

Overview

The Consolidated Appropriations Act of 2018 (the Act) permanently established income averaging as a third minimum set-aside election for new Housing Credit developments. This new income averaging set-aside allows Credit-qualified units to serve households earning as much as 80 percent of Area Median Income (AMI), as long as the average imputed income/rent limit of the property is 60 percent or less of AMI. Higher rents that households with incomes above 60 percent of AMI pay will have the potential to offset the lower rents for households living in units designated at lower income levels. Income averaging preserves rigorous targeting to low-income households, while providing more and greater income-mixing potential.

The following are general statutory requirements for this new option:

- Owners electing income averaging must commit to having at least 40 percent of the units in the property affordable to eligible tenants.
- Income averaging applies to the designated income/rent levels of the units, not the incomes of individual tenant households.
- Under income averaging, designated income/rent levels may only be set at 10 percent increments beginning at 20 percent of AMI. The allowable income/rent designation levels are 20 percent of AMI, 30 percent of AMI, 40 percent of AMI, 50 percent of AMI, 60 percent of AMI, 70 percent of AMI, and 80 percent of AMI
- Income averaging applies to both income and rent limits. If a unit has a designated limit of 80 percent of AMI, the maximum rent level that may be charged to a household in that unit is 30 percent of 80 percent of AMI. Similarly, if a unit has a designated limit of 30 percent of AMI, the maximum rent level that may be charged to a household in that unit is 30 percent of 30 percent of AMI.
- The minimum set-aside election is irrevocable once made on Form 8609. Therefore, existing developments already placed in service are not eligible to change their minimum set-aside/income election to income averaging.
- The next available unit rule, as modified by the new language, (i) provides that a unit is over income if the occupant's income exceeds 140 percent of the greater of 60 percent of AMI or the designated limit applicable to the unit and (ii) effectively requires that the next available unit of comparable or smaller size be rented (A) to a tenant whose income does not exceed the designated limit applicable to the new unit, if it was previously a low-income unit or (B) to a tenant at an income level that would not cause a violation of the 60 percent average, if the new unit had not previously been a low-income unit. Owners should consult with compliance experts in evaluating how income averaging will work in developments with market rate units.
- The 30 percent of AMI income and rent level under the Housing Credit for purposes of income averaging is not the same as the Extremely Low-Income and rent restriction under the National Housing Trust Fund. The Housing Trust Fund statute and regulation define "Extremely Low-Income" as the greater of 30 percent of AMI or the federal poverty line

for applicable household size. Income averaging unit designation is based solely on AMI. Properties that have layered National Housing Trust fund with credits should be mindful of this difference.

- Basic noncompliance will work the same as it does with the other minimum set-asides. If a development elects income averaging and fails to meet the income averaging standard at the end of a year, it is not a qualified low-income housing development for the year under IRC Section 42(g)(1)(C), and this noncompliance must be reported to IRS Form 8823 and the owner could be subject to loss of Credits. Presumably IRS will revise the Form 8823 and its instructions accordingly.

DCA adopted requirements for income averaging

Only properties funded under the 2018 (or later) Qualified Allocation Plan are eligible to elect the income averaging set aside.

- DCA reserves the right to disallow any clear skewing of unit designations. DCA will require applicants to provide reasonable parity between different bedroom sizes at each targeted income band utilized on the property.
- DCA will require that all units be designated with a specific AMI percentage at the time of application or request to change elections. DCA will include these unit designations in the recorded Land Use Restrictive Covenant. Ultimately, individual apartment numbers must have clear AMI designations for compliance purposes.
- DCA will not allow more than four of the possible AMI designations to be selected per property (e.g. an applicant might select 40, 50, 60, and 80 percent AMI groups).
- DCA will not allow the individual unit designations to change over time except as required by the Next Available Unit Rule.
- Owners of developments with more than one building will indicate on the Forms 8609 to treat all of them as part of a multiple building project (checking “Yes” on line 8b of the current form).
- The credit monitoring fee for properties electing the income averaging option will be increased to \$1,000 per unit.
- Properties with market-rate units that also elect the income averaging set-aside are subject to additional education requirements for property management staff and additional third-party reporting requirements to DCA.

Requests to use this new set aside must include the following documents:

- An updated DCA Core Application reflecting all designations/changes
- A legal opinion stating that the income averaging set aside will be compatible with the requirements of all other anticipated funding sources.
- A statement from permanent lenders and the equity provider acknowledging the selection of the income averaging set-aside.
- A market study or revised market that shows adequate demand for all possible combinations of unit sizes and percent limits selected.
- A matrix showing the AMI percentage(s) for each designated unit type.
- Statement committing to annual income averaging training for on-site property managers.

9% credit Applications - DCA will implement income averaging for 9% tax credit properties commencing with the 2018 competitive tax credit round. Developments funded in previous rounds will not be eligible for the income averaging set aside. Income averaging will not be available for 2018 applications at the time of the competitive round.

If selected for funding, 2018 properties may request a change in the set aside selected in the submitted tax credit application. Such a request must be made through the DCA Project Concept Change process and must be accompanied by all required documents. Requests for the new set-aside must be made on or before May 1, 2019.

- Selected properties that also have a DCA HOME loan will not be permitted to elect Income Averaging.
- Applicants selected for funding in the 2018 competitive round will not be permitted to offset “deeper targeted” units claimed for points under Appendix II, section II (A) of the 2018 Qualified Allocation Plan.
- The 70% and 80% designated rents do not need to meet the 2018 QAP requirement of being at least 10% less than market rents.

4% Tax Exempt Bonds/4% Credit Applications

DCA will permit the income averaging option only for 4% tax credit Applications submitted under the 2018 (and future) Qualified Allocation Plan. Applications submitted under previous QAPs will not be eligible for the income averaging option. The Act modifies IRC Section 42 to allow for income averaging, but does not make a similar change in IRC Section 142, which covers exempt facility bonds, including multifamily Housing Bonds. However, income averaging still may be used in bond-financed Housing Credit developments so long as the development satisfies both the income averaging minimum set-aside election and one of the minimum set-aside elections applicable to tax-exempt bond financing (20/50 or 40/60 minimum set-aside). Thus, units with income limits above 60 percent or 50 percent, as applicable, do not count for purposes of bond compliance.

Resyndication Applications

Any property seeking 9% or 4% credits for resyndication of previously awarded tax credit properties will not be eligible to select the income averaging set aside. A new election would not free the continuing low-income units of their obligations under the prior extended use agreement, so the owner would, in effect, have to comply with the more stringent rules applicable to each particular unit if it were to change its election upon resyndication. Given the complexity of complying with two separate minimum set-aside rules, DCA has decided not to allow income averaging for such resyndications.

Rehabilitation Properties

Applications must consider relocation impact in setting percentages for occupied rehab properties.

THIS POLICY IS SUBJECT TO CHANGE IN THE EVENT THE IRS ISSUES GUIDANCE ON INCOME AVERAGING.