# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4287-N-01]

Statutorily Mandated Designation of Difficult Development Areas for Section 42 of the Internal Revenue Code of 1986

**AGENCY:** Office of the Secretary, HUD. **ACTION:** Notice.

**SUMMARY:** This document provides revised designations of "Difficult Development Areas" for purposes of the Low-Income Housing Tax Credit ("LIHTC") under section 42 of the Internal Revenue Code of 1986, and describes the methodology used by the United States Department of Housing and Urban Development ("HUD"). The new Difficult Development Areas are based on FY 1997 Fair Market Rents ("FMRs"), FY 1997 income limits and 1990 census population counts as explained below. The corrected designations of "Qualified Census Tracts" under section 42 of the Internal Revenue Code published May 1, 1995 (60 FR 21246) remain in effect.

FOR FURTHER INFORMATION CONTACT: With questions on how areas are designated and on geographic definitions, Kurt G. Usowski, Economist, Division of Economic Development and Public Finance, Office of Policy Development and Research, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 708–0426, e-mail

Kurt\_G.\_Usowski@hud.gov. With specific legal questions pertaining to section 42 and this notice, Chris Wilson, Attorney, Office of the Chief Counsel, Pass Throughs and Special Industries Branch 5, Internal Revenue Service, 1111 Constitution Ave, NW, Washington, DC 20244, telephone (202) 622-3040, fax (202) 622-4779; or Harold J. Gross, Senior Tax Attorney, Office of the General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410, telephone (202) 708-3260, e-mail H.\_\_JERRY\_\_GROSS@hud.gov. A telecommunications device for deaf persons (TTY) is available at (202) 708-9300. (These are not toll-free telephone numbers.) Additional copies of this notice are available through HUDUSER at (800) 245-2691 for a small fee to cover duplication and mailing costs. COPIES AVAILABLE ELECTRONICALLY: This

notice is available electronically on the

Internet (World Wide Web) at http://

"Data Available from HUD."

www.huduser.org/ under the heading

#### SUPPLEMENTARY INFORMATION:

#### Background

The U.S. Treasury Department and the Internal Revenue Service thereof are authorized to interpret and enforce the provisions of the Internal Revenue Code of 1986 (the "Code"), including the Low-Income Housing Tax Credit ("LIHTC") found at section 42 of the Code, as enacted by the Tax Reform Act of 1986 (Pub. L. 99-514), as amended by the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. 100–647), as amended by the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101-239), as amended by the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508), as amended by the Tax Extension Act of 1991 (Pub. L. 102-227), and as amended and made permanent by the Omnibus Budget Reconciliation Act of 1993 (Pub. L. 103-66). The Secretary of HUD is required to designate Difficult Development Areas by section 42(d)(5)(C) of the Code.

In order to assist in understanding HUD's mandated designation of Difficult Development Areas for use in administering section 42 of the Code, a summary of section 42 is provided. The following summary does not purport to bind the Treasury or the IRS in any way, nor does it purport to bind HUD as HUD has no authority to interpret or administer the Code, except in those instances where it has a specific delegation.

### Summary of Low Income Housing Tax

The LIHTC is a tax incentive intended to increase the availability of low income housing. Section 42 provides an income tax credit to owners of newly constructed or substantially rehabilitated low-income rental housing projects. The dollar amount of the LIHTC available for allocation by each state (the "credit ceiling") is limited by population. Each state is allocated credit based on \$1.25 per resident. Also, states may carry forward unused or returned credit for one year; if not used by then, credit goes into a national pool to be allocated to states as additional credit. State and local housing agencies allocate the state's credit ceiling among low-income housing buildings whose owners have applied for the credit.

The credit allocated to a building is based on the cost of units placed in service as low-income units under certain minimum occupancy and maximum rent criteria. In general, a building must meet one of two thresholds to be eligible for the LIHTC: Either 20 percent of units must be rentrestricted and occupied by tenants with

incomes no higher than 50 percent of the Area Median Gross Income ("AMGI"), or 40 percent of units must be rent restricted and occupied by tenants with incomes no higher than 60 percent of AMGI. The term rentrestricted means that gross rent, including an allowance for utilities, cannot exceed 30 percent of the tenant's imputed income limitation (i.e., 50 percent or 60 percent of AMGI). The rent and occupancy thresholds remain in effect for at least 15 years, and building owners are required to enter into agreements to maintain the low income character of the building for at least an additional 15 years.

