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Internal Revenue Service
Attn: CC:PA:LPD:PR (Reg-119890-18)
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public agency

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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 the North Carolina Housing Finance Agency, which administers the Low-Income Housing Tax Credit (Housing Credit) in the state of North Carolina. I am 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. I would like to associate myself and our Agency with the comments of the National Council of State Housing Agencies (NCSHA), which represents North Carolina Housing Finance Agency and all other state Housing Credit administering agencies, and further elaborate on the specific impact these regulations will have in North Carolina.

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, North Carolina Housing Finance Agency developed policies for implementing the AIT in North Carolina. 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, North Carolina Housing Finance Agency has financed 60 Housing Credit properties for which the sponsors have either already chosen the AIT minimum set-aside on Form 8609 or have indicated to North Carolina Housing Finance Agency 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.

- North Carolina requires unit designations to float in all programs with multiple income layering. This is important for multiple reasons, including, but not limited to, being able to quickly restore compliance as household income increases or if a household needs to be transferred to an alternate unit as the result of a reasonable accommodation request under the Fair Housing Act.

  For any set-asides below 60% AMI, North Carolina Housing Finance Agency will apply the 140% rule to the actual set-aside level. For example, when a household that qualified at 20% AMI at move in exceeds 140% of the current 20% income limit, this household will be required to be designated at the next set-aside level. This is important from a public purpose perspective, allowing the lower rent to be utilized by a household that qualifies at this level while expecting someone with a higher income to pay the higher rent. This allows the 140% rule to be applied more consistently. The ability to report any violations of this requirement to the IRS would assist the implementation of this rule rather than consider the violation a state infraction.

- North Carolina Housing Finance Agency has over 20 years of experience with requiring units to float on properties with differing income tiers and monitoring this requirement for compliance. From the inception of our loan programs that provide gap financing on low-income housing credit properties, we have required multiple income tiers. It is important to require the units to float to achieve better overall compliance and satisfy both public purpose and the needs of the households being served.

- In recognition of the minimum set-aside violation risk, the proposed rule would allow a taxpayer up to 60 days after the end of the calendar year in which a violation occurred to take a mitigating action in order to avoid violating the minimum set-aside. However, the risk is still disproportionate for AIT properties as compared to the other minimum set-aside options. The owner may not even know that there is a violation of the average until well after the mitigation period is over, depending on when the violation occurs and when the state Agency's compliance monitoring is scheduled for that property. Even the most rigorous internal auditing and other due diligent measures on the part of an owner may not discover noncompliance until after the mitigation period.

- 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. If a tenant in a third-floor unit in a building with no elevators becomes disabled, the owner should be allowed to relocate this tenant to an accessible ground floor unit, swapping the income designations and avoiding any tax consequences.

- The proposed rule will create significant challenges for properties that are financed with other federal subsidies in addition to Housing Credit equity. Nearly every other major federal housing program has statutory or programmatic rules that require in practice the floating of unit designations to some degree. These notably include the HOME

Investment Partnerships (HOME) program, Public Housing, Section 8, the Housing Trust Fund, and Rural Development housing programs. Fixing the AIT designations would not work with these programs and uniquely disqualifies the AIT minimum set-aside from the majority of Housing Credit properties for this reason. In North Carolina, approximately 75% of the tax credit properties actively being monitored have gap financing or other subsidy that requires unit designations to float for compliance purposes. In cases where rental subsidies are being paid, failure to conform to the subsidy requirements will result in a loss of income to the property.

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

Sincerely,

Scott Farmer
Executive Director