LIHTC WORKING GROUP™
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December 12, 2022

Dillon Taylor
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: REG-113068-22 Section 42, Low-Income Housing Credit Average Income Test Regulations
Proposed/Temporary Treasury Regulation Section 1.42-19T (Guidance)

Dear Mr. Taylor:

We are writing this letter on behalf of the LIHTC Working Group. The members of the Working Group are low-income housing tax credit (LIHTC) professionals who work together to help resolve technical LIHTC program issues and provide recommendations to make the program even more efficient in delivering benefits to help build affordable housing. Our group includes nonprofit and for-profit developers, syndicators, investors, accountants, and lawyers.

The National Council of State Housing Agencies, while not an official member of the LIHTC Working Group, is also party to these comments.

We appreciate this opportunity to respond to the proposed/temporary Treasury regulations to streamline reporting requirements and alert the Internal Revenue Service (IRS) to potential consequences it may not foresee specific to the dynamic of the qualified group of units after the close of a year.

First, there is a concern about how and why two separate groups of qualified units need to be reported, a minimum set aside group and an applicable fraction group, if all groups have to average less than 60%. The first recommended language change is to streamline the reporting process so that owners can just report one group of qualified units to the state agency, where the 40% minimum set-aside is contained within the qualified group of units. The taxpayer would remain responsible for recording in its books and records the applicable qualified group of units for the purposes of record keeping, but for the reporting requirement to the state, we believe the following change will make reporting far easier for both state agencies and the taxpayer alike.

(c) Procedures—(1) Identification of low-income units for use in the average income set-aside test or the applicable fraction determination—

(i) In general. For a taxable year, a taxpayer must follow the procedures described in paragraph (c)(1)(ii) of this section to identify--

(A) A qualified group of units that satisfy the average income set-aside test; and

(B) A qualified group of units used to determine the applicable fraction.

(ii) Recording and communicating. The procedures described in this paragraph (c)(1)(ii) are—

(A) Recording the identification in its books and records, where the identification must be retained for a period not shorter than the record retention requirement under §1.42-5(b)(2); and

(B) Communicating the annual identifications to the applicable housing credit agency (Agency) as provided in paragraph (c)(2) of this section.

(C) Requirement of paragraph (c)(1)(i)(A) will be considered met if the qualified group of units under (c)(1)(i)(B) is at least 40% of the units in the project.

Second, we have a concern about how non-compliance discovered after the close of the year impacts the group of qualified units reported to the state agency, specifically if the non-compliant unit would cause the average designations of the remaining units in the group of qualified units to exceed 60%. Unfortunately, some within the industry are interpreting this as a new "cliff test" which could lead to concern among investors about participating in Average Income Test deals. It is clear in the Summary of Comments and Explanation of Revisions for the final regulation that the intent of the Service was to eliminate provisions that created a disparity between the application of the average income test to existing minimum set-asides.

While the general consensus is that the state agency could use their power under the waiver section (Tres. Reg. 1.42-19T(c)(4)) of the proposed regulations to allow the taxpayer to submit a corrected group of quailed units, there are concerns that

- the waiver had to be approved on a case-by-case basis, creating an administrative burden on agencies; and
- that state agencies may not have procedures in place to grant the waivers on a timely basis.

The proposed language change makes it so that the taxpayer has the ability to perfect the grouping without the state agency approval. It is important to note that this does not change the ways that a taxpayer can change designations, that part of the regulation is final and not covered in this proposed language – this change just allows an owner to submit a new qualified group of units if a unit goes out of compliance without needing the state to grant case by case approval. For example, if an owner discovered through an internal review that a unit was occupied by nonqualified full-time students, they would be able to submit a new grouping of qualified units, excluding that unit and any additional units to get restore the 60% average without needing the state agency to approve the updated grouping. This is very similar to how the program functions currently. If an owner found a nonqualified full-time student in the unit, they would disallow the credits on their return and would not need the state agency to grant them approval. In addition, since the owner would have 180 days to notify the state agency of the new group of qualified units, state agencies would be made aware of the non-compliance in a timely fashion and would be able to take any additional monitoring steps they deemed necessary. Our proposed language retains the ability for the state agency to issue a waiver as well, as proposed in the temporary regulation. We believe, if adopted, our proposed language will relieve investor concerns.

(4) Waiver for failure to comply with procedural requirements. ~~On a case-by-case basis, the Agency has the discretion to waive in writing any~~ Any failure to comply with the requirements of paragraph (c)(1) or (2) or (c)(3)(iv) of this section is treated as having been satisfied if up to 180 days after discovery of the failure, whether by taxpayer or Agency, a taxpayer submits a corrected qualified group of units, or the Agency waives in writing any failure to comply. If a taxpayer submits a corrected qualified group of units or an Agency exercises ~~this~~ the discretion to waive, then the relevant requirements are treated as having been satisfied. In such a case, the tax consequences under this section correspond to that deemed satisfaction. In all cases, the 180 days period does not commence until the close of the correction period described in TR1.42-5(e)(4).

Thank you in advance for your time and careful consideration of these issues. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

THE NOVOGRADAC LIHTC WORKING GROUP

NATIONAL COUNCIL OF STATE HOUSING AGENCIES

cc: Michael Novey, Associate Tax Legislative Counsel