Public Comment Related to Section 42, Low-Income Housing Credit Average Income Test Regulations (REG-119890-18)

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Submitter Name: Virginia Housing

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

As the Director of Compliance & Asset Management for Virginia Housing, which administers the Low Income Housing Tax Credit in the state of Virginia, I am writing to express my concerns about the Internal Revenue Service (IRS) notice of proposed rulemaking to establish regulatory guidance on the Average Income Test (AIT) minimum set-aside.

The IRS AIT proposed rule is inconsistent with the treatment of the other two minimum set-aside options. Section 42 does not include any prohibition on modifying income designations, and there is no indication that Congress intended to do so. The AIT proposed rule is more restrictive than the statute, and presents the risk of single noncompliant unit affecting the status of the qualified project. It also prohibits state agencies from allowing owners to modify unit designations, which is essential for the practical implementation of the AIT. Prohibiting changes in unit designations also creates potential conflicts with fair housing and accessibility-related laws, which may necessitate such changes.

The Average Income minimum set-aside helps Virginia Housing increase access to affordable housing under the Tax Credit program for tenants earning between 20 percent and 80 percent AMI, in rural communities and metro areas, and preserves affordable units in older, existing properties entering the program. Requiring the unit designations to remain “fixed” and prohibiting subsequent changes in unit designations will limit the Agency and project owner’s ability to create policies to make affordable units available to new, qualified households. The existing rule could also make it harder to meet existing tenants' needs in managing a casualty loss, reasonable accommodation requests, change in household size or income affecting continued eligibility, or an emergency transfer request for Violence Against Women Act (VAWA) protection.

Since the AIT became law, Virginia Housing has financed 74 Housing Credit properties electing the AIT minimum set-aside. We are very concerned about the impact this rule would have on these properties if made final as written. Virginia Housing implemented AIT procedures to review and confirm that the project unit mix and proposed unit designations are reasonably distributed across all unit sizes, and allow for unit designations changes. Project owners and investor partners enacted additional policies and procedures to ensure their property management agents have the experience and capacity to manage the new AIT requirements. Therefore, minimum set-aside or Average Income Test noncompliance is not expected to increase in properties electing Average Income. Agencies should have the ability to outline practical guidance for the Average Income minimum set-aside, which includes the flexibility to ensure affordable units are available to tenant populations throughout the Extended Use Period.

Project owners and investor partners rely upon an Agency’s written guidance to ensure compliance with each state’s QAP priorities. Agencies should be allowed to establish rules permitting project owners to change income limitations designated for units as needed to maintain compliance and occupancy of existing eligible households, as relevant. Minimum set-aside violations resulting from

household eligibility or physical conditions using 20-50 and 40-60 elections are uncommon in the Virginia Housing portfolio. In partnership with Virginia Housing QAP state priorities to provide affordable housing to households with income at 50percent AMI or less, project owners and property management agents have successfully managed qualified projects with both federal and state income limitations under the Virginia Housing QAP for decades.

Virginia Housing supports including the third Alternative Mitigating Action Approach in the final Average Income rulemaking guidance, which permits the taxpayer to re-designate a low-income unit's imputed income limitation to return the Average Income test to 60 percent of AMGI or lower at any time during the Extended Use Period. The final rule should allow project owners to modify unit designations according to Agency guidance. Unit designation changes should always be allowed as needed to follow the Fair Housing Act, The Violence Against Women Act, Section 504 of the Rehabilitation Act of 1973, or any other federal statute, as applicable.

NCSHA has recommended that the IRS provide guidance allowing the AIT minimum set-aside to be met as long as 40 percent of the units in the property have an average of 60 percent or less of AMI and for states to establish policies allowing for modifications of unit designations. I strongly concur with NCSHA’s recommendations and hope IRS will consider them in finalizing these regulations.

Sincerely,
Neal Rogers, Director of Compliance & Asset Management
Rental Division, Virginia Housing