December 29, 2020

VIA www.regulations.gov
Internal Revenue Service
1111 Constitution Avenue, Northwest
Washington, DC 20224

Re: **Section 42, Low-Income Housing Credit Average Income Test Regulations, IRS, REG–119890–18**

To Whom It May Concern:

The National Housing Law Project (NHLP) submits these comments on the Internal Revenue Service's (IRS) proposed "Low-Income Housing Credit Average Income Test Regulations."

NHLP advances housing justice for poor people and communities by strengthening and enforcing the rights of tenants, increasing housing opportunities for underserved communities, and preserving and expanding the nation's supply of safe and affordable homes. Founded in 1968, NHLP works at the crossroads of housing and community development advocacy, legal services for the poor, and civil rights.

With respect to the proposed regulations, of most concern to NHLP is the proposed regulation at §1.42-19 which prohibits an owner of a tax credit property from changing a unit's designated imputed income limitation at an Average Income Test (AIT) property. As discussed below, an absolute ban on an owner's ability to change a unit's designated imputed income limitation potentially presents significant barriers to compliance with fair housing laws (particularly the requirement to provide reasonable accommodations to persons with disabilities) and with effectuating emergency transfer requests for survivors of domestic violence, dating violence, sexual assault, and stalking under the Violence Against Women Reauthorization Act of 2013's[1] housing protections.

The proposed regulation also poses potential challenges to the use of tax credits with other federal subsidies. Most other subsidy programs require some degree of floating unit designation, which is necessary when layering tax credits, since those programs have a higher income cap. Barring the redesignation of a unit's imputed income limitation will make it challenging, if not impossible, for the tax credit program and the other federal subsidies to work together. Therefore, this ban will likely threaten the preservation of existing subsidized housing, given that

[1] Pub. L. 113–4, 127 Stat. 154 (Mar. 7, 2013) (housing provisions codified at 34 U.S.C. § 12491).

many existing subsidized housing developments depend on the tax credit program to finance their maintenance and preservation efforts.

For these reasons, the IRS should revise its proposed regulation to permit floating unit income designations within AIT properties, consistent with the approach taken across other federal housing subsidy programs and within non-AIT tax credit properties.

This letter also highlights our broader concern that the AIT allows and, indeed, incentivizes abuse of the Section 8 Housing Choice Voucher program in situations where the total rent paid under the voucher exceeds a unit's tax credit rent limitation. In such instances, owners are very likely to rent their very low-income and extremely low-income tax credit units to voucher holders which in turn duplicates the subsidy provided by the lowest AIT rent restriction tiers, makes these very and extremely low-income tax credit units unavailable to unassisted prospective tenants, and it results in a windfall of rental income to the owner on top of the significant public subsidy already received through the tax credits themselves. The IRS should address this problem by requiring AIT owners to direct Voucher holders to units at higher restricted tiers in cases where rent paid under the voucher program exceeds the applicable tax credit rent limitation by more than a specified percentage. The IRS can develop other solutions, keeping in mind the prohibition on voucher-holder discrimination and the need for allocating agencies to supplement IRS mandates based on local conditions.

<u>Fair Housing</u>

1. <u>The Proposed Rule's Prohibition on Changes to Imputed Income Limitations Raises Fair Housing Concerns.</u>

The Fair Housing Act (FHA) prohibits housing discrimination against protected classes.[2] The proposed rule's changes regarding imputed income unit designations raises fair housing concerns by removing the flexibility that housing providers need to fulfill requests for reasonable accommodations, and to accommodate families with children. In turn, these proposed changes will likely lead to an increased number of fair housing complaints being filed against owners of AIT properties.