The LIHTC reduces income tax liability dollar for dollar. It is taken annually for a term of ten years and is intended to yield a present value of either (1) 70 percent of the "qualified basis" for new construction or substantial rehabilitation expenditures that are not federally subsidized (i.e., financed with tax-exempt bonds or below-market federal loans), or (2) 30 percent of the qualified basis for the acquisition of existing projects or projects that are federally subsidized. The actual credit rates are adjusted monthly for projects placed in service after 1987 under procedures specified in section 42. Individuals can use the credit up to a deduction equivalent of \$25,000. This equals \$9,900 at the 39.6 percent maximum marginal tax rate. Individuals cannot use the credit against the alternative minimum tax. Corporations, other than S or personal service corporations, can use the credit against ordinary income tax. They cannot use the credit against the alternative minimum tax. These

corporations can also deduct the losses

from the project. The qualified basis represents the product of the "applicable fraction" of the building and the "eligible basis" of the building. The applicable fraction is based on the number of low income units in the building as a percentage of the total number of units, or based on the floor space of low income units as a percentage of the total floor space in the building. The eligible basis is the adjusted basis attributable to acquisition, rehabilitation, or new construction costs (depending on the type of LIHTC involved). These costs include amounts chargeable to capital account incurred prior to the end of the first taxable year in which the qualified low income building is placed in service or, at the election of the taxpayer, the end of the succeeding taxable year. In the case of buildings located in designated Qualified Census Tracts or designated Difficult Development Areas,

eligible basis can be increased up to 130 percent of what it would otherwise be. This means that the available credit also can be increased by up to 30 percent. For example, if the 70 percent credit is available, it effectively could be increased up to 91 percent.

Under section 42(d)(5)(C) of the Code, a Qualified Census Tract is any census tract (or equivalent geographic area defined by the Bureau of the Census) in which at least 50 percent of households have an income less than 60 percent of the AMGI. There is a limit on the amount of Qualified Census Tracts in any Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA") that may be designated to receive an increase in eligible basis: All of the designated census tracts within a given MSA/ PMSA may not together contain more than 20 percent of the total population of the MSA/PMSA. For purposes of **HUD** designations of Qualified Census Tracts, all non-metropolitan areas in a state are treated as if they constituted a single metropolitan area. This Notice does not redesignate Qualified Census Tracts. The corrected designation of Qualified Census Tracts published May 1, 1995, at 60 FR 21246 remains in effect. Qualified Census Tracts will not be redesignated until data from the 2000 census become available.

Section 42 defines a Difficult Development Area as any area designated by the Secretary of HUD as an area that has high construction, land, and utility costs relative to the AMGI. Again, limits apply. All designated Difficult Development Areas in MSAs/PMSAs may not contain more than 20 percent of the aggregate population of all MSAs/PMSAs, and all designated areas not in metropolitan areas may not contain more than 20 percent of the aggregate population of all non-metropolitan counties.

# Explanation of HUD Designation Methodology

#### A. Difficult Development Areas

In developing the list of Difficult Development Areas, HUD compared incomes with housing costs. HUD used 1990 Census data and the MSA/PMSA definitions as published by the Office of Management and Budget ("OMB") in OMB Bulletin No. 96–08 on June 28, 1996, with the exceptions described in section C., below. The basis for these comparisons was the fiscal year ("FY") 1997 HUD income limits for Very Low Income households ("VLILs") and Fair Market Rents ("FMRs") used for the section 8 Housing Assistance Payments

Program. The procedure used in making these calculations follows:

- 1. For each MSA/PMSA and each non-metropolitan county, a ratio was calculated. This calculation used the FY 1997 two-bedroom FMR and the FY 1997 four-person VLIL. The numerator of the ratio was the area's FY 1997 FMR. The denominator of the ratio was the monthly LIHTC income-based rent limit calculated as 1/12 of 30 percent of 120 percent of the area's VLIL (where 120 percent of the VLIL was rounded to the nearest \$50 and not allowed to exceed 80 percent of the AMGI in areas where the VLIL is adjusted upward from its 50 percent of AMGI base).
- 2. The ratios of the FMR to the LIHTC income-based rent limit were arrayed in descending order, separately, for MSAs/PMSAs and for non-metropolitan counties.
- 3. The Difficult Development Areas are those with the highest ratios cumulative to 20 percent of the 1990 population of all metropolitan areas and of all non-metropolitan counties.

#### B. Application of Population Caps to Difficult Development Area Determinations

In identifying Difficult Development Areas, HUD applied various caps, or limitations, as noted above. The cumulative population of metropolitan Difficult Development Areas cannot exceed 20 percent of the cumulative population of all metropolitan areas and the cumulative population of nonmetropolitan Difficult Development Areas cannot exceed 20 percent of the cumulative population of all nonmetropolitan counties.

