AVERAGE INCOME TEST MINIMUM SET-ASIDE

This guidance is applicable to all properties for which the average income test (AIT) has been selected as the minimum set-aside in order to meet the requirements of IRC §42(g)(1). New Hampshire Housing may modify this, or any related policies and guidance, based on subsequently enacted legislation or guidance provided by regulatory agencies.

This guidance is not intended to provide, and should not be relied on, for any tax, legal or accounting advice. Owners should consult their own tax, legal, accounting, and other advisors prior to choosing AIT as their property's minimum set-aside election.

BACKGROUND

The Consolidated Appropriations Act of 2018 permanently established an average income test minimum set-aside for Low Income Housing Tax Credit (LIHTC) projects. Implementation of and compliance with the AIT election is defined in Treasury Regulation §1.42-19.

Projects meet the AIT if the LIHTC units are both rent-restricted and occupied by households whose incomes do not exceed the imputed income limitation designated by the owner. The average of the imputed income limitations designated under this set-aside shall not exceed 60% of area median income (AMI).

For purposes of the AIT, the designated imputed income limitations are:

- 20% of AMI
- 30% of AMI
- 40% of AMI
- 50% of AMI
- 60% of AMI
- 70% of AMI
- 80% of AMI

Important items to note include:

- An AIT Low-Income Unit is a unit that is rent restricted, satisfies the imputed income limitation designated by the owner, is part of a "qualified group of units," and otherwise satisfies the requirements of §42.
- A Qualified Group of Units includes units that must both satisfy the requirements to be an AIT Low-Income Unit and the average of the imputed income limitations of the units in the group does not exceed 60% of AMI.
    - "Qualified Group of Units" is used in two contexts:

1. To satisfy the minimum set-aside test.
2. To satisfy the applicable fraction determination. The same or a different "qualified group of units" may be used for the minimum set-aside and the applicable fraction.

- Calculations for meeting tests are based on the unit designation and are not based on the incomes of individual tenant households.
- Units included in any "qualified group of units" must be identified as part of the property's recordkeeping. See UNIT DESIGNATION AND REDESIGNATION below.

PROJECTS USING 4% TAX CREDITS WITH TAX-EXEMPT BOND FINANCING

IRC §142 remains unchanged. A project subject to §142 (Tax Exempt Bonds) must still meet either the 20/50 or 40/60 minimum set-aside test. The project may elect the AIT for LIHTC as long as the unit mix selected will also meet the minimum set-aside test for Tax-Exempt Bond compliance purposes.

UNIT DESIGNATION AND REDESIGNATION

- AMI designations may float between units within the project (i.e., a particular unit is not locked into a specific AMI level).
- NH Housing will consider the owner to have "designated" a unit based on the AMI level when it is:
    1. Recorded on the Tenant Income Certification (TIC) form in the tenant file; and
    2. Reported through HDS Next Gen, NH Housing's online reporting system, or other designated reporting system.
- If an owner makes additional low-income set-aside commitments as part of their LIHTC application, then those designations must be maintained for the duration of the Land Use Restriction Agreement (LURA).
- §1.42-19(d) allows owners to change a unit's income and rent designation in the following circumstances:
    - Federally permitted changes: If permission for the change is contained in IRS forms, instructions, or guidance published in the Internal Revenue Bulletin.
    - Housing credit agency permitted changes: For circumstances other than those expressly allowed under §1.42-19(d), owners may establish written policies and procedures regarding the circumstances under which they would redesignate an occupied unit to a different income and rent limit than currently designated. (One such circumstance may be to correct noncompliance with other housing program requirements.) Redesignations in compliance with those policies and procedures are permitted; NH Housing approval is not required.
    - Certain laws: A change in designation is permissible when the change is required or appropriate to enhance protections contained in the following, as amended:
        - The Americans with Disabilities Act of 1990 (ADA)
        - The Fair Housing Amendments Act of 1988 (FHA)
        - The Violence Against Women Act of 1994 (VAWA)
        - The Rehabilitation Act of 1973 (Section 504)
        - Any other state, federal, or local law or program that protects tenants as identified by the IRS or NH Housing.
    - Tenant movement: If a current income-qualified resident moves to a different unit in the same project.
    - Restoring compliance with average income requirements: When an event occurs that causes a previously qualifying group of units identified for either the minimum set-aside or the applicable fraction to no longer meet the description in §1.42-19(b)(2)(ii), redesignation may be allowed.

    - Market-rate, vacant, or low-income units may be used for redesignation, but, in the case of occupied units, the current tenant must qualify under the new, lower income designation.
- When redesignating an occupied unit, a new initial Tenant Income Certification (TIC) must be completed if the household's income on the original TIC would not qualify the household for the new designation. (For mixed-income properties, use the household income from the most recent annual recertification to make this determination).
- A new certification is not necessary for unit transfers within a building or within the same multiple-building project, where the unit designations will swap status.
    - If the designation changes, a Clarification Record is needed in the tenant file identifying the updated designation.
    - Unit redesignations for an occupied unit must be updated in HDS Next Gen as they occur and must be completed by the end of the taxable year.
    - Any change in designation of vacant units will be reported in HDS Next Gen with the next occupancy of the unit.

APPLICABLE FRACTION DETERMINATION

- The applicable fraction must be maintained in accordance with §1.42-19(b)(3)(ii).
- Each building must maintain its applicable fraction for the duration of the 15-year compliance period and the entire term of the LURA.

