

December 23, 2020

Via email to the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov)

Department of Treasury  
Internal Revenue Service  
1111 Constitution Avenue  
Washington, DC 20219

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

To Whom It May Concern:

Thank you for the opportunity to comment on the Internal Revenue Service (IRS) notice of proposed rulemaking to establish regulatory guidance on the Low Income Housing Tax Credit (Housing Credit) Average Income Test (AIT) minimum set-aside.

Housing Partnership Network (HPN) is a business collaborative of high-performing nonprofits that develop and finance affordable housing and community development projects. HPN members work in all 50 states, creating affordable housing and improving neighborhoods. HPN's members are larger nonprofits that are able to tackle tough affordable housing challenges because they have strong business skills that enable them to develop and manage real estate efficiently, and they also have a social mission to help residents improve their lives. HPN's members own and manage more than 282,000 affordable apartments.

### **Importance of Income Averaging**

HPN supports income averaging flexibility as a way of making the Housing Credit program more efficient and effective. HPN advocated for the inclusion of the income averaging provision in the Consolidated Appropriations Act of 2018 because we believed it could broaden the reach of the Housing Credit to more low-income households, open Housing Credit properties to more very low- and extremely low-income households who do not receive rental assistance, and make more rural Housing Credit developments feasible.

### **Concerns with the Proposed Rule**

We are concerned that the proposed regulations have several provisions that will make the AIT unworkable in practice.

### Risk of violating minimum set-aside

The proposed rule requires all low-income units in a project to average no more than 60 percent of AMI as a condition of meeting the AIT minimum set-aside, which means a single noncompliant unit could result in a violation of the minimum set-aside if the loss of that unit causes the overall average unit designation to go above 60 percent of AMI. Violating the minimum set-aside results in the loss of all Credits on the project until the minimum set-aside is restored (or forever, if the violation occurs during the first year of the Credit period), not just loss of credits associated with the noncompliant unit(s). This is far more restrictive than the statute, which requires only that 40 percent of the units in the project be rent restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit to achieve the minimum set-aside requirements.

The treatment of AIT in the proposed rule is also inconsistent with that of the other two minimum set-aside options. For example, if a unit is out of compliance in a 40 at 60 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 rule creates additional risk for AIT developments when compared to other Housing Credit projects. From an investor perspective, AIT properties would be far riskier than properties that opt for either the 40 at 60 or 20 at 50 minimum set-asides. Investors and developers weigh the benefits of using income averaging against the proposed drastic penalty for minor noncompliance and under the proposed rule would be discouraged from using income averaging.

### Inability to modify income designations

The proposed rule also prohibits the taxpayer from changing the designated imputed income limitation of individual units once made, which hinders the practical implementation of AIT and sets up the potential for conflicts with the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973, and the Violence Against Women Act (VAWA). Any conflict with federal laws such as the Fair Housing Act creates the distinct possibility of litigation, creating unnecessary liabilities for property owners.

The proposed rule may also create significant challenges for properties that receive funding through other federal programs in addition to Housing Credit equity. Most other major federal housing programs have statutory or programmatic rules that require in practice the floating of unit designations to some degree. These include Section 8, the HOME Investment Partnerships (HOME) program, Public Housing, Section 8, and Rural Development housing programs. Fixing the AIT designations would not



allow AIT properties to work with these programs and would disqualify the AIT minimum set-aside from being used in a majority of Housing Credit properties, which rely on additional funding sources.

### **Alternative Recommendations**

HPN encourages the IRS to reconsider the proposed rule and instead adopt a new rule that better aligns with the Housing Credit, the intent of Congress and other federal affordable housing programs. In particular, we recommend the following:

- The AIT minimum set-aside should be considered met so long as 40 percent of the units in the property have an average of 60 percent or less of AMI. In addition, the property should have an overall average of no more than 60 percent of AMI across all low-income units, but if a unit goes out of compliance causing the property-wide average to go above 60 percent of AMI, this should be considered noncompliance for that unit, and not a violation of the minimum set-aside, so long as 40 percent of the units still meet the 60 percent average.
- The final rule should allow owners to modify unit designations. Unit designation changes should always be allowed if needed to adhere to the Fair Housing Act, the Violence Against Women Act, Section 504 of the Rehabilitation Act of 1973, or any other federal statute.

### **Conclusion**

We ask that the proposed AIT rule be reconsidered and amended. As the nation faces an affordable housing crisis that has been worsened by the pandemic, tools like income averaging are more important than ever. If you wish to discuss any points in this letter further please contact Shannon Ross, Vice President, Policy at [ross@housingpartnership.net](mailto:ross@housingpartnership.net). Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink that reads "Shannon M. Ross". The signature is written in a cursive, flowing style.

Shannon Ross  
Vice President, Policy  
Housing Partnership Network