHA discretion to require or incent employer-sponsored health insurance coverage in its allocation plan.

Payton Construction commented that the health insurance standard will be a challenge for General Contractors to monitor. MCAR commented that it is not reasonable to expect contractors and developers to collect insurance statements from all parties used on a job.

**Response:** The General Contractor will be required to know which subs have health insurance and to put a bid together with enough coverage to meet the standard pledged by the developer in their application. General Contractors will not be required to monitor the health insurance standard after that point. The point of determination is when bids are accepted.

The Chamber of Commerce commented that while the goal of the standard may be laudable, it will add to the already high cost of doing business in Maine and will hurt some of the employees it is trying to help. The Chamber of Commerce pointed to studies and reports to show the already high cost of doing business in Maine and stated that increased costs to MSHA-funded projects will only hurt taxpayers who already have the highest taxes in the nation. MEREDA commented that scarce

housing resources would be used to address issues not related to housing. MEREDA also commented that there is an unknown economic impact and a possible adverse effect on affordable housing as a result of the standard.

**Response:** As noted in the responses to the original comment period, awarding contracts to contractors who do not provide health care insurance to their employees has an adverse fiscal impact on the State. Taxpayers and the businesses in the State that do provide their employees health care coverage subsidize employers who do not provide health care for their employees through increased uncompensated care, increased welfare costs, increased health insurance premiums paid by the State for state employees and increased private health insurance premiums. Taxpayers at this point are not only subsidizing the affordable housing, they are also subsidizing the contractors who build it by paying for the healthcare costs of those uninsured workers.

Langford & Low commented that the health insurance requirement caused problems on the Walker Terrace project and if MSHA had not amended the requirements, the bid process would have been unsuccessful. Langford & Low further commented that the increase in cost is a result of health insurance and the increased pricing of the sub-contractors. ACM commented that on projects where these standards are already in effect, general contractors have not been able to persuade sub-contractors to bid, in large part because of the health insurance standard. Most sub-contractors cannot meet the requirements and instead are choosing not to bid on MSHA work. Bread of Life Ministries also commented that additional requirements, such as health insurance coverage, will result in greater reluctance by contractors to bid on MSHA projects.

**Response:** MSHA is glad that by offering to meet with contractors to explain the standards and by making adjustments based on comments that the process was ultimately successful. As noted in Maine Workforce Housing's letter, the successful general contractor on the Walker Terrace project believes the process will be smoother now that contractors have experienced it. MSHA's goal has been to have an inclusive process and on Walker Terrace, the first project in the Walk-In program that complies with the standards, the success was as a result of the process. We know from Maine Workforce Housing's comments that in fact the General Contractor was able to pick the most qualified sub contractors at the lowest cost and meet the health insurance standard. There were four General Contractors who bid on the project, and there does not seem to be the problem of lack of interest stated in the comments.

Representative R. Kenneth Lindell commented that the health insurance standard is contrary to current state policy. Current policy is to encourage the expansion of health insurance voluntarily rather than by mandate.

**Response:** MSHA is providing an incentive to expand health insurance in an industry that receives public funds. As noted earlier, this standard is in line with state policy, which is to promote access to healthcare coverage and to use its resources to further this goal.

**FISCAL IMPACT OF THE RULE:** The sale of the low income housing tax credits will raise approximately \$20,700,000 million in equity, which equity will be used to develop affordable housing for low-income persons. The proposed amendments will not impose any costs on municipalities or counties for implementation or compliance.