ILLINOIS HOUSING DEVELOPMENT AUTHORITY
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Submitted via www.regulations.gov

Mr. Dillon Taylor
Mr. Michael J. Torruella Costa
Department of the Treasury
Internal Revenue Service
1500 Pennsylvania Avenue NW
Washington, DC 20229

Re: REG-104591-18 Income Average Proposed Rule Response

Dear Mr. Taylor and Mr. Torruella Costa,

On behalf of the Illinois Housing Development Authority *(hereinafter referred to as IHDA)*, we are submitting comments in response to the Department of Treasury Internal Revenue Service (IRS) Notice of proposed rulemaking regarding Section 42, Low-Income Housing Credit Average Income Test Regulations on October 30, 2020, to express our concerns regarding what we view as various challenges to the implementation of the Average Income Test (*hereinafter referred to as AIT*). As an active member of the National Council of State Housing Agencies *(hereinafter referred to as NCSHA)* our organization agrees with their position and recommendation and would like to further specifically highlight how the aforementioned proposed rule impacts IHDA, its owners, agents and, most especially the tenants whose reliance upon quality affordable housing compels IHDA to carry forth our mission and commitment towards financing the creation and preservation of affordable housing in Illinois.

In its current proposal, the AIT rule seeks to implement an average of no more than 60 percent of the AMI as a condition of meeting the AIT, a much more restrictive approach than the current statute, which at Section 42(g)(1)(C)(i), requires only that 40 percent of the units in a project be rent-restricted and occupied by individuals whose income does not exceed the imputed limitation designated by the taxpayer for the specific unit to achieve the minimum set-aside requirements. The same concern also applies to "out of service" units and the impact such a status could have on the tax credit eligibility of a project if merely one unit is deemed out of compliance. The excessive nature of this risk creates tension and concern that investor interest in Low-Income Housing Tax Credit (LIHTC) could otherwise diminish, creating a void in a far too important affordable housing sector that those with both the means and ability would no longer be willing to fill. Of equal concern and importance is the inability to modify income designations by prohibiting the taxpayer from changing the designated imputed income limitation of individual units once made. A review of Section 42 does not include any prohibition on modifying income designations, and there is no indication that a change to this statute is forthcoming. The Consolidated Appropriations Act of 2018, which enacted AIT, modified the next available unit rule in Section 42(g)(2)(D) with the exception that, at least in projects that have market-rate units, an owner would need to be able to modify income designations to address over-income tenants. The proposed rule, in keeping with the aforementioned Section 42 statute, modifies the existing regulations at 1.42-15 relating to the next available unit rule. However, the proposed change to 1.42-15 contradicts the proposed new regulation at 1.42-19, as 1.42-15 allows for modification of income designation, whereas 1.42-19 prohibits such modification. In essence, the proposed rule is at odds with long-standing IRS policy concerning transfers of households between units within a project and further demonstrates the potential to create significant challenges for properties that are financed with other federal subsidies in addition to Housing Credit equity. Finally, the treatment of existing AIT properties comes into question under the proposed rule as it has been noted that the proposed rule for 1.42-19 would apply to Housing Credit properties that chose AIT for taxable years beginning after the date which the rule is finalized. This applies to existing AIT properties as well as any future AIT developments.

It is therefore the recommendation of IHDA that 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 AMI. Also, 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 AMI, this should be considered a non-compliance 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. Furthermore, the final rule should allow owners to modify unit designations, so long as the state Agency allows for that in its policies and the state Agency consents to the change. Unit designation changes should always be allowed if needed to adhere to the Fair Housing Act, the Violence Against Women Act of 1973, or any other federal statute. If the proposed rule is made final without significant changes, IRS should provide owners of AIT projects an opportunity and a reasonable period under the circumstances (e.g., the non-eviction rule) to choose a different minimum set-aside and grandfather existing residents who have been allowed occupancy in good faith per the statute and state Agency policies without a reduction in qualified basis. If any element of the proposed rule’s policy on violation of the minimum set-aside is retained, the rule should provide an exception when non-compliance results from a casualty loss. For example (in an example cited in the proposed rule), if there is a fire in the unit, the owner should not have to remove another unit from the credit calculation to account for non-compliance associated with the casualty loss.

Thank you for the opportunity to submit comments on the Notice of Proposed Rulemaking Section 42, Low-Income Housing Credit Average Income Test Regulations.

Sincerely,
Myriam Weaver
Director, Asset Management
The Illinois Housing Development Authority