December 21, 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 Executive Director of Montana Housing, which administers the Low Income Housing Tax Credit (Housing Credit) in the state of Montana, 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. I would like to associate myself with the comments of the National Council of State Housing Agencies (NCSHA), which represents the Department of Commerce's Montana Housing Division and all other state Housing Credit administering agencies, and further elaborate on the specific impact these regulations will have in Montana.

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, Montana Housing developed policies for implementing the AIT in Montana. We designed these policies under the assumption that eventual IRS guidance, if published, would similarly seek to facilitate the use of AIT in practice. Never did we 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, Montana Housing has financed several Housing Credit properties for which the sponsors have either already chosen the AIT minimum set-aside on Form 8609 or have indicated to Montana Housing 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.

Montana Housing supports the following recommendations that the NCSHA has submitted for comment to the IRS:

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, 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, Section 504 of the Rehabilitation Act of 1973, or any other federal statute.

This includes two types of changes:

Floating units in which the overall property average does not change. For example, Unit 1A previously a 40 percent-designated unit becomes an 80 percent-designated unit if Unit 2A previously an 80 percent-designated unit becomes a 40 percent-designated unit.

Modifying individual unit designations even if it changes the average in the property, so long as the average remains below 60 percent of AMI. For example, Unit 1A was a 40 percent-designated unit in a property that averaged 56 percent. Unit 1A becomes a 50 percent-designated unit, raising the property average to 58 percent.

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

Sincerely,

Cheryl Cohen, Executive Director