December 29, 2020

Internal Revenue Service
Attn: CC:PA:LPD:PR (Reg-119890-18)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

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

To Whom It May Concern:

Thank you for the opportunity to comment on the recent IRS Notice of Proposed Rulemaking on the Low Income Housing Tax Credit (LIHTC) Average Income Test (AIT). As the leading voice for aging, we value our ongoing partnership with the Internal Revenue Service (IRS) and look forward to working together to expand and improve affordable housing options for older adults with low incomes.

LeadingAge represents more than 5,000 aging services providers, including non-profit owners and managers of federally-subsidized senior housing properties. Our nationwide membership of senior housing providers have a keen interest in the administration of the LIHTC program, and we support the IRS's efforts to bring regulatory guidance to the field.

LeadingAge members were strong advocates of the AIT, enacted by Congress in 2018, as a way to reach more varied income levels within the Housing Credit program – specifically more low income and extremely low income senior households. Our membership also eagerly anticipated further clarity from the IRS on certain implementation aspects of the new set-aside mechanism.

However, as written, the proposed rule does not ease implementation of the AIT, but rather brings further challenges for Housing Credit properties and residents. We also believe certain aspects of the proposed rule also differ from Congressional intent during enactment. As such, we respectfully present three recommendations for the final rule on the Average Income minimum set-aside:

LeadingAge Recommendations for ATI Final Rule

Rather than easing implementation and improving affordable housing options, the proposed rule presents serious challenges for housing providers administering the Average Income Test at Housing Credit communities. Our recommendations include expanded opportunities to weigh in and discuss needed regulatory actions on this new set-aside mechanism, much-needed flexibility on unit designations, a reconsideration of non-compliance calculations for ATI properties, and modified timeframes for mitigating actions.

1. **Permanent Fixing of Unit Designation**
   As written, the proposed rule would not allow for units to be redesignated under the Average Income mechanism, presenting an inaccurate view that this portion of the tax code supersedes other requirements that Housing Credit properties may be subject to currently or in the future, including current relevant federal statutes; this inflexibility also creates unwarranted barriers to existing or forthcoming state actions, or for properties subject to other financing sources and requirements.
   For example, unit designation adjustments are needed in certain scenarios to maintain compliance with the Violence Against Women Act (VAWA), the Fair Housing Act, and the Rehabilitation Act of 1973 (Section 504). Further, states should be in a position to allow various types of unit designation modifications, such as for waitlist management and for cases where a mitigating action is necessary to correct property non-compliance with the set-aside. Importantly, modifications should also be allowed as floating designations in which the overall property average does not change, or designations that change the average of the property but do not bring the property out of compliance with the minimum set-aside (by resulting in an average income above 60 percent of Area Median Income, or AMI). In fact, nearly every other major federal housing program allows – through programmatic rules or statute – for floating or modifiable unit income designations based on a set of circumstances.
2. **Non-Compliance of the Minimum Set-Aside**
   Consistent with a literal reading of the tax code, and taking into consideration congressional intent in enactment of the AIT, we strongly recommend a reconsideration of non-compliance provisions in the rulemaking. Specifically, non-compliance should be calculated on a per unit basis, as is done with the other two existing minimum set-aside options, and not projected onto the entire property as non-compliance with the overall set-aside mechanism. If a non-compliant *unit* causes the property's average to go above 60 percent of AMI, the minimum set-aside for the *property* should still be considered met based on the fact that 40 percent of the units in the property have an average of 60 percent of less of AMI.
3. **Time Period for Mitigating Actions**
   If the proposed rule is made final, 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 statute and State Agency policies, without reduction in qualified basis.

The recommendations outlined above demonstrate our shared commitment to improve the program for the staff and residents of Housing Credit communities across the country. We appreciate your consideration of our comments and look forward to further opportunities to discuss improvements for this rule.

Sincerely,

Juliana Bilowich
Director, Housing Operations and Policy
LeadingAge