The FHA defines housing discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."[3] A reasonable accommodation in the form of a unit transfer might be necessary under the FHA if, for example, a tenant needs to move units within the property to be on a ground floor or closer to an elevator due to a mobility disability, or if the tenant needs a larger unit to accommodate a live-in aide or necessary medical equipment. Under the proposed regulation, the tenant will not be able to move to another unit where a unit with the same income designation as the tenant's current unit is unavailable and the tenant's income exceeds the income designation of any available unit(s). In such instances, by prohibiting an owner from changing a unit's imputed income designation[4], the

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[2] *See generally* 42 U.S.C. § 3601, *et seq*.
[3] 42 U.S.C. § 3604(f)(3)(B).
[4] *See* proposed § 1.42-19(b)(3)(i).

proposed rule denies the owner the flexibility it needs to effectuate crucial moves that would ensure that a tenant can remain in an affordable unit while still receiving the much needed (and legally mandated) reasonable accommodation. Thus, the proposed regulation could negatively impact tax credit tenants across the Country who need to move to another affordable unit due to a disability. Available data regarding the composition of LIHTC households across the country, while incomplete, suggest that an appreciable number of households served by the tax credit program has a household member with a disability.[5]

Similar concerns are raised when families with children, also a protected class under the FHA, add minor children to the household and need to move to a larger unit within the property as a result. Again, the family will not be able to move if a unit of equal designation is unavailable and where the family's income exceeds the imputed income limitation of the available unit(s). The proposed regulation could therefore disproportionately harm families with minor children – particularly larger families, when additional minor children join the household. Families should not lose their access to an affordable unit because their family size has increased due to the birth or adoption of additional minor children.

The Treasury Department has a statutory obligation to administer its programs and activities in a manner that affirmatively furthers the purposes of the FHA.[6] This includes the IRS and its administration of the tax credit program. Given the fair housing concerns raised by the proposed regulation, prohibiting owners from making subsequent changes to imputed income limitations without exception would likely be inconsistent with IRS' obligation to affirmatively further fair housing.

2. **The Proposed Rule's Prohibition on Changes to Imputed Income Limitations Also Raises Concerns Under Section 504 of the Rehabilitation Act.**

Many tax credit properties have layered subsidies, including Project-based Section 8 rental assistance. In addition to their FHA obligations, these properties also have obligations under Rehabilitation Act of 1973.[7] Section 504 of the Rehabilitation Act mandates that no otherwise qualified person, solely on the basis of their disability, shall be denied participation or subjected to discrimination in programs receiving federal financial assistance or under programs or activities conducted by executive agencies.[8]

In addition to making it more difficult for owners to transfer households who have a disability-related need for a vacant unit (as noted in the prior section), the proposed prohibition on changing a unit's imputed income designation will also prevent owners from moving persons

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[5] Peter Lawrence, Novogradac, "The LIHTC Continues to Serve Those Most in Need of Affordable Housing" (Mar. 26, 2018), https://www.novoco.com/notes-from-novogradac/lihtc-continues-serve-those-most-need-affordable-housing. This article notes that 9.5 percent of reported LIHTC households in 2015 identified at least one household member with a disability but acknowledges that "LIHTC properties may serve materially more persons with disabilities than indicated."
[6] 42 U.S.C. § 3608(d) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of [the Fair Housing Act]…").
[7] 29 U.S.C. § 701*, et seq.*
[8] *Id*. § 704(a).,

with disabilities who need an accessible unit at the property if the other unit is occupied by a household that does not need those features – as required by both Section 504 and the FHA. If the unit's imputed income designation cannot be "swapped" between the two households, this will result in situations where households who need another unit's accessible features cannot swap units with a household that has no need for them. This results in an inefficient use of accessible units and exacerbates the existing challenges for persons experiencing disabilities to access affordable, accessible units. An owner's failure to move a household to an accessible unit when needed to ensure equal access to the household member with a disability interferes with its ability to comply with both Section 504 of the Rehabilitation Act, as well as the FHA.

The Violence Against Woman Reauthorization Act of 2013

The Proposed Rule's Prohibition on Changes to Imputed Income Limitations Raises Concerns Under the Violence Against Women Reauthorization Act of 2013.

