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December 29, 2020

The Honorable David Kautter
Assistant Secretary of the Treasury (Tax Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: REG-104591-18 Section 42, Low-Income Housing Credit Average Income Test (AIT) Regulations, Docket RIN: 1545-BO92, Internal Revenue Service (IRS)

To Whom It May Concern:

The Council of Large Public Housing Authorities ("CLPHA") is pleased to submit comments on the Proposed Rule regarding "Section 42, Low-Income Housing Credit Average Income Test (AIT) Regulations" as defined in the Proposed Rule, by the Internal Revenue Service (IRS), Department of the Treasury.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities ("PHAs") own and manage nearly half of the units in the nation's public housing program, administer more than a quarter of the subsidies in the Housing Choice Voucher program, and operate a wide array of other housing programs.

<u>Comments to Changes to the Section 42, Low-Income Housing Credit Average Income Test (AIT) Regulations:</u>

CLPHA and its members believe this proposed rule change to the current Section 42, Low-Income Housing Credit Average Income Test (AIT) Regulations is too restrictive, creates new risks and excessive penalties for owners/taxpayers, will likely deter future private investment in and the development of affordable housing, and unnecessarily introduces new liabilities and potential legal conflicts for PHAs, Housing Credit Agencies, and property owners.

See our organization's comments to recommended questions below:

New Minimum Set-Aside Guidance:

This proposed rule limits an AIT property and all of its units, to averaging no more than 60 percent of AMI, a stark contrast from the current AIT interpretation, requiring that only 40 percent of units in a property be rent restricted and occupied by residents whose income does not exceed designated imputed income limitations set-aside by the owner. Because this rule would require the total of all units at a property to not exceed an average of more than 60 percent of AMI, it sets up a situation in which even a single noncompliant unit could result in a violation of the minimum set-aside if the loss of that unit causes the overall average unit designation to go above 60 percent of AMI.

Consequences for not adhering to this new proposed rule could result in the temporary or permanent loss of all tax credits for an entire project/development, affecting both future and existing properties – properties developed and invested in under the previous AIT guidance and regulations.

CLPHA recommends that the AIT minimum set-aside should be considered met so long as 40 percent of the units in the property have an average of 60 percent or less of AMI. In addition, the property should have an overall average of no more than 60 percent of AMI across all low-income units, but if a unit goes out of compliance causing the property-wide average to go above 60 percent of AMI, this should be considered noncompliance for that unit, and not a violation of the minimum set-aside, so long as 40 percent of the units still meet the 60 percent average.

Inflexible Income Designations for Set-Aside Units:

The proposed rule prohibits the owner from modifying existing income limitations for individual units, potentially setting up PHAs, Housing Credit Agencies, and other property owners for future litigation due to conflicts with the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, and the Violence Against Women Act (VAWA).

In certain circumstances, the proposed rule may create conflicts with the Fair Housing Act and Section 504 of the Rehabilitation Act of 1973 because it could prevent an owner from making a reasonable accommodation upon request of a tenant with a disability. The proposed rule may also create conflicts with VAWA, which provides that victims/survivors of domestic violence, dating violence, sexual assault, or stalking may request an emergency transfer to a different unit or property if the person reasonably believes there is a threat of imminent harm from further violence if they remain in their unit or if a sexual assault occurred on the premises 90 days before the transfer request is made.

These new restrictions to modifying income designations for set-asides may also prevent the transfer of tenants who have seen an increase in their income to other units – either market-rate or an increased percentage of AMI designated unit – or an income modification of their current to maintain that the household is safely and stably housed in their current residence.

CLPHA recommends that owners should be able to modify unit designations under current state and federal guidance, and that these rules remain flexible to adhere to the Fair Housing Act, the

Violence Against Women Act, Section 504 of the Rehabilitation Act of 1973, or any other federal statute.

Deterrence to Affordable Housing Developments and Investments:

CLPHA considers the changes in this proposed rule combine to make a stable and reliable affordable housing real estate investment market, more risky and less appealing for private equity investors, not-for-profit developers, and PHAs. The unnecessary and excessive risk the proposed rule creates is likely to significantly reduce investor interest in AIT properties, which would make AIT useless in practice. From an investor perspective, AIT properties would be far riskier than properties that opt for either the 40 at 60 or 20 at 50 minimum set-asides.

CLPHA recommends that while in the middle of a pandemic and economic contraction, policymakers concentrate on incentivizing the development of more affordable housing options, not restricting the investment and asset flexibilities of current and future affordable housing owners.

In sum,

Thank you for the opportunity to submit these comments.

Sincerely,

Sunia Zaterman

Sunia Zaterman
Executive Director