



1400 16th St. NW
Suite 420
Washington, DC 20036
(202) 939-1750
Fax (202) 265-4435
www.housingonline.com

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Mr. Dillon Taylor
Attorney
Office of the Associate Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Michael J. Torruella Costa
General Attorney (Tax)
Office of the Associate Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

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

Dear Mr. Taylor and Mr. Torruella Costa:

Thank you for all the time and hard work that went into drafting the proposed Low Income Housing Credit (LIHTC) Average Income Test proposed regulations. We appreciate the opportunity to provide our comments to help shape the forthcoming final rule. We believe the Average Income Minimum Set-Aside Election as approved by Congress in 2018 offers great potential to serve both very low-income (20 and 30 percent of area median income (AMI)) and middle-income households (70 and 80 percent of AMI), groups that historically have been hard to include in the LIHTC program. Unfortunately, the Internal Revenue Service's (IRS) proposed rule, as currently drafted, is fundamentally flawed and does not conform to Congressional intent. As such, the proposed rule, as currently drafted, would result in an unworkable minimum set-aside election that will go unused by the affordable housing development community.

Our association's deep, on-the-ground experience managing the leasing and compliance of thousands of LIHTC properties, including dozens that have already made the average income election, gives us unique insight into insurmountable barriers the proposed regulations, as currently drafted, would create. We present brief comments below with the aim of making recommendations that would make the regulations functional and practicable in an operational context. We also support the comments of our industry colleagues like the National Council of State Housing Agencies, the Affordable Housing Investors Council, the Affordable Housing Tax Credit Coalition, the LIHTC Working Group hosted by Novogradac, Dominion and many others.

The proposed rule, as currently drafted, puts affordable housing owners and operators in the impossible conundrum of choosing which federal law to violate: the Fair Housing Act of 1968, as amended, the Violence Against Women Act of 1994, as amended or Section 504 of the Rehabilitation Act of 1973, as amended. The proposed rule also sets up conflict with countless agency rules and guidance on everything from the U.S. Department of Housing and Urban Development's HOME Investment Partnership, Section 8 and National Housing Trust Fund programs to U.S. Department of Agriculture Rural Development and tax-exempt bonds. The Average Income Minimum Set-Aside Election does not

exist in a vacuum. The U.S. Department of the Treasury (Treasury) and the IRS must consider the consequences of its rules alongside the other federal programs that make the financing and development of affordable housing possible.

In addition to risking compliance with other federal laws and regulations, we observe that the penalty for noncompliance in draft regulations is out of proportion with the LIHTCs other two election designations (40 percent of units at 60 percent of AMI and 20 percent of units at 50 percent of AMI). In the 40 at 60 and 20 at 50 elections, non-compliance on an individual unit level generally results in the inability of investors to claim credits on the specific units that are out of compliance in any given year because transactions are structured to have some cushion so as not to fail to meet the minimum set-asides.

Under the proposed regulation, the penalty for noncompliance in properties using the Average Income Minimum Set-Aside Election would generally result the inability of investors to claim tax credits *on the entire property* if just one unit is out of compliance. This penalty is made all the more terrifying if the noncompliance happens in the first year, at which point the entire property would lose the ability to claim credits *in perpetuity*. Given these enormous risks, combined with a 60-day cure period and the inability to change unit designations, investors, syndicators and developers simply would not elect to use the Average Income Minimum Set-Aside Election.

Furthermore, the proposed 60-day cure period after the end of the calendar year in which a violation occurred is highly problematic. Depending on when the violation occurs and when the state housing credit allocating agency's compliance monitoring is scheduled for that property, the owner may not even know that there is a violation of the average income set-aside until well after the mitigation period is over. Even the most rigorous internal auditing and other due diligence measures on the part of owners may not discover noncompliance until after the mitigation period.

It is our legal interpretation of the statute that the Average Income Minimum Set-Aside Election only requires that a minimum of 40 percent of the units in a property meet their imputed income limitation designations, whatever they may be. This stands in contrast to the position taken by the IRS in the proposed regulation that all units must average 60 percent AMI. We believe that Congress intended the Average Income Minimum Set-Aside Election to work similarly to the pre-existing 40 at 60 and 20 at 50 designations. We urge you reconsider the statute with a plain-text reading, which at Section 42(g)(1)(C)(i), requires only that 40 percent of the units in the project be rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit to achieve the minimum set-aside requirements.

In the absence of federal regulations since Congress created the Average Income Minimum Set-Aside Election in the spring of 2018, housing credit allocating agencies, investors, syndicators and affordable housing owners and operators have developed compliance regimes which weigh guardrails to stymie potential bad actors against practical realities. Owners acted in good faith on these policies, most of which allow income designation changes in various circumstances. The ability to do so was a crucial aspect of the decision to elect average income.

In this case, the proposed guardrails make the financing and development of affordable housing using the Average Income Minimum Set-Aside Election simply unfeasible. Treasury and the IRS will need to consider what options properties using the mutually-agreed-to, previous compliance regime will have.

One option is to allow a change to the irrevocable set-aside election. Another is to grandfather the properties developed before the final adoption of the proposed regulations by allowing them to proceed with the state-level guidance they have been operating under for the remainder of their compliance period.

Throughout this comment letter, we have been careful to qualify the proposed rule as “as currently drafted.” We believe the public comment process affords the IRS the opportunity to change course and rectify the issues identified herein and so that the Average Income Minimum Set-Aside Election will be workable for developers and investors and ultimately, the very low-income and middle-income households that the election is intended to serve. Thank you again for your attention to this matter. We look forward to working with you and would be happy to offer our insight you as proceed towards a final rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Thom Amdur", with a long horizontal flourish extending to the right.

Thom Amdur
President