The Violence Against Women Reauthorization Act of 2013 (VAWA 2013) offers certain protections for survivors of domestic violence, dating violence, sexual assault, and stalking (VAWA crimes).[9] The tax credit program is a covered program under VAWA 2013,[10] meaning that owners of tax credit properties are subject to VAWA 2013's housing provisions. These provisions include the ability of survivors of VAWA crimes to request an emergency unit transfer if a survivor tenant "reasonably believes that the tenant is threatened with imminent harm from further violence if the tenant remains within the same dwelling unit assisted under a covered housing program"; or "in the case of a tenant who is a victim of sexual assault, the sexual assault occurred on the premises during the 90-day period preceding the request for transfer."[11]

Given the exigent danger they face, survivors of VAWA crimes often have to move quickly. And survivors may simply want to move to a different unit in the same complex (unknown to the perpetrator and/or unassociated with the trauma they experienced), rather than move to a completely different property, for reasons such as proximity to work or a child's school. But under the proposed regulation, owners would be unable to transfer the survivor within the property if no other units that the survivor qualifies for, or that the survivor can afford, are available. This puts both owners and survivors in a difficult position. Owners are denied the flexibility they need to comply with their VAWA obligations. Meanwhile, survivors are faced with the choice of staying in their unit where they feel unsafe while they wait for an external emergency transfer to another VAWA covered property[12] or giving up their affordable unit altogether. A survivor losing their access to affordable housing because of the violence committed against them contradicts the very core of VAWA 2013's housing protections.[13]

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[9] *See generally* 34 U.S.C. § 12491.
[10] 34 U.S.C. § 12491(a)(3)(J).
[11] *Id*. § 12491(e)(1)(B).
[12] This process is often long and difficult in large part because of the Treasury Department and IRS's failure to meaningfully implement VAWA 2013's housing provisions, particularly the statutory mandate that Treasury/IRS create a model emergency transfer plan. *See* 34 U.S.C. § 12491(e).
[13] 34 U.S.C. § 12491(b)(1) ("An applicant for or tenant of housing assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual

Furthermore, the denial of an emergency transfer may open an owner up to housing discrimination complaints, as policies that negatively impact survivors can constitute sex discrimination under the FHA.[14] Accordingly, the IRS must ensure that owners have the flexibility they need to meet the immediate housing and safety needs of survivors.

Importantly, the Treasury Department's and IRS's more general failure to issue guidance or regulations regarding VAWA 2013 has significantly hindered the implementation of VAWA 2013 protections for survivors who live in tax credit properties, leaving states to navigate VAWA compliance on their own,[15] or organizations such as the National Council on State Housing Agencies to fill in gaps.[16] Therefore, in addition to the forgoing comments, the Treasury/IRS should also take immediate steps to implement VAWA 2013's housing provisions in the tax credit program to give owners and housing finance agencies much-needed direction on implementing these important and life-saving protections for survivors.

Impact on the Rental Assistance Demonstration and Other Federal Subsidy Programs

The Proposed Rule Will Create Significant Challenges for Properties with Other Federal Subsidies and Impede Preservation.

Nearly every other major federal housing program has statutory or programmatic rules that require the floating of unit designations to some degree. These notably include Section 8, the HOME Investment Partnerships (HOME) program, the National Housing Trust Fund, Rural Development and tax-exempt bonds. The proposed ban on redesignating a unit's imputed income limitation is incompatible with the flexibility required under these programs, making program administration very difficult, if not impossible.

This incongruity could also greatly impede efforts to preserve existing federally subsidized housing. One of the primary benefits of the AIT was the ability to better align the tax credit program with other federal housing programs - such as Section 8, HOME, and Rural Development - that have income limitations up to 80 percent of AMI and thereby make the tax credit program a better tool for preserving federally subsidized housing. The AIT would have allowed tax credits to be used for preservation while significantly limiting the displacement of

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assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy.").

[14] *See e.g.,* Memorandum from Sara K. Pratt, Deputy Assistant Secretary for Enforcement and Programs, HUD Office of Fair Housing and Equal Opportunity (FHEO), to FHEO Office Directors and Regional Directors (Feb. 9, 2011); HUD, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016).

