NATIONAL MULTIFAMILY HOUSING COUNCIL
NATIONAL APARTMENT ASSOCIATION

December 16, 2020

The Honorable David Kautter
Assistant Secretary of the Treasury (Tax Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

The Honorable Michael Desmond
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20224

CC:PA:LPD:PR (REG-119890-18)
Room 5203
Internal Revenue Service
P.O. Box 7604
Washington, D.C. 20224

Re: Comments on Proposed Regulations Regarding Low-Income Housing Credit Average Income Test (REG-119890-18)

Dear Sirs,

We are writing on behalf of the members of the National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA) to provide comments on proposed regulations regarding the Low-Income Housing Tax Credit (LIHTC) average income test. For more than 20 years, NMHC and NAA have partnered to provide a single voice for America's apartment industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management and finance. NMHC represents the principal officers of the apartment industry's largest and most prominent firms. As a federation of 153 state and local affiliates, NAA encompasses over 82,000 members representing more than 10 million rental housing units globally.

By way of background, Congress enacted the "income averaging" option as part of the Consolidated Appropriations Act of 2018 (P.L. 115-141) to enable the LIHTC to serve households earning up to 80 percent of area median income (AMI). This NMHC- and NAA-supported provision makes the LIHTC program more flexible and allows for more mixed-income housing. Prior to the availability of income averaging, LIHTC program rules required owners to either rent 40 percent of their units to households earning no more than 60 percent of AMI, or 20 percent to those earning no more than 50 percent of AMI. Income averaging provides owners the option of reserving 40 percent (25 percent for New York City) of the units in a property for people whose average income collectively is below 60 percent of AMI.

Although we appreciate the Treasury Department and Internal Revenue Service publishing proposed regulations to implement the average income test (AIT) option, we are concerned that if not modified prior to being finalized, the proposed regulations could have unintended consequences and prevent its effective use. In particular, we are concerned that the proposed regulations: (1) pose excessive risk to violating minimum set-aside rules; and (2) prevent taxpayers from modifying income designations and, thereby: (A) trigger potential conflicts with other Federal statutes, (B) potentially prevent the use of other Federal subsidy programs, and (C) create difficulties for prospective residents on waitlists or to correct compliance issues.

To address these issues, we respectfully request that the final regulations: (1) treat LIHTC set-aside requirements to be met so long as 40 percent or more of the units in a project are occupied by residents earning an average of 60 percent or less of AMI; and (2) enable taxpayers to modify unit designations so long as the change: (1) does not cause the development to violate set-aside requirements; and (2) the State Housing Finance Agency approves.

We turn now to a detailed analysis of our concerns with the proposed regulations and proposed modifications that we respectfully request be included in final regulations:

Issue 1: The proposed regulations pose excessive risk to violating minimum set-aside rules

The proposed regulations unduly exacerbate the risk of taxpayers running afoul of minimum set-aside rules. If the final regulations do not modify the proposed regulations, we are extremely concerned that taxpayers will decline to use the AIT option.

Under the proposed rule, to satisfy the requirements of the AIT, *all* low-income units in a project must average no more than 60 percent of AMI. The consequences for failing to meet this requirement could be devastating for a LIHTC development. In fact, a violation results in the loss of LIHTCs for a project (not just with respect to non-compliant units) until it is rectified. Worse, if the failure occurs during the first year of a credit period, the development is permanently prevented from receiving LIHTCs.

Unfortunately, the proposed regulations go far further than the statute requires. IRC Section 42(g)(1)(C)(i) regarding the AIT states:

> The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both 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.

By its plain reading, the statute mandates that only *40 percent or more* (as opposed to all) of the units in a project must meet minimum set-aside requirements for AIT purposes. Notably, this interpretation is also consistent with the treatment of the other two set-aside options under the LIHTC program. For example, in a development that has elected the requirement for 40 percent of the units to be affordable to households with 60 percent or less of AMI, the project does not fail to meet set-aside rules so long as 40 percent of a project's units are in compliance.

If the proposed regulations are not modified, we are extremely concerned that the AIT option may not be used. Investors will likely see AIT properties as far riskier than properties electing one of the other two set-aside options. While we do note that the proposed regulations provide taxpayers 60 days to cure a set-aside violation, there may well be situations in which taxpayers may be unaware that they have a deficiency until after the 60-day period has expired. For example, a State Housing Finance Agency may not conduct a compliance review that would uncover a violation until after the 60-day period.

