Public Comment Related to Section 42, Low-Income Housing Credit Average Income Test Regulations (REG-119890-18)

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Following are my comments relative to the IRS Notice of proposed rulemaking relative to the Low-Income Housing Tax Credit Average Income Test Regulations (IRS REG-104591-18).

1.The proposed regulations require that once unit designations are made, they cannot be changed. Such a requirement will impose significant hardships from a management perspective. For example, assume an 40% designated unit is vacated and no current applicants qualify at or below the 40% income level. If unit designations cannot be changed, the owner will be forced to leave this unit vacant until a qualified applicant with income at or below the 40% level applies. Even if there are current applicants with incomes above the 40% level, this would be the case. However, if the owner had the ability to change the designation of the unit in order to occupy the unit with a household qualifying at a higher designated income limit, this would maintain project cash flow and provide housing to a qualified low-income applicant. The owner could then change the designation of another low-income unit (as long as it was occupied by a household that would qualify under the new unit designation) in order to maintain the 60% average. In order to provide maximum flexibility in the management of these properties, the owner should be able to change unit designations - with approval of the allocating agency.

2.The proposed regulation also requires that the low-income units be designated no later than the end of the first year of the credit period. In some cases, a single project claims credit beginning in two different years. For example, assume a 100 unit project with ten buildings and ten units in each building. Construction begins in 2021 and at the end of 2021, seven buildings have been fully leased (70 units), meaning that 70% of the units have been qualified, meeting the minimum set-aside requirement of at least 40% of the units. The taxpayer chooses to claim credit for the seven buildings in 2021, deferring credits for three buildings to 2022. In this case, we ask that the IRS only require that the 70 units in the seven buildings for which credits are claimed be designated by the end of 2021. The remaining 30 units will have to be designated by the end of 2022, and once designated, the average designated income of all 100 units could not exceed 60%.

3.The proposed regulation provides two alternatives for mitigation in the event a designated unit is lost as a low-income unit. In both examples, the loss of the unit is due to the unit no longer being suitable for occupancy. Left unanswered is what happens if a low-income unit is suitable for occupancy, but is occupied by an ineligible household (i.e., either over the allowable income limit at move-in or occupied by a non-qualified full-time student household). Based on a strict reading of the law, while the unit would not be credit eligible due to the ineligible household, it would still be counted toward the 60% average test since it was properly "designated" by the taxpayer. For example, if a taxpayer designates a unit as a 40% unit but the unit is occupied by a household with income at move-in in excess of the 40% limit, the unit would still be "designated" as a 40% unit - even though occupied by an ineligible household. As long as the required minimum set-aside of at least 40% of the units being occupied by households with incomes at or below the owner designated income limit, the unit should not affect the 60% average determination. This is in keeping with the methodology followed for the 20-50 and 40-60 tests. As long as the minimum set-aside is met, only the ineligible unit is removed from the building's applicable fraction. Also, what if the issue that would remove a unit from the low-income count occurs in one year, is not discovered by the owner, and is discovered by the State Agency during a review that occurs more than 60 days after the end of the tax year in which the event occurred? While this could not happen in the case of a habitability issue, it could certainly occur relative to resident eligibility. Since this would be after the 60-day mitigation period, would this result in the loss of all credits for the project? If so, the Average Income Minimum Set-Aside test is dead on arrival and no investor will approve its use. There is no indication that Congress intended this draconian result with the law was passed in 2018. For these reasons, consideration should be given to eliminating the mitigation test unless the project falls below the minimum set-aside. In other cases, designated units that are no longer low-income at the end of a tax year should be removed from the building's applicable fraction but should still be counted for purposes of the 60% average test, based on the income limit designated by the taxpayer.

Thank you for consideration of these comments.

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