[15] *See generally* Rachel Blake and Karlo Ng, "Upstanders and Bystanders: The Role of State Housing Finance Agencies in Implementing the Violence Against Women Act in the Low-Income Housing Tax Credit Program," Journal of Affordable Housing & Community Development Law, Vol. 28, No. 2 (2019), https://www.americanbar.org/content/dam/aba/publications/journal_of_affordable_housing/Volume28_Number2/ah_journal_10_18_19.pdf.

[16] NCSHA, Recommended Practices in Housing Credit Administration, at 41-42 (Dec. 2017), https://www.ncsha.org/wp-content/uploads/2018/05/NCSHA-Recommended-Practices-in-Housing-Credit-Administration-Updated-Dec-2017.pdf

households whose incomes fall between 60 and 80 percent of AMI. Indeed, "LIHTC has become the most critical method of preserving and expanding the stock of affordable rental housing. From redeveloping public housing to preserving project-based rental assistance properties, from expanding rural rental housing to assisting with disaster recovery, LIHTC is leveraged to supplement and even take the place of other housing investments in order to continue to make affordable units available."[17] The proposed rule, however, by barring unit designation modifications, completely removes practical access to these benefits for the AIT minimum set-aside and makes preservation of these properties very challenging.

The impact of the proposed regulation on the Rental Assistance Demonstration program is particularly concerning.[18] In 2011, in an effort to preserve affordable housing and address the then $26 billion nationwide backlog of deferred maintenance in public housing properties, Congress enacted the Rental Assistance Demonstration (RAD).[19] RAD gives owners of public housing and four HUD "legacy" programs (Rental Supplement, Rental Assistance Payment, Section 8 Moderate Rehabilitation, and Section 8 202 with Project Rental Assistance Contracts) the option to enter into long term Project-Based Section 8 contracts that, together with additional capital resources, facilitate the financing of necessary repairs. Specifically, the RAD program enables public housing authorities ("PHAs") and owners to change the type of housing assistance provided at certain properties by converting these properties to the Project-Based Voucher (PBV) or project-based rental assistance programs (PBRA). Transitioning to PBVs or PBRA allows for the use of other private financing and tax credits serve as one of the primary sources of funding.[20]

Furthermore, RAD tenants must, at a minimum, retain all of the rights and protections afforded to tenants under the public housing program.[21] Congress intended to "ensure that the RAD program does not adversely impact tenants, and stipulates that all residents living in converted properties will maintain their existing rights."[22] Projects converting to RAD must also adhere to the following resident protection requirements, among others:

- No re-screening of existing tenants;
- No involuntary displacement of existing tenants;
- RAD conversions cannot result in a reduction in the total number of assisted units, except by a de minimis amount, defined as "no more than the greater of five percent

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[17] Corriane Payton Scally et al, THE URBAN INSTITUTE, *The Low-Income Housing Tax Credit: Past Achievements, Future Challenges*, p. 9-10 (July 2018), https://www.urban.org/sites/default/files/publication/98761/lithc_past_achievements_future_challenges_final_0.pdf
[18] NHLP also notes the different program examples provided by the National Council of State Housing Agencies in its December 17, 2020 comment letter. National Council of State Housing Agencies Letter to the Internal Revenue Service, (Dec. 17, 2020), p. 8-10, https://www.ncsha.org/wp-content/uploads/NCSHA-Comment-on-IRS-Average-Income-Test-Proposed-Rule-12.17.20.pdf
[19] Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 673 (Nov. 18, 2011).
[20] United States Government Accountability Office, RENTAL ASSISTANCE DEMONSTRATION, HUD Needs To Take *Action To Improve Metrics and Oversight*, p. 9, (Feb. 2018) https://www.gao.gov/assets/700/690210.pdf.
[21] *Id.*; S. Rpt. 112-83, 112th Cong., 1st Sess., 108 (Sept. 21, 2011).
[22] *Id.*

of the number of project or portfolio units under ACC immediately prior to conversion or five units," and under other limited circumstances.[23]

