

MEMORANDUM

TO: Low Income Housing Tax Credit Development Applicants

FROM: Planning and Housing Development Division
Jennifer Henderson, Director

DATE: June 28, 2018

RE: Income Averaging Minimum Set-Aside Option

The Consolidated Appropriations Act of 2018 (Act), signed into law on March 23, 2018, included the creation of a third minimum set-aside option as an alternative to the existing elections of “40 at 60” and “20 at 50”. The new set-aside election is known as Income Averaging (IA) and it requires 40% of a project’s units to be income and rent restricted at or below 80% area median income (AMI) so long as the average LIHTC income and rent restriction does not exceed 60% AMI. Income and rent limit designations under IA are set in ten-percent increments from 20% to 80% AMI. IA is based on the AMI level assigned to the unit, and not on the actual income of the household residing in the unit. IA does not require a running average of actual household incomes to be calculated in order to demonstrate a project’s compliance with IA. AMI designations are allowed to float among units within the project. A particular unit is not locked into a specific AMI limit, however the total unit mix must be maintained. The agreed upon unit mix will be recorded in the Land Use Restrictive Agreement.

The Act allows for immediate implementation of IA on projects which have not yet received an IRS Form 8609 from the allocating agency, however the final responsibility of implementing IA is left at the discretion of the states. NDHFA has chosen to offer the IA option to any LIHTC projects which have not yet placed in service.

Requirements for Projects Electing the IA Minimum Set-Aside

The following are NDHFA’s IA requirements, some of which are more narrow than those allowed in federal regulation.

- IA is only permitted on projects with an applicable fraction of 100%. The project may not have units which are unrestricted or designated above 80% AMI. Manager units are not included in the applicable fraction and are permitted in IA developments.
- Allowable income and rent designations include 20% AMI, 30% AMI, 40% AMI, 50% AMI, 60% AMI, 70% AMI, and 80% AMI. The average AMI designation of all LIHTC units must be 60% or less.
- Projects consisting of multiple residential buildings must answer “Yes” to question 8b on IRS Form 8609, thereby designating the development as a multiple building project.
- Applicants electing IA must provide written acknowledgment to NDHFA that subsequent guidance from IRS may result in changes to the IA regulations and policies.

- For projects which have already been awarded a reservation of tax credits, but have not yet placed in service, the following conditions apply:
 - A switch to IA must not result in a material change to the project's score from the original application.
 - Formal written consent to the change to IA from all lenders and the tax credit equity investor must be provided to NDHFA.
 - An updated market study to support the new unit income mix is required unless the project is merely shifting some previously designated 60% AMI units to 70% or 80% AMI designations with no commensurate increase to the proposed rents.
 - A request to switch to IA is initiated by submission of a revised NDHFA Low Income Housing Tax Credit Application and Exhibit A spreadsheet set.

Applicability to Developments with 4% LIHTCs and Tax-Exempt Bonds

Federal regulations related to tax-exempt bonds, found in 26 United States Code Section 142, was not amended to include IA provisions. Therefore, for tax-exempt bond eligibility under Section 142, a project must still meet one of the existing minimum set-asides of "20 at 50" or "40 at 60". However, the project may also elect IA for purposes of the 4% LIHTC allocation. Therefore, an IA project having both 4% LIHTCs and tax-exempt bonds must meet the IA minimum set-aside as well as one of the "20 at 50" or "40 at 60" minimum set-asides in order to be compliant for both tax credit and bond programs.

Resyndication Applications

Properties seeking LIHTCs for resyndication of previously awarded tax credit properties are not eligible to select the IA set-aside unless the project has completed its extended use period and is no longer in the LIHTC program.

Compliance

Noncompliance with IA will have the same consequences as with other minimum set-aside elections. A development which has elected IA and fails to meet the IA standard (40% of the units at or below 80% AMI *and* average restriction at 60% AMI) at the end of the year is not a qualified low-income housing development for the year under Internal Revenue Code Section 42(g)(1)(C). Such noncompliance must be reported on IRS Form 8823, and the project could be subject to a loss of credits. NDHFA's LIHTC Program Compliance Manual is being revised to include IA, and will be released by the end of summer 2018.

Additional Guidance

As of the date of this memo, the IRS has issued no guidance on the implementation or administration of the IA option. NDHFA's interpretation of the law is based on significant research and discussion with our industry partners, including the National Council of State Housing Finance Agencies (NCSHA) and Novogradac and Company. Those considering IA in their projects are strongly encouraged to review the IA information provided on the NCSHA and Novogradac websites (www.ncsha.org and www.novoco.com), particularly Novogradac's recorded webinar on the subject, which can be found at: <https://www.novoco.com/training/webinars/novogradac-webinar-new-income-averaging-option-lihtc-properties>.

Questions on IA as it applies to projects in North Dakota can be directed to Bill Hourigan, LIHTC Program Administrator, at 701-328-8088 or wijhourigan@nd.gov.