

## *Average Income Guidelines*

### **Preface**

The guidelines contained in this Appendix are based on the Commission's best understanding of current IRS regulations concerning this federal election. These guidelines will change if the IRS issues additional guidance pertaining to Average Income. 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 Average Income as their project's federal election.

### **Background**

The Consolidated Appropriations Act of 2018 signed into law on March 23, 2018, established Average Income (AI) as a third federal election (minimum set-aside) for tax credit projects. This new election allows projects to designate units as low as 20%, and as high as 80% of Area Median Income (AMI), as long as the average AMI of all project units, as defined in line 8b on IRS Form 8609, is at or below 60% of AMI.

### **Projects Ineligible for Income Averaging**

- Any mixed income (i.e., project with both affordable and market-rate units) project
- Any currently existing project considering a tax credit resyndication (though AI can be chosen as a federal election to be effective **after** the initial Regulatory Agreement has expired)
- Any project that plans on designating each BIN (or subset of BINs) as its own project.

### **Statutory Requirements**

- An Owner electing AI must commit to having at least 40% of the units in the project affordable to eligible households whose income does not exceed 60% of AMI.
- AI applies to the designated income and rent levels of the units, not the incomes of individual resident households. The designations must be in 10% increments, up to 80% of AMI, i.e., 20% AMI, 30% AMI, 40% AMI, 50% AMI, 60% AMI, 70% AMI, or 80% AMI.
- AI applies to both income and rent limits. If a unit has a designated limit of 20% of AMI, the maximum rent level that may be charged to a household is the commensurate 20% of AMI rent limit.
- The minimum set-aside election is irrevocable once made on IRS Form 8609. Therefore, existing developments are not eligible to change their minimum set-aside/income election to Average Income.
- Average Income can be chosen as a federal election at resyndication, **but it is not effective until** the term of the first Regulatory Agreement has expired.

- The 30% of AMI income and rent level under the tax credit program for purposes of AI is **not the same** as the federal Extremely Low-Income and rent restriction under the National Housing Trust Fund. The tax credit 30% unit designation is calculated as a percentage of the 50% AMI.

### **Average Income Must Apply at the Project Level**

- Owners electing AI must choose this election for all sites at a multi-site project, regardless of how many Regulatory Agreements are executed.
- Owners electing AI as the minimum set-aside for projects with more than one building must elect to treat each building as part of one multiple building project by selecting “yes” on line 8b of the IRS Form 8609. Owners must also attach a list showing all buildings at the property within one project.
- Selecting “yes” under 8b on the 8609 and including all buildings as part of the same project means that AI applies across the entire project rather than building by building.
- If credits are claimed prior to the issuance of 8609s by the Commission, Owners must provide a memo from the tax advisor who completed the Owner’s tax return which confirms the elections that will be made on the 8609 forms submitted to the IRS (once they are issued by the Commission). Specifically, the memo must address how question 8b will be completed on each 8609 and what will be shown on the accompanying 8b election schedule.

### **Meeting the AI Election in the First Credit Year**

If a project elects Average Income, it must rent a minimum of 40% of the units to eligible households whose applicable income set-asides average at or below 60% of AMI. The Commission’s understanding is that any project meeting this requirement will have satisfied the minimum set-aside in the first year and the project will remain a qualified tax credit project.

### **Assigning AMI Set-Asides to Units**

- Owners may modify AMI assignments across the project as long as the project-wide AMI average is maintained at or below 60% of AMI.
- Unit designations may not be changed to a higher designation during a qualified household’s lease term unless the designation is made to correct previous noncompliance concerning the household’s income qualification.
- The Commission does not require that Owners reassign households to a different AMI based on household income at the time of recertification.
- If the Owner makes additional low income set-aside commitments as part of their tax credit application, then those units must be rented at the prescribed AMI for the duration of the regulatory period.

