Income Limits
WORKING GROUP™
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March 5, 2025

Mr. Michael Novey
Department of the Treasury
1500 Pennsylvania Ave., NW, Room 1041
Washington, D.C. 20220

Mr. Dillon Taylor
Senior Technician Reviewer, Branch 5, CC:PSI:B5
IRS Office of Chief Counsel (Passthroughs and Special Industries)
1111 Constitution Ave., NW, Room 5111
Washington, D.C. 20224

RE: **Income and Rent Limits Under Internal Revenue Code §42 and §142**

Dear Mr. Novey and Mr. Taylor:

On behalf of the members of the Income Limits Working Group, along with the Affordable Housing Tax Credit Coalition, Enterprise Community Partners, the National Association of Home Builders, the National Affordable Housing Management Association, the National Council of State Housing Agencies and the National Multifamily Housing Council, we request clarification on income and rent limits relating to the Housing and Economic Recovery Act of 2008 ("HERA").

Background

Since 1986, low-income housing tax credit ("LIHTC") and tax-exempt bond properties under Internal Revenue Code ("IRC") §42 and §142 have determined their income limits from HUD Section 8 income limits. However, in 2009, to accommodate adjustments to the Section 8 income limits required by HERA, HUD published income limits for IRC §42 and §142 separately from Section 8. This separate data set for IRC §42 and §142 is called Multifamily Tax Subsidy Projects ("MTSP"); and includes both the Section 8 income limits and the HERA Special income limits. LIHTC and tax-exempt bond properties under IRC §42 and §142 still use Section 8 income limits as their baseline, but HUD now publishes the MTSP income limits to accommodate the HERA adjustments. The two adjustments from HERA are as follows:

1. HERA Special adjustment for counties with no income decrease in 2007 or 2008 due to HUD's hold harmless policy
2. HERA Hold Harmless provision to prevent income limits from decreasing

The IRS has not issued any formal guidance as to how these two policies should be implemented. As more projects are reaching year 15 and income limits are increasingly volatile the industry has critical questions about how the hold harmless and HERA Special limits should be applied.

Technical Issue 1 – HERA Hold Harmless Definition of "Determined" for when hold harmless should begin

Section 3009(a) of HERA established a hold harmless policy for tax credit and tax-exempt bond projects by amending IRC §142(d)(2)(E)(i) to read as follows:

> "Any determination of area median gross income under subparagraph (B) with respect to any project for any calendar year after 2008 shall not be less than the area median gross income determined under such subparagraph with respect to such project for the calendar year preceding the calendar year for which such determination is made." (emphasis added)

Informally in [LIHC Newsletter #35] issued in May of 2009 it is indicated that the hold harmless period should begin once a project is placed in service because that is when income and rent limits are first determined for the project. This interpretation does not reconcile with formal guidance related to the gross rent floor election under Revenue Procedure 94-57. In Revenue Procedure 94-57 a gross rent floor by default applies to a project at allocation and by election can be effective as of the placed in-service date.

The rent limits under IRC Section 42(g) are calculated on the area median gross income for the project. Therefore, Revenue Procedure 94-57 implies that the area median gross income has been determined for a project no later than the date a state agency allocates credits to a project, or a credit determination letter for projects described under 42(h)(4)(B).

We request the IRS issue formal guidance to clarify when the hold harmless starts for LIHTC projects that conforms to existing guidance.

Technical Issue 2 – What happens to hold harmless and HERA Special incomes when projects are resyndicated

Section 3009(a) of HERA established a special income calculation for tax credit and tax-exempt bond projects by amending IRC§142(d)(2)(E)(ii), (iii), and (iv) to read as follows:

> "(ii) Special rule for certain census changes. In the case of a HUD hold harmless impacted project, the area median gross income with respect to such project for any calendar year after 2008 (hereafter in this clause referred to as the current calendar year) shall be the greater of the amount determined without regard to this clause or the sum of—

> (I) the area median gross income determined under the HUD hold harmless policy with respect to such project for calendar year 2008, plus
> (II) any increase in the area median gross income determined under subparagraph (B) (determined without regard to the HUD hold harmless policy and this subparagraph) with respect to such project for the current calendar year over the area median gross income (as so determined) with respect to such project for calendar year 2008.
>
> (iii) HUD hold harmless policy. The term "HUD hold harmless policy" means the regulations under which a policy similar to the rules of clause (i) applied to prevent a change in the method of determining area median gross income from resulting in a reduction in the area median gross income determined with respect to certain projects in calendar years 2007 and 2008.
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> (iv) "The Term 'HUD hold harmless impacted project' means any project with respect to which area median gross income was determined under subparagraph (B) for calendar year 2007 or 2008 if such determination would have been less but for the HUD hold harmless policy."

Similar to Issue 1, there has not been any formal guidance issued on this topic. Informally in LIHC Newsletter #35 issued in May of 2009 it states that "if you (or a subsequent owner) receive a new allocation of credit and begin a new credit period sometime in the future, you would use the normal MTSP income limits since you did not rely upon HUD's income limits in either 2007 or 2008."

This answer does not align with the facts of the situation in resyndication and is harmful to preserving existing affordable housing as affordable.

