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

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

To Whom It May Concern:

The Minnesota Housing Finance Agency is the primary administrator of the Low Income Housing Tax Credit (Housing Credit) in the State of Minnesota. We are writing to express our 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. In addition to these comments, we also fully support the comments of the National Council of State Housing Agencies (NCSHA), which represents us and all other state Housing Credit administering agencies.

IRS's AIT proposed rule creates unnecessary and excessive risk of violating the minimum set-aside for Housing Credit investors and developers. It 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.

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 when such guidance might be published, the Minnesota Housing Finance Agency developed policies for implementing the AIT in Minnesota. 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 expect that the IRS would take the positions it has in the proposed rule in respect to violation of the minimum set-aside and requiring perpetually fixed income designations for units.

Since the AIT became law, the Minnesota Housing Finance Agency has financed ten Housing Credit properties for which the sponsors have already chosen the AIT minimum set-aside on Form 8609 or and several more have indicated to us that it is their intent to do so. We are very concerned about the impact this rule would have on these properties if made final as written. These impacts include:

- **Incompatibilities with blended federal and state funding for unit distribution.** The AIT would impact developments blended with other federal resources, such as the HOME Investment Partnerships program that allows for fixed and floating units. One project we have underway who has selected AIT also has Section 504 funding. Decker Dwellings, in Duluth, MN is a property that has selected AIT for its new construction property and would experience difficulties with maintaining the right range of income for tenants with other floating federally funded units.
- **Complexity and uncertainty with changing set aside structure for underwriting.** Through Minnesota Housing's 2022 Qualified Allocation Plan, we instituted a policy to require developers to get our agency's approval to change set aside from average income to the other income splits, e.g. 40/60. We instituted this policy to prevent shifting during the underwriting process which specifies rents. We are concerned this added complexity could create financial gaps in the project once financing is completed.
- **Concerns with the cliff test by developers and investors.** We have heard Minnesota based developer concerns with the cliff test that would put full properties out of compliance and penalized for the property wide average to go above 60% by the shift of a single unit.
- **Concerns with fair housing violation.** The proposed regulation creates limitations of transferring households to different units with requests for reasonable accommodation for disabilities, a transfer via the Violence Against Women Act, etc.
- **Mitigation time period is not practicably sufficient.** The proposed regulations allow a taxpayer to elect to take mitigating actions in order to avoid failing the Average Income Test due to noncompliance. These actions need to be taken within 60 days after the end of the year when the noncompliance occurred. Our agency's annual deadline for submitting the annual owner certification, as well as our forms of certification of applicable fraction and certification of average income test is February 15th, which less than 60 days after the end of the year. This makes it confusing for both owners and the state agency as to what should be certified for the prior year and whether and what the monitoring agency should report on form 8823.

Recommendations

The monitoring agencies' responsibility for identifying and reporting noncompliance with the Average Income Test should be consistent with the established procedures in the 8823 Guide. The 8823 Guide provides that monitoring agencies may allow an owner up to 90 days to correct noncompliance of which it becomes aware. With good cause up to 180 days may be allowed (up to one year for failing to file an extended use agreement).

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 agree with NCSHA's recommendations and hope IRS will consider them in finalizing these regulations.

Please contact me with any questions at Jessica.deegan@state.mn.us.

Best Regards,

A handwritten signature in blue ink, appearing to read "J Deegan". The signature is fluid and cursive, with the first letter of the first name being a large, stylized 'J'.

Jessica Deegan
Director of Federal Affairs