December 15, 2020

Section 42, Low-Income Housing Credit Average Income Test Regulations
Docket Number: REG-104591-18
Docket RIN: 1545-BO92

Internal Revenue Service

The Association of Washington Housing Authorities (AWHA) appreciates the opportunity to provide comments on the Internal Revenue Service and Treasury Department's (agencies) Notice of Proposed Rulemaking (NPRM) regarding the low-income housing credit average income test (AIT).

AWHA is a member organization made up of 37 housing authorities across Washington State. AWHA members build homes and run a variety of programs that support Washington working families, children, seniors, veterans, and people with disabilities, serving over 173,000 people every night. They are important business partners, contributing millions of dollars each year to communities through rental subsidies.

Requirement to Maintain 60 Percent Area Median Gross Income Average Test

Under the proposed rule, a project is required to average no more than 60 percent of Area Median Income (AMI) across all low-income units as a primary condition in meeting the AIT minimum set-aside. Of particular concern to AWHA is the possibility that even a single over-income unit, or other event of non-compliance affecting a single unit within a project, could result in a complete loss of annual credits for the project as a whole. Further, if this event of non-compliance crossed calendar years it would result in a tax credit loss of two years for the entire project. As a result, the proposed rule effectively establishes a "cliff test" for the minimum set-aside requirement, threatening the most severe consequences on a project for even an isolated instance of noncompliance.

As proposed, this "cliff test" is more restrictive than the statute (Section 42(g)(1)(C)(i)), which only requires that 40 percent of the units in the project be rent restricted and occupied by individuals whose income do not exceed the imputed income limitations. As a result, the proposed rule is not consistent with the compliance treatment of the other two set-aside options (40/60 or 20/50). In the event of non-compliance under these set asides, if the project meets the minimum, a single issue of non-compliance would not jeopardize the credits of the entire project but rather only the units found out of compliance.

We believe that this section of the proposed rule is not consistent with the intent of Congress when it passed the 2018 Consolidated Appropriations Act (the Act) as it provides less flexibility and increases

overall financial risk. Given the significant negative implications of failing the "cliff test", we believe that investors will be more risk adverse when investing in projects using AIT. As a result, this could lead to reduced investor interest, lower tax credit pricing and/or requirements that projects be underwritten to a lower average AMGI, resulting in the need for additional debt or public resources.

We acknowledge that the proposed rule does allow for a 60-day cure period following the end of the calendar year. However, this assumes that the State Housing Finance Agency (HFA) has completed their review and the non-compliance has been identified within the period and in practice this does not occur.

To address these issues related to the "cliff test" we urge the agencies to amend the proposed rule to align with the requirements of projects that elect the 40/60 or 20/50 set asides. As stated earlier, we believe that this was the intent of Congress and this change would enhance rather than impair the tax credit program.

Designation of Imputed Income Limitations

The proposed rule also prohibits any changes to the designated imputed income limitation of individual units once the initial designation is made. We believe that this part of the proposed rule significantly impairs implementation of AIT and again is not what Congress intended when they passed the Act. Further, we believe that this section of the proposed rule creates possible conflicts with the Fair Housing Act and the Violence Against Women Act (VAWA).

Currently, Section 42 does not include any prohibitions on modifying income designations, and the statue and prior rules have left this to the HFAs to design and implement. In addition, it was not Congress's intent to place this restriction on the new set aside as the Act further modified the next available unit rule in Section 42(g)(2)(D) with the expectation that, at least in projects that have market-rate units, an owner would need to be able to change income designations to address over-income tenants.

We also believe that in certain circumstances, the proposed rule may conflict with the Fair Housing Act. For example, this restriction could prevent an owner from making a reasonable accommodation upon request of a tenant with a disability if that accommodation would require relocating tenants into units with different income designations. This creates an issue as the Fair Housing Act makes it unlawful for any person to refuse "to make reasonable accommodations in rules, policies, practices, or services when such accommodation may be necessary to afford… person(s) [with disabilities] equal opportunity to use and enjoy a dwelling."[1]

For similar reasons this proposed rule could create conflicts with VAWA, as an owner may not be able to accommodate an emergency transfer request if they are unable to switch unit designations. Since

[1] 42 U.S.C. Section 3604(f)(3)(B).

the reauthorization of VAWA in 2013, the Housing Credit has been a covered program for purposes of the law.

We urge the agencies to revise the proposed rule to allow for changes in the designation of imputed income limits and eliminate the cliff test requirement. If the proposed rule is implemented as written, we believe that the agencies should provide owners that have already elected the AIT set aside an opportunity modify their set aside election. Given that this rule applies to all AIT projects, we believe this would be the most equitable treatment, as this proposed rule will create significant challenges for owners.

We thank the agencies for the opportunity to comment on the proposed rule and urge you to consider these changes to better reflect the intent of Congress and improve the Credit program.

Sincerely,

Lowel Krueger
President, AWHA