With the different income limits between the tax credit program and the projects converting to PBV or PBRA under the RAD program, some tenants in RAD projects will be over income for the tax credit program. While a PHA "may encourage an existing tenant who is over LIHTC income limits to move from the project by offering an [Housing Choice Voucher] from the PHA's own allocation…the PHA may not require the existing tenant to move. If the tenant wishes to remain, he or she has that right. In that case, the over-income tenant's unit would not be eligible for the LIHTC program."[24] There are also differences in eligibility if the tenant is a full-time student.[25] These programmatic differences make it imperative that the AIT be applied in the manner it was intended and permit unit modifications so that the RAD non-displacement rules can be followed while still enabling owners and PHAs to access the tax credit program resources necessary to finance the redevelopment and preservation. Otherwise, the credits on those units will have to be foregone if the RAD household exceeds the income cap.

Broader AIT Concerns

The Rule Should Restrict the Potential for Increased Financial Windfalls and Abuse of the Cross-Subsidy Purpose of the AIT Scheme Where Housing Assistance Is Involved.

Under the Section 8 Housing Choice Voucher program, voucher holders pay a portion of the contract rent (approved by the local public housing authority) based upon 30% of the household income, plus any amount by which the rent exceeds the "payment standard," i.e., the maximum subsidy amount that a housing authority will pay. The local public housing authority pays the remaining balance through a housing assistance payment. Where vouchers are used at tax credit properties, these assistance payments are not included in the calculation of restricted gross rents. Thus, in markets where the payment standard exceeds the applicable tax credit rent limitation, owners of AIT properties can lease their very low-income units (i.e., units designated at 20%-40% AMI) to voucher holders, allowing them to receive much more rental income than ordinarily allowed under the tax credit program while remaining program compliant. Although a rental income premium from a portion of the Voucher assistance payments is already available with non-AIT tax credit units, the amount of the premium grows as the AIT restricted rent levels drop. Not only do owners in this situation receive a windfall of rental income (on top of the public benefit already conferred through the tax credits they received), but it also creates an incentive for the owner to lease a disproportionate number of its very low-income units to voucher holders who, because of the assistance, can afford to rent units at the higher restricted tiers. This makes these very and extremely low-income units unavailable to prospective unassisted tenants who face even higher rent burdens because they lack any subsidy –

[23] *Id.;* Rental Assistance Demonstration – Final Implementation, HUD Notice PIH 2012-32 (HA)(REV-3) §§ 1.4, 1.6.C., 1.7.B. (Jan. 12, 2017).
[24] HUD, RAD Resource Desk, (last visited Dec. 21 2020) https://www.radresource.net/search_categories.cfm?xid=67
[25] *IRS Guide for Completing Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition (Audit Technique Guide, Rev. 01-2011),* ch. 4.

undercutting the basic purpose of the AIT cross-subsidy scheme, while duplicating the subsidy provided by the lowest AIT rent restriction tiers. We understand that the same manipulation risk may exist if the AIT scheme is used with tax credit units receiving project-based subsidies for less than all of the project's tax-credit-restricted units under most or all HUD and Rural Development project-based assistance programs.

The IRS should address this problem by requiring AIT owners to direct Voucher holders to units at higher restricted tiers in cases where the payment standard exceeds the applicable tax credit rent limitation by more than a specified percentage, e.g., 10% or 20%. Other solutions could also be developed; solutions that preserve access for voucher holders to those units (where the assistance is needed to pay the restricted rents) and balance an owner's statutory obligation not to discriminate against voucher holders while avoiding a financial windfall for owners at the expense of ensuring access for very low-income and extremely low-income unassisted tenants. Any solution should also reserve authority for credit allocating agencies to adopt policies to curb abuses as necessary based upon local conditions, including the interactions between tax credit restricted rent levels, the needs of unassisted very low-income tenants, and local Voucher payment standards.

We appreciate your consideration of our comments. If you have any questions, please do not hesitate to contact Marcos Segura, msegura@nhlp.org.

Sincerely,

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