

December 15, 2020

**Via Upload to Federal Rulemaking Portal**

CC:PA:LPD:PR (REG 119890-18)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044  
Attention: Sunita Lough, Depute Commissioner for Services and Enforcement

**RE: Comments on REG-119890-18: Section 42, Low-Income Housing Credit Average Income Test Regulations**

Dear Ms. Lough:

We are submitting comments in response to Internal Revenue Service (IRS) notice of proposed rulemaking document 2020-20221, REG-119890-18: Section 42, Low-Income Housing Credit Average Income Test Regulations. We appreciate the opportunity to provide comments on the guidance the IRS has provided regarding the average income set-aside under Section 42 of the Internal Revenue Code.

We currently operate 30 multifamily communities financed under the Section 42 program, providing quality, affordable apartment homes for over 7,000 households and over 20,000 individuals. Additionally, we are beginning the lease-up phase for over 2,000 additional apartment homes that could potentially utilize income-averaging.

The option of income averaging in the Low-Income Housing Tax Credit (LIHTC) program, if administered properly, increases economic diversity and helps to develop more culturally inclusive communities. These policy goals should be at the forefront of all thoughts regarding rulemaking guidance.

We are unable to elect income-averaging and benefit our tenants and communities unless the following changes to IRS guidance are implemented:

1. Final regulations should allow owners to adjust imputed income designations over time, provided that the owner's adjusted designations continue to satisfy the parameters of the new set-aside (i.e. at all times 40 percent of the units remain rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the owner, and the average of the imputed income limitation designations would not exceed 60 percent of the area median gross income in any given year). The underlying rules for changing designations should be determined based on procedures established by the State or local housing credit agencies.
2. Final regulations should not include a reduction in the applicable fraction for compliant units that are "removed" for purposes of calculating the annual tax credit. The consequence of non-compliance or units not being suitable

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for occupancy should be a reduction of the applicable fraction only for the units which are non-compliant or are not suitable for occupancy as of the taxpayer's year-end.

3. Final regulations should implement the "alternative mitigating action approach" described in II-H of the Explanation of Provisions. It is not uncommon for a unit with, say, a 60% imputed income designation to be occupied by a tenant with an AMI of under 40%. By allowing this unit's designation to be changed to 40%, as permitted by the alternative mitigating action approach, it would prevent non-compliance and associated recapture.
4. Final regulations should allow the opportunity to take mitigating action to be taken up to 90 days following the discovery of the issue causing the failure of the minimum set-aside test.

We offer the following supporting information to provide real-life context to the importance of proper income averaging guidance.

- The need for affordable housing has never been greater. Individuals and families at a variety of income levels are finding it harder and harder to find a stable home near jobs, good schools and access to transit. Before income-averaging, there were not a lot of options for federally assisted housing for families with incomes between 61 and 80 percent AMI. Our organization specializes in providing housing for large households and, in fact, more than 50% of our affordable apartment home inventory are in the three, four, and five-bedroom unit types. The average income set-aside allows us to reach a larger potential tenant base, which will greatly benefit families in significant need of this housing. HUD has identified that unit types of 3+ bedrooms are scarce and in great demand. The proposed regulations, as presented, would have a disparate impact on households with dependents and large families who need to have options for quality housing in desirable areas.
- The HNN portfolio of properties includes over 1,500 households who have disabled family members. The proposed regulations state that once an apartment home has an income designation, that unit's designation is fixed and can never be changed. This presents a very significant conflict to federal fair housing rules and overall options for reasonable accommodations. For example, a household qualifies and moves into a 3<sup>rd</sup> floor apartment designated at the 70% income level. During their residency, the household needs a lower level unit due to medical reasons and submits a reasonable accommodation request to transfer to a lower level apartment home. The household, however, does not qualify for any unit designation lower than 70% set-aside. The only lower level apartment homes are units with fixed set-asides 60% or lower. The household would not be allowed to move, resulting in a potential fair housing violation and owner liability. The proposed regulations, as presented, would have a disparate impact on disabled individuals.
- Our portfolio of affordable housing welcomes everyone. However, income averaging could expand the band of affordability to households with much lower incomes (20%, 30%, 40%) as well as to households with higher incomes (70% and 80%). The result is more diverse and inclusive communities. Income averaging policy guidance can be a lasting promise for low-income families – effectively promoting and encouraging diversity and inclusion among all people, regardless of race, ethnicity, gender, age, national origin, religion, disability, sexual orientation, socioeconomic status, education, marital status, language, and physical appearance. Proper guidance will encourage a diversity of thought: ideas, perspectives and values. The proposed regulations, as presented, concentrate on a narrow band of affordability and discourage fairer, more equitable opportunities for all.

In closing, the policy goals should dictate the proposed guidance on income averaging. We have identified our proposed changes to the regulations that will allow us to participate in income averaging and provide measurable benefits to the communities and households that we serve. We encourage your consideration of our comments.

Regards,

A handwritten signature in black ink, consisting of a stylized 'P' followed by a series of connected loops and a final horizontal stroke.

Philip G. Nored  
President