In most resyndications the owner is still subject to the extended use agreement and in hold harmless or HERA Special areas will have tenants that were qualified under the HERA Special and Hold Harmless income limits who are paying rents under calculated using HERA Special and Hold Harmless Income limits therefore the project has relied on relied upon the income limits.

In addition, if the income limits reset – it would appear to violate the hold harmless rule under IRC §142(d)(2)(E)(i), since the HERA Special income limit was determined for the project in the prior year. The argument that the income was not determined for the project prior to resyndication does not make sense.

In addition, it is unclear why a resyndication would be treated differently than any other financing change on a project. If a project were to obtain additional non-LIHTC funds to rehab a project the income limits would not reset and if a project is sold the income limits do not reset.

This rule creates a disparate treatment of projects that undergo a LIHTC resyndication and it is the only transfer that results in a re-setting of the income limits.

As outlined above the guidance does not match up to the wording in the law. This interpretation is even worse when you consider that in some resyndications there is no transfer of ownership. An owner may be seeking only rehab credits and not acquisition credits. In these cases it is impossible to interpret that income limits were not determined for the project in prior year in the case of hold harmless.

Technical Issue 3 – Hold Harmless for Rural Projects

Section 3004 of HERA created IRC §42(i)(8), which allows rural tax credit projects to use the greater of AMGI or the national non-metro median income for purposes of determining the applicable rent and income limit.

IRC §42(i)(8) reads as follows:

> "For purposes of this section, in the case of any project for residential rental property located in a rural area (as defined in section 520 of the Housing Act of 1949), any income limitation measured by reference to area median gross income shall be measured by reference to the greater of area median gross income or national non-metropolitan median income."

IRC §42(i)(8) does not specify that hold harmless treatment applies at the national non-metro amount for rural projects, however, IRC §42(g)(4) by reference to IRC §142(d)(2)(E) implies that hold harmless treatment would apply at the national non-metro amount for rural projects. The hold harmless policy should apply to the national non-metro because IRC§42(i)(8) states "any income limitation measured by reference to area median gross income shall be measured by reference to the greater of area median gross income or national non-metropolitan median income," and therefore any income limitation determined under IRC§42(g)(4) would use the greater of AMGI or the national non-metro median income for purposes of determining the applicable rent and income limit.

Scope of Issue

According to HUD's LIHTC database there are 32,961 properties that were placed in service prior to 2009. Of those properties 19,717(60%) are located in counties that have a HERA Special income limit for HUD FY2023, 11,634 (35%) were located in non-HERA-Special counties and 1,610 (5%) did not have enough information to determine what county they were located in. Please see the table below for more information on the projects placed in service prior to 2009.

	Properties		Units	
Special	19,717	59.82%	1,012,468	56.12%
Regular	11,634	35.30%	720,781	39.95%
Insufficient Data	1,610	4.88%	70,905	3.93%
Total	32,961		1,804,154	

The HUD LITHC Database does not have the number of low-income units for all properties and is missing the number of low-income units by bedroom size. However, we can make a few assumptions to obtain a rough idea of the magnitude of the issue, if assume that all low-income units are 2 bedroom units, the most common bedroom size, the average difference between the non-HERA Special rent and HERA Special rent is $62 per unit per month. If we use the unit mix provided in the HUD LIHTC Database the average difference between the non-HERA Special rent and HERA Special rent is $60 per unit per month. If you multiply this by the number of impacted units it results in between a $731,000,000 and $754,000,000 reduction in rent across the properties if they are no longer able to use HERA Special rent and income limits. This reduction in rental income can lead to many LIHTC resyndications being infeasible.

Practical Issues

Impact to Property Owners

LIHTC and tax-exempt private activity bond properties are unique compared to other federal programs as their rent limits are directly impacted by the income limits for the area. The current policy of reducing income limit and rent limits upon resyndication is detrimental to the preservation of affordable housing. The current policy forces owners to choose between rehabbing a project with tax credits and lower rents or not rehabbing the project and continuing to collect the permitted HERA rents. In many cases owners may choose to let the extended use agreement expire or pursue a qualified contract where allowed as opposed to rehabbing with tax credits. In addition, lowering the rents will impact the resyndicated project's ability to pay debt service thereby reducing the amount of debt the resyndicated project can support which may make the resyndication unfeasible or limit the amount of rehab that can be completed. It is important to note, that the owners have been charging permitted rents and allowing HERA Special and Hold Harmless to continue after a resyndication results in tenants paying the same rents they had paid prior to the resyndication of the project and typically would not result in a rent increase to existing tenants.

The current policy also impacts tenants. Many projects require substantial rehabilitation to address deteriorating living conditions and deferred maintenance. Due to the current interpretation of the HERA Special and hold harmless income limits, it is not feasible to rehabilitate the existing projects because the reduction in rent will not support enough debt to cover the portion of rehab costs that cannot be paid by tax credit equity. As mentioned before, maintaining the same rent structure as prior to the rehab does not negatively affect existing tenants.

We request that you issue guidance clarifying that the correct interpretation of the HERA income rules related to hold harmless starting no later than allocation or credit determination and that hold harmless and HERA Special do not reset upon resyndication. Thank you for your consideration of these matters. If there is any way we can be of assistance, please feel free to contact Thomas Stagg (425) 519-1234.

Yours very truly,

THE INCOME LIMITS WORKING GROUP

Novogradac & Company LLP

Thomas Stagg, Partner