In applying these caps, HUD established procedures to deal with how to treat small overruns of the caps. The remainder of this section explains the procedure. In general, HUD stops selecting areas when it is impossible to choose another area without exceeding the applicable cap. The only exceptions to this policy are when the next eligible excluded area contains either a large absolute population or a large percentage of the total population, or the next excluded area's ranking ratio as described above was identical (to three decimal places) to the last area selected, and its inclusion resulted in only a minor overrun of the cap. Thus for both the designated metropolitan and nonmetropolitan Difficult Development Areas there are minimal overruns of the caps. HUD believes the designation of these additional areas is consistent with the intent of the legislation. Some latitude is justifiable because it is impossible to determine whether the 20 percent cap has been exceeded, as long

as the apparent excess is small, due to measurement error. Despite the care and effort involved in a decennial census, it is recognized by the Census Bureau, and all users of the data, that the population counts for a given area and for the entire country are not precise. The extent of the measurement error is unknown. Thus, there can be errors in both the numerator and denominator of the ratio of populations used in applying a 20 percent cap. In circumstances where a strict application of a 20 percent cap results in an anomalous situation, recognition of the unavoidable imprecision in the census data justifies accepting small variances above the 20 percent limit.

#### C. Exceptions to OMB Definitions of MSAs/PMSAs and Other Geographic Matters

As stated in OMB Bulletin 96–08 defining metropolitan areas: "OMB establishes and maintains the definitions of the (Metropolitan Areas) MAs solely for statistical purposes \* \* \* OMB does not take into account or attempt to anticipate any nonstatistical uses that may be made of the definitions \* \* \* We recognize that some legislation specifies the use of metropolitan areas for programmatic purposes, including allocating Federal funds."

HUD makes exceptions to OMB definitions in calculating FMRs by deleting counties from metropolitan areas whose OMB definitions are determined by HUD to be larger than their housing market areas. In addition, HUD is required by statute to calculate a separate FMR and VLIL for Westchester County, New York, which OMB includes as part of the New York, NY PMSA. The following counties are assigned their own FMRs and VLILs and evaluated as if they were separate metropolitan areas for purposes of designating Difficult Development Areas.

Metropolitan Area and Counties Deleted Atlanta, GA: Carrol, Pickens, and Walton Counties.

Chicago, IL: DeKalb, Grundy, and Kendall Counties.

Cincinnati-Hamilton, OH–KY–IN: Brown County, Ohio; Gallatin, Grant, and Pendleton Counties, Kentucky; and Ohio County, Indiana.

Dallas, TX: Henderson County. Flagstaff, AZ–UT: Kane County, Utah. New York, NY: Westchester County. New Orleans, LA: St. James Parish.

Washington, DC-MD-VA-WV: Clarke, Culpeper, King George, and Warren Counties, Virginia; and Berkely and Jefferson Counties, West Virginia. Affected MSAs/PMSAs are assigned

the indicator "(part)" in the list of

Metropolitan Difficult Development Areas. Any of the excluded counties designated as difficult development areas separately from their metropolitan areas are designated by the county

Finally, in the New England states (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont) OMB defines MSAs/PMSAs according to county subdivisions or Minor Civil Divisions ("MCDs") rather than county boundaries. Thus, when a New England county is designated as a Nonmetropolitan Difficult Development Area, only that part of the county (the group of MCDs) not included in any MSA/PMSA is the Nonmetropolitan Difficult Development Area. Affected counties are assigned the indicator "(part)" in the list of Nonmetropolitan Difficult Development Areas.

For the convenience of readers of this Notice, the geographic definitions of designated Metropolitan Difficult Development Areas and the MCDs included in Nonmetropolitan Difficult Development Areas in the New England states are included in the list of Difficult Development Areas.

#### **Future Designations**

Difficult Development Areas are designated annually as updated income and FMR data become available. Qualified Census Tracts will not be redesignated until data from the 2000 census become available.

### **Effective Date**

The list of Difficult Development Areas is effective for allocations of credit made after December 31, 1997. In the case of a building described in Internal Revenue Code section 42(h)(4)(B), the list is effective if the bonds are issued and the building is placed in service after December 31, 1997. The corrected designations of Qualified Census Tracts published May 1, 1995, at 60 FR 21246 remain in effect.

#### **Interpretive Examples for Effective Date**

For the convenience of readers of this Notice, interpretive examples are provided below to illustrate the consequences of the effective date in areas that gain or lose Difficult Development Area status with respect to projects described in Internal Revenue Code section 42(h)(4)(B).

