



December 20, 2020

Internal Revenue Service
Attn: CC:PA:LPD:PR (Reg-119890-18)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

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

On behalf of Preservation of Affordable Housing, Inc. (POAH), thank you for the opportunity to comment on the Internal Revenue Service (IRS) notice of proposed rulemaking to establish regulatory guidance on the Low Income Housing Tax Credit (Housing Credit) Average Income Test (AIT) minimum set-aside, including modifications of §1.42-15 for the Next Available Unit rule and development of a new regulation at §1.42-19 for the AIT.

POAH is an entrepreneurial nonprofit developer, owner and operator of affordable homes in 11 states and the District of Columbia. Our primary mission is to preserve, create and sustain affordable, healthy homes that support economic security, racial equity, and access to opportunity for all.

POAH has made extensive use of the Housing Credit since its founding in 2001, building or renovating more than 10,000 housing units in more than 100 transactions using either the 4% or the 9% Housing Credit. POAH was an early advocate for the creation of the AIT as a tool for preservation transactions, where it would allow units occupied by existing residents with incomes between 60% and 80% to be included in Housing Credit basis – unlike the two original tests. POAH also supported the AIT as a tool to allow the Housing Credit to support lower-income households.

POAH recently completed its first project which will elect the AIT minimum set-aside, and has numerous other pipeline projects slated to use AIT. However, we are concerned that the proposed rule will make the AIT unworkable by adding compliance risks and burdens which are not required by the AIT's statutory language, are inconsistent with the treatment of the other two set-aside tests, and will deter sponsors and investors. In addition to the limited comments that follow, POAH fully endorses the detailed comments submitted by the National Council of State Housing Agencies (NCSHA) and by the Stewards of Affordable Housing for the Future (SAHF).

1. AIT minimum set-aside treatment.

We are deeply concerned that the proposed rule provides for a violation of the AIT minimum set-aside (and attendant loss of credits of all credits) in the event that a single noncompliant unit causes the overall average income designation of the remaining LIHTC units to rise above 60% of AMI, even if there remain at least 40% of LIHTC units with designations averaging 60% AMI or less. This outcome is inconsistent with the statute, which requires only that 40% of the project's units be rent-restricted and occupied by income-eligible households.

This treatment is also inconsistent with the requirements of the other two set-asides, where isolated noncompliance triggers loss of credits for specific units but a project continues to satisfy the minimum set-aside if 40% (or 20%, as applicable) of its units remain in compliance.

This interpretation of the AIT minimum set-aside test will impose extremely severe consequences on projects which elect the AIT and which have even isolated instances of noncompliance – potentially including the loss of all credits and complete recapture of Housing Credit equity investments. Despite the AIT's appeal as a tool for preservation, and for serving lower-income households, POAH will not be able to justify its use if it imposes such extreme risks. Already, investors with which POAH has worked successfully on numerous projects are indicating they cannot consider supporting POAH projects proposing to elect the AIT set-aside, because of the risks imposed by the proposed rule.

While the proposed rule offers mitigation actions a taxpayer may take to correct violations of the AIT minimum set-aside, this framework does not protect projects which learn of instances of noncompliance after the provided mitigation window has closed (60 days after the end of the calendar year in which the noncompliance occurred), as may often happen due to widely spaced compliance audit processes, despite responsible owners' best efforts to maintain compliance.

In view of the foregoing, we urge the IRS to alter the final rule to provide that the AIT minimum set-aside is satisfied if 40% or more of the project's units are occupied by households in compliance with income limitation designations averaging 60% or less of AMI.

2. Modification of income designations.

POAH urges the IRS to reconsider the proposed rule's prohibition on changing units' designated imputed income limitations. This restriction has no basis in the statute, and would impose a serious operational problem for AIT properties assisted by other subsidy programs – notably HOME, Housing Trust Fund, or Project-Based Section 8 – which often require changes to units' income limitations to satisfy income-targeting requirements.

The proposed rule's prohibition on changes to unit designations could also needlessly impede household transfers which would otherwise be desirable to accommodate resident needs – for example, a transfer to a vacated ADA unit, or a transfer to accommodate a victim of domestic violence.

Additionally, modification of units' income designations may be desirable or necessary to maintain the overall average income designation in cases where some lower-income units are offline due to casualty loss, or become noncompliant (a circumstance the proposed rule anticipates).

Accordingly, we urge the IRS to alter the final rule to permit the modification of income designations as long as the applicable state agency allows such modifications.

Thank you for the opportunity to provide these comments. If you have any questions, please contact me at (617) 449-1016 or aspofford@poah.org.

Sincerely,

A handwritten signature in black ink, appearing to read "AS", with a large, sweeping flourish extending to the right.

Andrew Spofford
Preservation of Affordable Housing, Inc.