AVAILABLE UNIT RULE

Compliance with the AIT available unit rule is outlined in §1.42-15. For purposes of the AIT set-aside, a low-income unit will be considered "over-income" if the household's income is:

- More than 140% of the 60% AMI if the unit's designated income limit is 20%, 30%, 40%, 50% or 60%; or
- More than 140% of the unit's designated income if the unit's income designation is 70% or 80%.
- If multiple units are over-income at the same time, the owner need not comply with the AUR in any specific order. Renting any available comparable or smaller vacant unit to a qualified tenant maintains the status of all over-income units as low-income units.

ANNUAL REPORTING

In accordance with §1.42-19(c)(3)(iv), unit designations must be reported annually to NH Housing. Owner's will be considered in compliance with this requirement when complete tenant data for the previous calendar year is received through HDS Next Gen (or other reporting system) no later than the date designated in NH Housing's Annually required Certifications, Reports, and Submissions guidance, currently March 1st of each year.

Failure to submit data by the designated date will result in noncompliance with the project's minimum set-aside in accordance with §42(g)(1). An initial correction period of 30 days will be provided to bring the project back into compliance. NH Housing will follow established guidance for determination and reporting of noncompliance. See REPORTING OF COMPLIANCE below.

CORRECTING FAILURES TO COMPLY WITH PROCEDURAL REQUIREMENTS

§1.42-19(c)(4) allows for correction of any failure to comply with the requirements relating to recording, retention, and annual communications related to unit designations as follows:

- Discovery by Owner: If the owner discovers a failure to comply, the owner must submit a correction to NH Housing. Such a correction may be in the form of a revised qualified group of units to HDS Next Gen (or other reporting system). This submission must occur not more than 180 days after discovery of the failure.
- Discovery by NH Housing: If NH Housing discovers the failure to comply, NH Housing will provide prompt notification to the owner and the owner must submit a correction in accordance with NH Housing's Compliance Monitoring Requirements.
- On a case-by-case basis, NH Housing has the discretion to waive in writing any failure to comply with the requirements of §1.42-19(c)(1)-(3). Waiver requests must be submitted in writing to the property's assigned Asset Manager.

COMPLIANCE MONITORING

NH Housing will monitor for LIHTC compliance, including compliance with the AIT minimum set-aside, in accordance with Treasury Regulation §1.42-5 and NH Housing's LIHTC Compliance Monitoring Requirements.

REPORTING OF NONCOMPLIANCE

NH Housing is required to report to the IRS any noncompliance of which it becomes aware, including noncompliance with AIT requirements. The following noncompliance will be reported on IRS Form 8823.

- Household Income Above Income Limit upon Initial Occupancy:
  - Units must be occupied with households that have gross incomes less than or equal to a respective unit's income designation. If a household is not income eligible, noncompliance will be reported on Line 11a of Form 8823.
- Gross Rent(s) Exceed Tax Credit Limits
  - Gross rents charged for units must be less than or equal to the maximum rent limitation for the respective unit's rent designation. If the gross rent exceeds the maximum rent limitation, noncompliance will be reported on Line 11g of Form 8823.
    - NH Housing must determine compliance with the gross rent requirements both on a tax year basis and on a monthly basis.
    - Once a unit is determined to be out of compliance with the rent limits, the unit ceases to be a low-income unit for the remainder of the owner's tax year. A unit is back in compliance on the first day of the owner's next tax year if the rent charged on a monthly basis does not exceed the limit. An owner cannot avoid noncompliance by rebating excess rent or fees to the affected households.
- Failure to comply with the AIT minimum set-aside.
  - Noncompliance will be reported on Line 11f of Form 8823 if either of the following occurs:
    - It is determined that no Qualified Group of Units exists to meet the AIT minimum set-aside for any project.
    - Complete tenant data is not received through HDS Next Gen (or other reporting system) by the designated date or the established correction period.

Additional information and guidance regarding noncompliance can be found in the IRS Guide for Completing Form 8823 and §1.42-19.

COMPLIANCE WITH OTHER HOUSING PROGRAMS

Owners should be aware of compliance requirements for overlapping programs, including, but not limited to, the HOME Investment Partnerships Program, federal Housing Trust Fund, Tax Exempt Bond, and Section 8 programs. All laws, rules, regulations, and guidance for these programs must continue to be followed.

It is important to note that the 30% AMI income and rent levels for the LIHTC program (including AIT) differ from the Extremely Low-Income rent and income restrictions under the federal Housing Trust Fund and Section 8 programs.

LIABILITY

Compliance with the requirements of §42 of the Internal Revenue Code is the responsibility of the owner of the qualified low-income building for which the credit is allowable. NH Housing's obligation to monitor for compliance with the requirements of §42 of the Code does not make NH Housing liable for an owner's noncompliance.

In the event of a conflict between this guidance and §42 or applicable Treasury regulations, §42 and the applicable Treasury regulations will prevail.

APPLICABLE DATE

In general, the final regulations under §1.42-19 apply to taxable years beginning after December 31, 2022. For taxable years prior to the first taxable year to which the regulations apply, taxpayers may rely on a reasonable interpretation of the statute in implementing the AIT for taxable years to which the regulations do not apply. In other words, the provisions of the final regulation may be applied to AIT projects that were operating prior to 2023.