(Case A) Project "A" is located in a newly-designated 1998 Difficult Development Area. Bonds are issued for Project "A" on November 1, 1997, but Project "A" is placed in service March 1, 1998. Project "A" IS NOT eligible for the increase in basis otherwise accorded a project in this location because the bonds were issued BEFORE December 31, 1997.

(Case B) Project "B" is located in a newly-designated 1998 Difficult Development Area. Project "B" is placed in service November 15, 1997. The bonds which will support the permanent financing of Project "B" are issued January 15, 1998. Project "B" IS NOT eligible for the increase in basis otherwise accorded a project in this location because the project was placed in service BEFORE December 31, 1997.

(Case C) Project "C" is located in an area which is a Difficult Development Area in 1998, but IS NOT a Difficult Development Area in 1999. Bonds are issued for Project "C" on October 30, 1998, but Project "C" is not placed in service until March 30, 1999. Project "C" is eligible for the increase in basis available to projects located in 1998 Difficult Development Areas because both events (bonds issued and project placed in service) have occurred AFTER December 31, 1997.

#### **Other Matters**

#### Environmental Impact

In accordance with 40 CFR 1508.4 of the CEQ regulations and 24 CFR 50.20 of the HUD regulations, the policies and actions in this notice are determined not to have the potential of having a significant impact on the quality of human environment and therefore further environmental review under the National Environmental Policy Act is not necessary.

#### Regulatory Flexibility Act

In accordance with 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the undersigned hereby certifies that this notice does not have a significant economic impact on a substantial number of small entities. The notice involves the designation of "Difficult Development Areas" for use by political subdivisions of the States in allocating the LIHTC, as required by section 42 of the Code, as amended. This notice places no new requirements on the States, their political subdivisions, or the applicants for the credit. This notice also details the technical methodology used in making such designations.

#### Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this notice will not have any substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the notice is not subject to review under the order. The notice merely designates "Difficult Development Areas" for the use by political subdivisions of the States in allocating the LIHTC, as required under section 42 of the Internal Revenue Code, as amended. The notice also details the technical methodology used in making such designations.

Dated: October 14, 1997.

Andrew M. Cuomo,

Secretary.

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1998 Internal Revenue Code Section 42(d)(5)(C) Metropolitan Difficult Development Areas

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	Kern County	Butte County	Fresno County Madera County		Los Angeles County	
	MERCED, CA	SALINAS, CA	SAN FRANCISCO, CA		SAN LOIS OBISPO-A I ASCADENO- PASO ROBLES, CA	
	Merced County	Monterey County	San Francisco Marin County County San Mateo Co	Marin County San Mateo County	San Luis Obispo County	
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	MIAMI, FL	OCALA, FL	ORLANDO, FL		PUNTA GORDA, FL	
	Dade County	Marion County	Lake County Osceola County Orange County	County	Charlotte County	
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1998 Internal Revenue Code Section 42(d)(5)(C) Metropolitan Difficult Development Areas (cont.)

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¥	DUTCHESS COUNTY, NY	NASSAU-SUFFOLK, NY	NEW YORK, NY (part)	NEWBURGH, NY-PA
	Duchess County	Nassau County Suffolk County		Pike County, PA Orange County, NY
			New York County Rockland County Putnam County	
	WESTCHESTER COUNTY, NY Westchester County			
R	EUGENE-SPRINGFIELD, OR	MEDFORD-ASHLAND, OR		
	Lane County	Jackson County		
PA	STATE COLLEGE, PA			
	Centre County			
PR	AGUADILLA, PR	CAGUAS, PR	MAYAGUEZ, PR	SAN JUAN-BAYAMON, PR
	Aguada Municipio Aguadilla Municipio	Caguas Municipio Gurabo Municipio	Anasco Municipio Mayaguez Municipio	Aguas Buenas Mu. Corozal Municipio
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1998 Internal Revenue Code Section 42(d)(5)(C) Nonmetropolitan Difficult Development Areas

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ۆ ك	ALPINE COUNTY	AMADOR COUNTY	CALAVERAS COUNTY	COLUSA COUNTY
	DEL NORTE COUNTY	GLENN COUNTY	HUMBOLDT COUNTY	IMPERIAL COUNTY
	INYO COUNTY	KINGS COUNTY	LAKE COUNTY	MARIPOSA COUNTY
	MENDOCINO COUNTY	MODOC COUNTY	MONO COUNTY	NEVADA COUNTY
	PLUMAS COUNTY	SAN BENITO COUNTY	SIERRA COUNTY	SISKIYOU COUNTY
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	MADISON PARISH	MOREHOUSE PARISH	NATCHITOCHES PARISH	POINTE COUPEE PARISH
	RED RIVER PARISH	RICHLAND PARISH	SABINE PARISH	ST. HELENA PARISH
	ST. MARY PARISH	TANGIPAHOA PARISH	TENSAS PARISH	VERNON PARISH
	WASHINGTON PARISH	WEST CARROLL PARISH	WEST FELICIANA PARISH	
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1998 Internal Revenue Code Section 42(d)(5)(C) Nonmetropolitan Difficult Develeopment Areas (cont.)

