NEW HAMPSHIRE HOUSING

December 15, 2020

Via upload to the Federal eRulemaking Portal (www.regulations.gov)

Internal Revenue Service
REG-104591-18

To Whom It May Concern:

RE: Comments Regarding Section 42, Low-Income Housing Tax Credit Average Income Test

New Hampshire Housing Finance Authority (NHHFA), as the allocating agency for the Low-Income Housing Tax Credit (Housing Credit) in the state of New Hampshire, appreciates the opportunity to submit comments regarding proposed regulations for the Average Income Test (AIT), established by the Consolidated Appropriations Act of 2018 (2018 Act).

The National Council of State Housing Agencies (NCSHA), which represents NHHFA and all other state and local Housing Credit allocating agencies, will be submitting comments on our behalf. We wish to associate ourselves with those comments and further elaborate on the specific impact the proposed regulations will have in New Hampshire.

<u>Proposed §1.42-15, Next Available Unit Rule for the Average Income Test</u>
Owners will be greatly assisted in the practical application of the Next Available Unit Rule proposed in §1.42-15(c)(2)(B)(ii). Specifically, if multiple units are over-income at the same time, allowing owners to rent any available comparable or smaller unit to a qualified household in no specific order allows owners to serve families in need of rental units and maintain the revenue stream from those units.

NHHFA recommends that this provision be retained in the final regulation.

<u>Proposed §1.42-19, Average Income Test</u>
Method and Timing of Unit Designation
NHHFA appreciates the opportunity provided to allocating agencies in the proposed §1.42-19(b)(2) to establish procedures for designation of the imputed income limitation of units; however, the provision in proposed §1.42-19(b)(3)(1) that no change may be made to the designated imputed income limitations is of great concern for two reasons: pairing the Housing Credit with other federal housing programs and the subsequent complications in providing accommodations to persons with disabilities.

Nearly 90 percent of NHHFA's Housing Credit portfolio is comprised of properties that are funded by other federal housing programs and we rely on these programs to develop and preserve affordable housing in our state. Some of these programs, including Section 8, the HOME Investment Partnerships Program, and the National Housing Trust Fund, have statutory requirements or programmatic rules that require unit transfers or redesignation of income limitations in some capacity.

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Many of these housing programs require owners to comply with Section 504 of the Rehabilitation Act of 1973, which provides accessibility protections to persons with disabilities. In addition, New Hampshire state law provides similar protections, including the requirement for an owner to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. One important accommodation, which would be prohibited under the proposed regulation unless the household qualifies under the imputed income limitation for the new unit, is a transfer to another unit that is accessible or contains accessibility features. A finding of discrimination under these laws could have serious financial consequences for owners and, just as importantly, would deny much needed housing accommodations to persons with disabilities.

The inability to "float" unit designations under the proposed regulations would stymie our ability to pair these programs with AIT Housing Credit projects due to the inability to reconcile the conflicting requirements. NHHFA recommends that the final regulation exclude any language indicating that changes to the imputed income limitations may not be made. If this language is retained, then guidance must be provided on how to reconcile fixed imputed income unit designations with other federal housing programs and with applicable federal and state discrimination laws.

Requirement to Maintain 60 Percent AMGI Average Test

By requiring the AIT minimum set-aside to be met by an average of all low-income units (including units in excess of the minimum 40 percent set-aside), proposed §1.42-19(a)(3) appears to hold AIT projects to a higher standard than those that elect either of the other set-asides (20/50 or 40/60). The 2018 Act gives no indication of the intention of this higher standard, which could have serious financial consequences for project owners.

Failure to meet the minimum set-aside in the first year of the credit period results in uncorrectable non-compliance; the owner is prohibited from ever claiming the credit awarded. Failure to meet the minimum set-aside in any subsequent year results in loss of credit for the entire year. Under the proposed regulation, if a single unit causes the project average to rise above 60 percent, the entire credit could be lost. This consequence is inconsistent with the other set-asides, which require only that the *minimum* number of units (20 percent or 40 percent) is maintained.

New Hampshire is a small state with a strong group of small non-profit and for-profit developers, most of whom serve as the general partner in the limited partnership arrangements required for Housing Credit allocations. Most Limited Partnership Agreements require the general partner to financially cover any and all loss of credit or recapture. The potential loss of credit under the proposed AIT regulations could be financially devastating to many of our developers, which could hinder their ability for future affordable housing development.

Conclusion

The creation of the Average Income Test in the 2018 Act provided a great opportunity to provide decent, safe, affordable housing to a greater number of households than ever before. Unfortunately, the proposed regulations make the risks far outweigh the benefits of any owner electing this set-aside.

NHHFA strongly recommends that IRS reconsider the issues outlined above and those to be presented by NCSHA and make the requested changes to make the Average Income Test a successful option in serving households in need across the country.

Thank you for your consideration.

Sincerely,

DocuSigned by:
Dean Christon
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Dean J. Christon
Executive Director