NATIONAL AFFORDABLE HOUSING MANAGEMENT ASSOCIATION

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The Honorable David Kautter
Assistant Secretary of the Treasury (Tax Policy)
U.S. Department of the Treasury
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The Honorable Michael Desmond
Chief Counsel
Internal Revenue Service
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Internal Revenue Service
Attn: CC:PA:LPD:PR (REG-104591-18)
Room 5203
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RE: Comments on REG-104591-18 Low Income Housing Tax Credit Average Income Test Regulations

The National Affordable Housing Management Association (NAHMA) appreciates the opportunity to provide comments on the subject proposed regulatory guidance on the Low Income Housing Tax Credit (Housing Credit) Average Income Test (AIT) minimum set-aside. NAHMA is concerned the proposed changes may adversely impact an important tool to expand the supply of affordable housing across the nation. We understand that many of these same concerns have been shared by affordable housing developers, private providers, investors, and finance stakeholders. Please find our concerns and recommendations below.

About NAHMA

NAHMA is the leading voice for affordable housing management, advocating on behalf of multifamily property managers and owners whose mission is to provide quality affordable housing. NAHMA supports legislative and regulatory policy that promotes the development and preservation of decent and safe affordable housing, is a vital resource for technical education and information and fosters strategic relations between government and industry. NAHMA's membership represents 75 percent of the affordable housing management industry, and includes its most distinguished multifamily owners and management companies.

Concerns

1. **Unfeasible High Minimum Set-Aside Standard**

   The proposed rule requires all low-income units in a project to average no more than 60 percent of area median income (AMI) as a condition of meeting the AIT minimum set-aside. NAHMA believes this is inconsistent with Internal Revenue Code (IRC) §42, as a minimum set-aside should always be a "minimum." Specifically, §42(g)(1)(C)(i), requires only that "40 percent… 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" to achieve the minimum set-aside requirements. The IRC also sets forth a separate Average Test stating, "The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of the area median gross income." In contrast, the proposed rule requires that all low-income units average 60 percent or less in order to meet the minimum set-aside. NAHMA members are concerned that the consequence of not achieving that average is loss of all credits on the property for at least a period of time, not only the loss of the credits associated with the noncompliant unit(s). NAHMA believes that inability to meet the Average Test should be considered noncompliance of the individual unit(s) in question, not a violation of the minimum set-aside, unless the noncompliance is so extreme that fewer than 40 percent of the units meet a 60 percent average. The penalty for noncompliance—potential loss of credits and/or recapture on a specific unit(s)—is sufficient to encourage compliance with the Average Test.

In addition, this treatment of the AIT in the proposed rule is inconsistent with that of the other two primary minimum set-aside options. For example, if a unit is out of compliance in a 40 at 60 development, so long as 40 percent of the units in the development are in compliance, the project does not fail the minimum set-aside; whereas under the proposed rule, a single unit out of compliance in an AIT property could jeopardize the minimum set-aside, even if 40 percent of the low-income units still have an average of 60 percent or less.

2. Prohibits Modifying Income Designations

Changing unit designations is an important mitigating action to correct noncompliance. For the benefit of Housing Credit property residents, NAHMA supports allowing owners to modify unit designations, so long as the applicable state housing finance agency allows for such designation changes in its policies and approves of the changes the owner would like to make. IRC §42 does not prohibit modification of income designations, and there is no indication that it was Congress' intent to do so. In fact, the Consolidated Appropriations Act of 2018, which enacted the AIT, modified the next available unit rule in §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 modify income designations to address over-income tenants. Moreover, the proposed rule, in keeping with §42(g)(2)(D), modifies the existing regulations at §1.42-15 relating to the next available unit rule. However, the proposed change to §1.42-15 contradicts the proposed new regulation at §1.42-19, as §1.42-15 allows for modifications of income designation, whereas §1.42-19 prohibits such modifications. In addition, the proposed rule is also at odds with long-standing IRS policy with respect to transfers of households between units within a project. IRS Revenue Procedure 2004-82 in Section E, Vacant Unit Rule Issues, in answer to question #8, established that the low-income qualified status of a unit moves with a qualified household if the household transfers from one unit to another. In contrast, the AIT proposed rule would lock the qualifying designations down by unit far more rigorously, and would make management and compliance relating to transfers for AIT projects far less flexible than is allowed for the other minimum set-asides. The flexibility allowed in this policy has always provided a safe harbor for compliance at Housing Credit properties with other relevant housing laws and regulations.

By prohibiting the taxpayer from changing the designated imputed income limitation of individual units once made, the proposed rule not only stymies practical implementation of

AIT, but also sets up the potential for conflicts with other federal housing programs (HOME, Section 8 programs, and Housing Trust Fund), the Fair Housing Act, §504 of the Rehabilitation Act of 1973, and the Violence Against Women Act (VAWA). Any conflict with these federal laws could lead to litigation, creating liabilities for state agencies and property owners.

Recommendations

In light of these concerns, NAHMA recommends IRS make the following changes in the Final AIT Rule:

1. The AIT minimum set-aside should be considered met so long as 40 percent of the units in the property have an average of 60 percent or less of AMI. In addition, the property should have to meet an overall Average Test of no more than 60 percent of AMI across all low-income units. If a unit is out of compliance causing the property-wide average to go above 60 percent of AMI, this should be considered noncompliance for that unit, but not a violation of the minimum set-aside, so long as 40 percent of the units still meet the 60 percent average.

2. The final rule should allow owners to modify unit designations, so long as the state agency allows for that in its policies and the state agency consents to the change. Unit designation changes should always be allowed if needed to adhere to the Fair Housing Act, VAWA, §504 of the Rehabilitation Act of 1973, or any other relevant federal or state statute. States should be able to allow modifications to unit designations by either of these options: (1) Floating units in which the overall property average does not change; and (2) Modifying individual unit designations even if it changes the average in the property, so long as the average remains below 60 percent of AMI.

If the proposed rule is made final without the above concerns addressed, the IRS should provide owners of AIT properties an opportunity and a reasonable period under the circumstances to choose a different minimum set-aside and grandfather existing residents who have been allowed occupancy in good faith in accordance with the statute and state agency policies without reduction in qualified basis.

Thank you for the opportunity to provide comments. Please contact Larry Keys, NAHMA Manager of Government Affairs, at lkeys@nahma.org, with any questions.

Sincerely,

Kris Cook, CAE
Executive Director