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December 23, 2020

Internal Revenue Service
Attn: CC:PA:LPD:PR (Reg-119890-18)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Comments on Reg-119890-18 Regarding Low Income Housing Tax Credit Average Income Test Regulations

To Whom It May Concern:

As the Director of the Arizona Department of Housing (ADOH), which administers the Low Income Housing Tax Credit (Housing Credit) in the state of Arizona, I am writing to express my concerns about the Internal Revenue Service (IRS) notice of proposed rulemaking to establish regulatory guidance on the Housing Credit Average Income Test (AIT) minimum set-aside. ADOH would like to align its self with the comments of the National Council of State Housing Agencies (NCSHA), which represents other state Housing Credit administering agencies, and further elaborate on the specific impact these regulations will have in Arizona.

The AIT was established and available as an option to project sponsors immediately upon enactment of the Consolidated Appropriations Act of 2018. As such, and in the absence of IRS guidance or knowing if IRS guidance might be published, ADOH developed policies for implementing the AIT in Arizona. We designed these policies under the assumption that eventual IRS guidance, if published, would similarly seek to facilitate the use of AIT in practice. We did not assume that the IRS would take the positions it has proposed with respect and in violation of the minimum set-aside and requiring perpetually fixed unit income designations.

IRS's AIT proposed rule creates unnecessary and excessive risk of violating the minimum set-aside for Housing Credit investors and developers. The treatment of AIT in the proposed rule is inconsistent with that of the other two minimum set-aside options.

For example, if a unit is out of compliance in a 40/60 percent project, so long as 40 percent of the units in the project are in compliance, the project does not fail the minimum set-aside; whereas under the proposed rule, a single unit out of compliance in an AIT property could jeopardize the minimum set-aside, even if 40 percent of the low-income units still have an average of 60 percent or less.

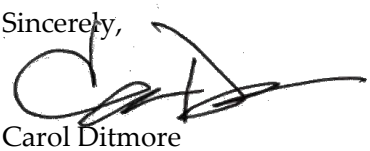
The proposed regulation also prohibits state agencies from allowing owners to modify unit designations, which is essential for practical implementation of the AIT. Prohibiting changes in unit designations also creates potential conflicts with fair housing and accessibility-related laws, which may necessitate such changes. In certain circumstances, the proposed rule may create conflicts with the Fair Housing Act because it could prevent an owner from making a reasonable accommodation upon request of a tenant with a disability. Specifically, 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."

Additionally, a Housing Credit owner may not be able to accommodate an emergency transfer request under VAWA if they are unable to modify unit designations. Not following VAWA at a property covered by the VAWA statute can also be determined by FHEO to be a violation of the Fair Housing Act, under HUD FHEO disparate impact policy. An owner will be put in an unworkable position to decide to adhere to the limitations of the unit designations or violate them in order to abide by the laws under The Fair Housing and VAWA Acts.

ADOH, for many years, has had a state specific Available Unit Rule in place for lower state set aside units at the 20, 30 and 40 percent AMI levels. We are well versed in the concept of unit redesignations and would have a seamless transition to applying it on Federal 20, 30 and 40 percent AMI units. However, if the propsed rule is unchanged, the proposed regulations will essentially eliminate our state policy which allowed for unit redesignations within a project in the event of a household recertifying over the 140 percent income level. While ADOH has not financed any Housing Credit properties under the AIT minimum set-aside election, we are very concerned about the impact this rule would have on owner and developer interest in selecting this option in the future.

NCSHA has recommended that IRS provide guidance allowing the AIT minimum set-aside to be met so long as 40 percent of the units in the property have an average of 60 percent or less of AMI and for states to establish policies allowing for modifications of unit designations. We strongly concur with NCSHA's recommendations and hope IRS will consider them in finalizing these regulations.

Sincerely,



Carol Ditmore
Director
Arizona Department of Housing