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Section 42, Low-Income Housing Credit Average Income Test Regulations
Docket Number: REG-104591-18
Docket RIN: 1545-BO92

Internal Revenue Service

The Seattle Housing Authority (SHA) appreciate the opportunity to provide comments on the Internal Revenue Service and Treasury Department's (Agencies) Notice of Proposed Rulemaking (NPRM) regarding the low-income housing credit average income test (AIT). SHA is the public housing authority serving the city of Seattle and owns/manages more than 8,500 housing units and administers more than 10,000 Housing Choice Vouchers. SHA serves more than 37,000 low-income people, including veterans, seniors, children and individuals with disabilities. Over the past 20 years, SHA has extensively used and supported the Low Income Housing Tax Credit (LIHTC) Program. SHA has 18 active partnerships that have utilized tax credits to finance the construction and rehabilitation of just over 4,600 units.

We provide more detail below but in summary we have two primary concerns:

- The requirement that projects electing AIT maintain an average of 60 percent of Area Median Gross Income (AMGI) across all units is a significant diversion from the existing set-aside requirements. Under this set-aside an event of non-compliance carries the most severe penalties available under the Statute, resulting in greater risk for projects electing to use the AIT set-aside.

- Requiring projects that elect AIT to designate the imputed income limits on individual units goes against the intent of Congress in passing the 2018 Act, creating significant operational challenges and presenting potential conflict with the Fair Housing Act and VAWA.

Requirement to Maintain 60 Percent Area Median Gross Income Average Test

The proposed rule requires a project to maintain an average of no more than 60 percent of Area Median Income (AMI) across all low-income units as a condition of meeting the Average Income Test (AIT) minimum set-aside. Non-compliance, even in a single unit, could result in a violation of the minimum set-aside requirement and a loss of all tax credits at the project. This effectively establishes a "cliff test" and the non-compliance associated with the test is the most extreme version of non-compliance imposed under the existing rules of the program.

This “cliff test” is more restrictive than the statute (Section 42(g)(1)(C)(i)) which only requires that 40 percent of the units in the project be rent restricted and occupied by individuals whose income does not exceed the imputed income limitations. As a result, the proposed rule is not consistent with the compliance treatment of the other two set-aside options currently available. In the event of non-compliance under the two set-asides (40/60 or 20/50), as long as the project meets its minimum set-aside non-compliance would not jeopardize the credits of the entire project but rather only the units not in compliance.

SHA believes that this section of the proposed rule is not consistent with the intent of Congress when they passed the 2018 Consolidated Appropriations Act (the Act) as it provides less flexibility and increases risk. Given the significant negative implications of failing the “cliff test”, we believe that investors will be more risk averse when investing in project using AIT. As a result, this could lead to reduced investor interest, lower tax credit pricing and/or requirements that projects be underwritten to a lower average AMGI resulting in the need for additional debt or public resources.

While the proposed rule does allow for a 60-day cure period following the end of the calendar year, this assumes that the State Housing Finance Agency (HFA) has completed its review and the non-compliance has been identified within the period. However, in practice this does not occur, so as a result, the 60-day cure period will have little benefit to owners.

To address these issues related to the “cliff test” we urge the Agencies to amend the proposed rule to align with the requirements of projects that elect the 40/60 or 20/50 set-aside. As stated earlier, we believe that this was the intent of Congress and would enhance rather than impair the LIHTC Program.

Designation of Imputed Income Limitations

The proposed rule also prohibits any changes to the designated imputed income limitation of individual units once the initial designation is made. We believe that this part of the proposed rule significantly impairs the implementation of AIT, again not what Congress intended when it passed the Act. This proposed section of the rule could have possible conflicts with the Fair Housing Act and the Violence Against Women Act (VAWA) as it significantly limits an owner’s flexibility.

Currently, Section 42 does not include any prohibition on modifying income designations, leaving definition of any policies and implementation up to the State HFAs. In addition, we believe this goes against Congress’ intent as the Act provided further flexibility as it modified the next available unit rule in Section 42(g)(2)(D) with the expectation that, at least in projects that have market-rate units, an owner would need to be able to change income designations to address over-income tenants.

An example of how the proposed rule may conflict with the Fair Housing Act is that this restriction could prevent an owner from making a reasonable accommodation upon request of a tenant with a disability if that accommodation would require relocating tenants into units with different income designations. This creates an issue as the Fair Housing Act makes it unlawful for any person to refuse "to make reasonable accommodations in rules, policies, practices, or services when such accommodation may be necessary to afford… person(s) [with disabilities] equal opportunity to use and enjoy a dwelling."1

For similar reasons this proposed rule could create conflicts with VAWA as an owner may not be able to accommodate an emergency transfer request if they are unable to switch unit designations. Since the reauthorization of VAWA in 2013, the LIHTC Program has been a covered program for purposes of the law.

We urge the Agencies to revise this portion of the proposed rule to allow for changes in the designation of imputed income limits. In the event that the proposed rule gets implemented as written, we believe that the Agencies should provide owners who have already elected the AIT set-aside with an opportunity to elect a different set-aside. Given that this rule applies to all AIT projects, we believe this would be the most equitable treatment, seeing as this proposed rule could create significant challenges for owners.

We thank the Agencies for the opportunity to comment on the proposed rule and urge you to consider these changes to better reflect the intent of Congress and improve the tax credit program.

Sincerely,

Andrew J. Lofton
Executive Director

[1] 42 U.S.C. Section 3604(f)(3)(B).