



December 29, 2020

Mr. Dillon Taylor & Mr. Michael Torruella Costa
Office of the Associate Chief Counsel
Internal Revenue Service
Department of the Treasury

RE: Notice of Proposed Rulemaking -- Section 42, Low-Income Housing Credit Average Income Test Regulations (REG-119890-18) [Docket Number: IRS-2020-0038]

Dear Mr. Taylor and Mr. Torruella Costa:

Thank you for the opportunity to provide comment on the implementation of the income averaging test as set forth in Section 42(g)(1)C) of the Internal Revenue Code. Please note that these comments have not been submitted to or approved by NeighborWorks America's board and do not necessarily represent the views of its board members, either collectively or as individuals. These comments have been formed based on the ongoing work of NeighborWorks America with our network of nearly 250 local and regional nonprofit affiliated NeighborWorks organizations.

For over 40 years, Neighborhood Reinvestment Corp. (d/b/a NeighborWorks America), a Congressionally-chartered, national, nonpartisan nonprofit, has created opportunities for people to improve their lives and strengthen their communities by providing access to homeownership and safe, affordable rental housing. Our network organizations are actively involved in the development, management, and preservation of affordable rental housing, and the Low-Income Housing Tax Credit is a primary source of capital for this work. In fact, nearly 100,000 (representing over 53%) of the rental units in the NeighborWorks network's rental portfolio are financed with LIHTCs. In recent years, statutory changes made to the program have strengthened the utility of the program, creating additional flexibility and enhancing the value of the credits. The income averaging provision enacted as part of the Affordable Housing Credit Improvement Act of 2018 was an important component of these improvements, and we encourage the IRS to structure its regulations in such a fashion as to maximize the benefits that the Congress intended to create.

Specifically, NeighborWorks offers the following comments on the proposed rule.

Unit Designations

NeighborWorks is concerned by the proposal to lock in income designations once set. Although offering a year before the designations must be made is helpful, the proposed regulations would prevent an owner from making subsequent changes to these units' income designations. This restriction is not required by statute and would present a significant barrier to operationalizing the flexibility that income averaging was intended to provide, while serving no offsetting public policy purpose. Such a restriction would hamstring owners' attempts to serve their communities and respond to market conditions and may also risk creating fair housing issues. NeighborWorks recommends that the regulations be written to allow for modifications to unit designations throughout the LIHTC compliance period, so long as they comply with all other program requirements.

Mitigation

The proposed regulations would require that income averaging calculations exclude non-compliant units, despite there being no such requirement in statute. The NPRM acknowledges the potential of the average income requirement to “magnify the adverse consequences of a single unit’s failure to maintain its status as a low-income unit” and proposes certain mitigating actions to avoid total disqualification of the project, but this proposal is based on a requirement to revisit the project average that does not exist in statute. While non-compliance should result in the loss of LIHTCs associated with the non-complaint units, there is no reason why it must affect the designations of the units. The statute requires that “average of the imputed income limitations *designated* [emphasis added]... shall not exceed 60 percent of area median gross income. By straying from the direct language of the statute, the proposal would again limit the utility of the income averaging provision. NeighborWorks recommends that the regulations be crafted to take full advantage of the statutory language without imposing additional, unnecessary limitations.

Unintended Consequences

The potential negative consequences of these provisions should not be ignored. By creating these constraints, the IRS would be creating de facto incentives for owners to develop projects that are less than 100 percent LIHTC which could result in higher rents for the LIHTC households. These projects would face substantial additional complexities with respect to compliance responsibilities and may be hampered by diminished interest from equity investors. Alternatively, developers may find it necessary to create a buffer by keeping the property average below 60 percent AMI. By so doing there may be negative financial implications such as requiring an increased deferred developer fee and/or running the risk of operating deficits. Anecdotally, members of the NeighborWorks network have reported that they have made the operational decision to maintain an 8-10% buffer in order to ensure continued compliance. Collectively, these negative consequences diminish the power of the LIHTC program to create and preserve affordable housing.

NeighborWorks appreciates the opportunity to comment on these important regulations and contribute to our shared goal of developing and maintaining a regulatory environment that fully embodies the statutory purposes of the Low-Income Housing Tax Credit. We encourage the IRS to modify the proposed rule to maximize the benefits of income averaging as reflected in the statute while minimizing unnecessary barriers to its implementation.

Sincerely,



Kirsten T. Johnson-Obey
Senior Vice President, Public Policy and Legislative Affairs
NeighborWorks America