**Examples:**

The tax credit application for Greenview Apartments notes a total of 100 units at the project. The application commits to setting aside 50% of the units for households at or below 30% of AMI. During the regulatory period, Greenview Apartments must continuously rent 50 units (50% of the total units) at or below 30% of AMI. The remaining 50 units can be rented at any combination of set-asides that, when combined with all the 30% units, does not cause the project-wide set-aside average to exceed 60% of AMI.

The tax credit application for Happy Valley Apartments notes a total of 72 units at the project. The application commits to setting aside 40% of the units for households at or below 60% of AMI. During the regulatory period, Happy Valley Apartments must continuously rent 29 units (40% of the total units) at or below 60% of AMI. The remaining 50 units can be rented at any combination of set-asides that, when combined with all the 60% units, do not cause the project-wide set-aside average to exceed 60% of AMI.

**Unit Parity**

Income set-asides should be reasonably distributed among all buildings, bedroom sizes and unit types at an AI project. Assigning a specific income set-aside to all units of a particular bedroom size does not constitute equitable distribution and may constitute a Fair Housing violation.

**Maintaining the Project-Wide Average**

The Commission expects tax credit project Owners and their agents to monitor their AI projects continuously throughout the year to ensure that the project-wide set-aside average never exceeds 60% of AMI.

As with other federal elections, the Commission will perform the minimum set-aside test for AI as of 12/31 each year. If the project fails the minimum set-aside as of 12/31, the Commission will report this as noncompliance to the IRS.

**Compliance**

Owners must annually complete the Commission's Average Income Worksheet and submit it with each AI project's annual report materials. The worksheet is available in the Reports section of the Commission's website. The worksheet must note the set-asides assigned to each unit (as of 12/31 of the reporting year) and must result in a project-wide AMI average at or below 60%. If the project is a 4% tax credit development, the worksheet must also show that the project is meeting its minimum **bond** set-aside as well. The worksheet unit configuration is expected to match the unit data entered in the Web-based Annual Reporting System for the same reporting period.

The Owner must check the appropriate AI checkbox(es) in the Owner's Annual Certification form that is submitted with the Annual Report.

The Owner must use the tax credit income/rent limit set which applies to their property. Tax credit limits can be found on the Commission's website. HUD establishes tax credit income limits at 20%, 30%, 40%, 50%, 60%, 70% and 80% of AMI. The Commission then uses IRS-mandated formulas to calculate all commensurate rent limits at each set-aside level.

Note that the Commission retains the right to request more or different documentation from the Owner in order to satisfy our monitoring requirements and ensure a tax credit project is in compliance with both federal and state regulations.

### **Noncompliance**

If the Commission determines the project has one or more over-income households or households that have been overcharged rent, those instances of noncompliance will continue to be reported to the IRS under the Commission's current rules (see Chapter 7 of the Tax Credit Compliance Manual on our website).

In an AI project, any out-of-compliance household, **regardless of their AMI level**, is subject to reporting to the IRS. This is because all income set-asides in an AI project are considered federal set-asides; therefore, all income- or rent-related noncompliance is considered federal-level noncompliance.

Over-income households or rent overcharging may or may not impact the project-wide AMI average. The Commission will not report income- or rent-related noncompliance as a violation of the Federal Election **unless** such noncompliance causes a failure of the minimum set-aside test.

The Commission will work with owners to allow reasonable corrections to restore compliance with Average Income requirements.

If an issue is discovered by the owner and corrected within the reporting year the problem occurs, the owner can correct the issue to ensure that there is a qualifying group of units and that the Minimum Set-aside test is met by the end of the reporting year.

If an issue is not discovered and corrected within the taxable year that the problem occurs, any retroactive correction to designations must be made within 90 days of discovery of an issue by the owner or the Commission. If discovered by the owner, the issue and suggested correction must be promptly communicated to the Commission to benefit from this correction period.

### **Changes to these Guidelines**

These procedures are subject to change at any time by the Commission based on staff experience and/or Commissioner guidance. These procedures may also be suspended or amended based on additional IRS clarification, guidance or changes to regulations.