Request for Final Regulations: NMHC and NAA respectfully ask that the final regulations address the issues raised above by treating set-aside requirements to be met so long as 40 percent or more of the units in a project are occupied by residents earning an average of 60 percent or less of AMI. Additionally, should this requirement be met, but a unit falls out of compliance causing the property average to exceed 60 percent of AMI, only that unit should be considered to be non-compliant as opposed to the entire property.

Issue 2: The proposed regulations prevent taxpayers from modifying income designations and, thereby, trigger potential conflicts with other Federal statutes, potentially prevent the use of other Federal subsidy programs, and create difficulties for prospective residents on waitlists or to correct compliance issues.

Despite no statutory requirement, the proposed regulations mandate that a taxpayer may not modify an imputed income limitation attributable to a particular unit once made. Unfortunately, this inflexibility could prevent practical implementation of the AIT option in several respects. First, it could potentially cause taxpayers to run afoul of the Fair Housing Act, Section 504 of the Rehabilitation Act of 1973 (given that much LIHTC-financed housing receives a Federal subsidy), and the Violence Against Women Act. These possible conflicts could result in unnecessary and costly litigation and leave taxpayers open to significant liability. In addition, the proposed regulations could prevent taxpayers electing the AIT option from using other Federal housing subsidies. Finally, the proposed regulations could create difficulties for prospective residents on waiting lists or to correct compliance issues.

To illustrate the above, please consider the Fair Housing Act. The Act, under 42 U.S.C. 3604(f)(3)(B), makes it illegal to "refuse 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." A conflict between the Act and the proposed regulations could arise in a case such as the following: A household with an income of 45 percent of AMI lives in a second-floor unit designated at 50 percent of AMI in a LIHTC property that has elected the AIT option. Unfortunately, a household member becomes disabled and needs a first-floor unit because that individual can no longer climb stairs. A first-floor unit is available, but it is designated at 40 percent of AMI. Under the proposed rule, the disabled individual's household is precluded from occupying that first-floor unit because its income designation cannot be changed. A violation of the Fair Housing Act is triggered due to the inflexibility of the elected AIT option.

In addition to conflicts with Federal laws, an inability to modify imputed income limitations could also cause difficulties with other Federal housing programs. As noted above, the LIHTC is often used in conjunction with other Federal subsidies to finance and develop housing. Many of these subsidy programs, including Section 8, the HOME Investment Partnerships program, the National Housing Trust Fund, Rural Development, and tax-exempt bonds, have statutory or programmatic rules that to one degree or another necessitate the floating of income limits attributable to particular units. There is no reason that the AIT option should interfere with the effective use of other Federal programs.

Finally, the inability to modify imputed income limitations could create difficulties for potential residents on waiting lists or to correct compliance issues. Quite simply, a prospective resident on a waiting list might not be able to occupy an otherwise-available unit because income limits cannot be modified. Additionally, a taxpayer may not be able to correct a compliance issue that arises as a result of a resident earning too much income for a unit.

With respect to a resident on a waiting list, please consider the following example. A prospective resident with income of 35 percent of AMI is on a waitlist, and a taxpayer has a unit available. Unfortunately, that unit is designated for a household at 30 percent of AMI, making it unavailable for the prospective resident. Under the proposed regulations, the taxpayer would be prohibited from redesignating the unit even if such a modification would not cause the development to violate set-aside requirements.

Turning to compliance issues, consider a household occupying a unit designated for a household earning 40 percent or less of AMI. Following an audit, it is discovered that the household actually earned 42 percent of AMI. The taxpayer cannot redesignate the unit under the proposed regulations even if the result would be continued compliance with set-aside requirements. This inflexibility will force the household to vacate the unit. In the best-case scenario, the household could move to a unit available to households with 50 percent or more of AMI. In the worse-case scenario, the resident would have to be moved out of the development altogether. There does not appear to be justification for such results.

Request for Final Regulations: NMHC and NAA respectfully request that the final rule enable taxpayers to modify unit designations so long as the change: (1) does not cause the development to violate set-aside requirements; and (2) the State Housing Finance Agency approves. For example, if Unit A has a 40 percent of AMI limit, it should be able to exchange designations with Unit B that has a 60 percent of AMI limit. In addition, if Unit C has a 40 percent of AMI limit, a taxpayer should be able to increase the limit to 50 percent of AMI so long as overall set-aside requirements are maintained.

NMHC and NAA thank you for considering our views. Please feel free to contact Cindy Chetti, NMHC's Senior Vice President of Government Affairs, at 202-974-2300 or Greg Brown, NAA's Senior Vice President of Government Affairs, at 703-518-6141, should you have any questions.

Sincerely,

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