

December 28, 2020

www.regulations.gov

Internal Revenue Service
Room 5203, P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

**RE: IRS Reg-119890-18
Low Income Housing Tax Credit Average Income Test Regulations**

To Whom It May Concern:

Thank you for providing the opportunity for Owners and Management Companies to comment on the draft LIHTC Average Income Test Regulations. As a Consultant, Owner and Compliance Monitoring Company in the LIHTC program, **we request that you consider the following changes to the proposed regulations:**

- 1. Allow the Average Income Minimum Set-Aside to be met as long as 40% of the units average 60% or less of the Area Median Income, similar to the requirements of the other two minimum set-asides.**
- 2. Change the penalty for a unit causing the property-wide average to go above 60% to be limited to the 1 unit in non-compliance and not cause the entire property to “fall off the cliff.”**
- 3. Allow Average Income Units to “float,” instead of requiring that units be fixed at a specific income limit for the duration of the Compliance Period and the Extended Use Period. This will give owners the ability to meet the needs of their residents/applicants.**

Based upon our Consulting and Compliance experience, we have concerns with the following:

1. The proposed language requires that ALL units must meet the minimum set-aside and that non-compliance in just one (1) unit would “cause a property to fall off the cliff” and lose tax credits on the entire property. Giving an owner 60 days after the end of the year to correct noncompliance of which they are unaware does not provide sufficient time to correct. If an owner makes a math error (or a monitoring agency does not agree with a calculation), one mistake discovered months after the end of the year could cause the entire property to lose tax credits.
2. The proposed language requires Owners to have “fixed” units instead of “floating” units. While fixed units are much easier from a monitoring perspective, “floating” units can be very helpful for owners and applicants/residents. Situations in which “floating” units are helpful include:
 - a. A household in a “floating” HOME unit failed to vacate upon the date expected. Another household was scheduled to move into the HOME unit and faced homelessness since the unit was not available. Since the HOME units were “floating”, the owner was able to move the new household into another unit, and designate that unit as a HOME Unit. Then when the original household vacated, that unit swapped status and was rented to a household meeting a higher income limit. (Actual situation.)

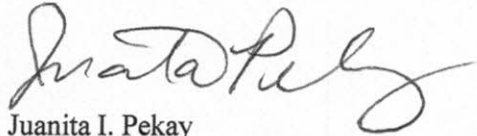
- b. When an owner discovered non-compliance in a “floating” HOME unit, the owner was able to designate another unit as a HOME unit, swap the status of the units, and correct the noncompliance. (Actual situation.)
- c. When a handicapped household needs the features of a different unit (roll-in shower, switches at lower heights, all bedrooms on one floor), the proposed language would prevent owners from being able to offer units if the transfer would violate the “fixed income designation” for the unit involved. Failure to move the household would violate Fair Housing Laws, which require an owner to make reasonable accommodations in rules, policies and practices when the accommodation is necessary to give the person with disabilities equal opportunity to use a dwelling. (This type of situation has occurred twice with my clients.)
- d. I anticipate similar VAWA violations if an owner cannot transfer a household, which is the victim of domestic violence, into an available unit because the household’s income does not meet the income limit for the designated unit. (Anticipated situation.)
- e. When an owner adds Tax Credits to an existing Project Based Section 8 or Market Rate Building, electing the Average Income Minimum Set-Aside allows the owner to retain households earning up to 80% of the Area Median Income. In my experience, in a Section 8 project with 100 units, approximately 5 units exceed the 60% AMI, and Owners need to deliver 100% buildings. Electing Average Income allows most of these households to qualify. Then, when the higher income households vacate, Section 8 owners have been expecting to re-rent the units to 30% households, re-designate the units as 30% units, and swap them with other units in which the households’ incomes have increased. (This is an anticipated situation, based upon how owners have interpreted the Average Income regulations and guidance from state agencies.)

I believe it is likely that the current language of the proposed regulations would create the following negative consequences:

1. Cause many Syndicators to prohibit the use of the Average Income Minimum Set-Aside since the chance of violating the Minimum Set-Aside would be greater than the benefits of selecting Average Income. My clients already have difficulty convincing Syndicators to allow Income Averaging at their properties, even though it would greatly benefit the handful of residents whose income is between 60% and 80% of the income limit when Tax Credits are added to a property.
2. Confusion in the industry about Minimum Set-Asides, since one noncompliant unit could cause significant recapture for properties with Average Income, while properties choosing 20/50 or 40/60 can have a few instances of noncompliance, without violating the Minimum Set-Aside in most cases.
3. Inability to transfer some households, including making reasonable accommodations for people with disabilities or victims of domestic violence, and inability to meet the needs of applicants/residents when existing tenants don’t move as expected.

Thank you for the opportunity to comment on the proposed regulations. We hope you will consider these comments as you finalize the regulations. If you would like to discuss these concerns, I can be reached at juanitapekay@jankenhs.com or at 763-226-1833.

Sincerely,

A handwritten signature in cursive script, appearing to read "Juanita I. Pekay". The signature is written in black ink and is positioned above the printed name.

Juanita I. Pekay

JIP:tim