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2	CAMDEN COUNTY	DARE COUNTY	WATAUGA COUNTY	
ΗN	BELKNAP COUNTY	CARROLL COUNTY	CHESHIRE COUNTY	GRAFTON COUNTY
	HILLSBOROUGH COUNTY (part)	MERRIMACK COUNTY (part)	ROCKINGHAM COUNTY (part)	STRAFFORD COUNTY (part)
	Antrim town Lyndeborough town	Andover town Hopkinton town	Deerfield town	Middleton town
	L M	town	Northwood town	New Durham town
	Deering town Peterborough town	Bow town Newbury town  Bradford town New London town	Nottingnam town	Strafford town
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	Hancock town Windsor town	Chichester town Pembroke town		
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		Epsom town Warner town Franklin city Webster town	-	
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	QUAY COUNTY	SAN MIGUEL COUNTY	TAOS COUNTY	
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≽	CHENANGO COUNTY	CLINTON COUNTY	COLUMBIA COUNTY	CORTLAND COUNTY
	ESSEX COUNTY	GREENE COUNTY	HAMILTON COUNTY	JEFFERSON COUNTY
	SCHUYLER COUNTY	SULLIVAN COUNTY	TOMPKINS COUNTY	ULSTER COUNTY
OR R	BAKER COUNTY	CLATSOP COUNTY	COOS COUNTY	CROOK COUNTY
	CURRY COUNTY	DESCHUTES COUNTY	DOUGLAS COUNTY	GILLIAM COUNTY
	GRANT COUNTY	HARNEY COUNTY	HOOD RIVER COUNTY	JEFFERSON COUNTY
	JOSEPHINE COUNTY	KLAMATH COUNTY	LAKE COUNTY	LINCOLN COUNTY
	LINN COUNTY	MALHEUR COUNTY	MORROW COUNTY	SHERMAN COUNTY
	TILLAMOOK COUNTY	UMATILLA COUNTY	UNION COUNTY	WALLOWA COUNTY
	WASCO COUNTY	WHEELER COUNTY		
PA	MONROE COUNTY	NORTHUMBERLAND COUNTY	UNION COUNTY	WAYNE COUNTY
₹.	NEWPORT COUNTY (part)	WASHINGTON COUNTY (part)		
	Middletown town Portsmouth town Newport city	New Shoreham town		
S	BUTTE COUNTY	LAWRENCE COUNTY	MEADE COUNTY	

1998 Internal Revenue Code Section 42(d)(5)(C) Nonmetropolitan Difficult Development Areas (cont.)

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	LLANO COUNTY	REAGAN COUNTY	VAL VERDE COUNTY	WALKER COUNTY
5	DAGGETT COUNTY	IRON COUNTY	WASHINGTON COUNTY	
≸	CAROLINE COUNTY	KING AND QUEEN COUNTY	WESTMORELAND COUNTY	
⋝	ADDISON COUNTY	BENNINGTON COUNTY	LAMOILLE COUNTY	ORANGE COUNTY
	RUTLAND COUNTY	WASHINGTON COUNTY	WINDHAM COUNTY	WINDSOR COUNTY
WA	ADAMS COUNTY	ASOTIN COUNTY	CHELAN COUNTY	CLALLAM COUNTY
	COLUMBIA COUNTY	DOUGLAS COUNTY	FERRY COUNTY	GARFIELD COUNTY
	GRANT COUNTY	GRAYS HARBOR COUNTY	JEFFERSON COUNTY	KITTITAS COUNTY
	KLICKITAT COUNTY	LEWIS COUNTY	LINCOLN COUNTY	MASON COUNTY
	OKANOGAN COUNTY	PACIFIC COUNTY	PEND OREILLE COUNTY	SAN JUAN COUNTY
	SKAGIT COUNTY	SKAMANIA COUNTY	STEVENS COUNTY	WAHKIAKUM COUNTY
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≩	TAYLOR COUNTY	UPSHUR COUNTY		