

## **Overview**

The Consolidated Appropriations Act of 2018 (the Act) permanently established income averaging as a third minimum set-aside election for new Housing Credit developments. This new income averaging set-aside allows Credit-qualified units to serve households earning as much as 80 percent of Area Median Income (AMI), as long as the average imputed income limit of the property is 60 percent or less of AMI. Higher rents that households with incomes above 60 percent of AMI pay will have the potential to offset the lower rents for households living in units designated at lower income levels. Income averaging preserves rigorous targeting to low-income households, while providing more and greater income-mixing potential.

### **The following are general statutory requirements for this new option:**

- Owners electing income averaging must commit to having at least 40 percent of the units in the property affordable to eligible tenants.
- Income averaging applies to the designated income/rent levels of the units, not the incomes of individual tenant households.
- Under income averaging, designated income/rent levels may only be set at 10 percent increments beginning at 20 percent of AMI. The allowable income/rent designation levels are 20 percent of AMI, 30 percent of AMI, 40 percent of AMI, 50 percent of AMI, 60 percent of AMI, 70 percent of AMI, and 80 percent of AMI.
- Income averaging applies to both income and rent limits. If a unit has a designated limit of 80 percent of AMI, the maximum rent level that may be charged to a household in that unit is 30 percent of 80 percent of AMI. Similarly, if a unit has a designated limit of 30 percent of AMI, the maximum rent level that may be charged to a household in that unit is 30 percent of 30 percent of AMI.
- The minimum set-aside election is irrevocable once made on Form 8609. Therefore, existing developments already placed in service are not eligible to change their minimum set-aside/income election to income averaging.
- The next available unit rule, as modified by the new language, (i) provides that a unit is over income if the occupant's income exceeds 140 percent of the greater of 60 percent of AMI or the designated limit applicable to the unit and (ii) effectively requires that the next available unit of comparable or smaller size be rented (A) to a tenant whose income does not exceed the designated limit applicable to the new unit, if it was previously a low-income unit or (B) to a tenant at an income level that would not cause a violation of the 60 percent average, if the new unit had not previously been a low-income unit. Owners should consult with compliance experts in evaluating how income averaging will work in developments with market rate units.
- The 30 percent of AMI income and rent level under the Housing Credit for purposes of income averaging is not the same as the Extremely Low-Income and rent restriction under the National Housing Trust Fund. The Housing Trust Fund statute and regulation define "Extremely Low-Income" as the greater of 30 percent of AMI or the federal poverty line for applicable household size. Income averaging unit designation is based solely on AMI. Properties that have layered National Housing Trust fund with credits should be mindful of this difference.

- Basic noncompliance will work the same as it does with the other minimum set-asides. If a development elects income averaging and fails to meet the income averaging standard at the end of a year, it is not a qualified low-income housing development for the year under IRC Section 42(g)(1)(C), and this noncompliance must be reported to IRS Form 8823 and the owner could be subject to a loss of Credits. Presumably the IRS will revise the Form 8823 and its instructions accordingly.

### **OHFA Adopted Requirements for Income Averaging**

#### **Income Averaging is available to developments making their minimum set-aside election after March 23, 2018.**

- Owners of developments with more than one building must elect on the Forms 8609 to treat all of them as part of a multiple building project (checking “Yes” on line 8b of the current form).
- OHFA will amend the Chapter 36 Rules to increase the credit monitoring fee for properties electing the income averaging option.
- Additional education requirements for property management staff will be required.
- Income designations are permitted to “float”. For example, if at the time of Application the Owner committed to a mix of 30%, 50%, 60% and 80% units with an overall income percentage of 60%, then throughout the affordability period (as long as the overall income percentages remains at or below 60%) the unit designations may be changed to any combination of 20 %, 30%, 40%, 50%, 60%, 70% and 80% units.
- Developments that are not comprised of 100% Low Income units, i.e. those including market rate units, will be required to complete annual re-certifications.
- Developments that are comprised of 100% Low Income units, including 70% and 80% units, will not be required to complete annual re-certifications. This policy could change if the IRS decides to require annual re-certifications.
- Owners must disperse 20%, 30%, 40%, 50%, 60%, 70% and 80% units across unit types and sizes in a manner that does not violate Fair Housing.
- OHFA reserves the right to disallow any clear skewing of unit designations. OHFA will require applicants to provide reasonable parity between different bedroom sizes at each targeted income band utilized on the property.

#### **Requests to use this new set aside must include the following documents:**

- An updated OHFA Application Form reflecting all designations/changes
- A legal opinion stating that the income averaging set aside will be compatible with the requirements of all other anticipated funding sources.
- A statement from permanent lenders and the equity provider approving the selection of the income averaging set-aside.
- A market study or revised market study that shows adequate demand for all possible combinations of unit sizes and percent limits selected.

- A matrix showing the AMI percentage(s) for each designated unit type.
- Statement committing to annual income averaging training for on-site property managers.

### **Tax Exempt Bonds/4% Credit Applications**

The Act modifies IRC Section 42 to allow for income averaging, but does not make a similar change in IRC Section 142, which covers exempt facility bonds, including multifamily Housing Bonds. However, income averaging may be used in bond-financed Housing Credit developments so long as the development satisfies both the income averaging minimum set-aside election and one of the minimum set-aside elections applicable to tax-exempt bond financing (20/50 or 40/60 minimum set-aside). Thus, units with income limits above 60 percent or 50 percent, as applicable, do not count for purposes of bond compliance.

### **Resyndication Applications**

Any property seeking 9% or 4% credits for resyndication of previously awarded tax credit properties will not be eligible to select the income averaging set aside. A new election would not free the continuing low-income units of their obligations under the prior extended use agreement, so the owner would, in effect, have to comply with the more stringent rules applicable to each particular unit if it were to change its election upon resyndication. Given the complexity of complying with two separate minimum set-aside rules, OHFA has decided not to allow income averaging for such resyndications.

### **Rehabilitation Properties**

Applications must consider relocation impact in setting percentages for occupied rehab properties.

**PLEASE NOTE: THE IRS MAKES THE ULTIMATE DETERMINATION REGARDING WHETHER OR NOT A DEVELOPMENT IS IN COMPLIANCE WITH THIS AND/OR ANY OTHER ELECTIONS MADE BY THE OWNER. ACCEPTANCE BY OHFA DOES NOT GUARANTEE ACCEPTANCE BY THE IRS. OWNERS SHOULD CONSULT WITH THEIR LEGAL COUNSEL. THIS POLICY IS SUBJECT TO CHANGE IN THE EVENT THE IRS ISSUES GUIDANCE ON INCOME AVERAGING.**