

## **New York State Homes & Community Renewal Average Income Minimum Set-Aside Guidance**

The Consolidated Appropriations Act of 2018 established average income (“AI”) as an additional minimum set-aside for federal Low-Income Housing Tax Credit developments (26 USC 42(g)(1)(C)). The AI minimum set-aside allows developments to provide greater income diversity by including units at higher (80% and/or 70% Area Median Income “AMI”) and lower (50%, 40%, 30%, and/or 20% AMI) income levels. The Internal Revenue Service released final regulations for the AI minimum set-aside on October 7, 2022 (26 CFR §1.42-19).

### **Eligibility and Goals**

To utilize the AI minimum set-aside, a designated group of at least 40 percent of the units in the project must be rent-restricted, low-income units, and the average of the imputed income designations of the units in such group cannot exceed 60% AMI.

HCR may approve use of the AI minimum set-aside election upon the applicant’s demonstration that utilizing AI:

- allows greater income diversity and deeper affordability by enabling higher-income units to offset lower-income units;
- reduces the amount of HCR resources needed; and/or,
- directly advances the State Housing Goals as articulated in HCR’s Term Sheets and Financing Guide for Tax-Exempt Bond and Subsidy Financing, HCR’s Multifamily 9% LIHTC Request for Proposals, or other HCR guidance.

HCR may approve use of New York State Low Income Housing Tax Credits (“SLIHC”) in AI projects which meet the above criteria. Further, the AI minimum set-aside election may be utilized in projects which include non-LIHTC units, subject to HCR approval.

### **Process and Requirements**

#### Timing

- 9% LIHTC Financed Projects:
  - Project applicants must commit to elect the AI minimum set-aside at the time of application, unless otherwise authorized by HCR.
  - Project applicants must provide evidence in the initial funding application that the project intends to make the AI election as set forth in the Letter of Interest/Intent provided by the tax credit investor to provide equity financing to the Project.

- 
- 4% LIHTC/Tax-Exempt Bond Financed Projects:
    - Project applicants must commit to elect the AI minimum set-aside prior to construction closing, unless otherwise authorized by HCR.
    - Project applicants must provide evidence that the project intends to make the AI election in the prospective credit investor's Letter of Interest/Intent to provide equity financing to the Project.

### Income Bands

The designated imputed income limits for units in AI projects must be set at 10% increments, ranging from 20% to 80% of AMI. While the AI minimum set-aside requires the average of the imputed income designations for the group of qualified units comprising at least 40% of the total project units not exceed 60% AMI, HCR recommends project applicants designate imputed incomes which average less, 55% - 58% AMI, for example, to provide a cushion to maintain compliance during the project's operating period.

### Distribution and Designation of Units

- Units at all designated income tiers must be reasonably and proportionally distributed throughout the project and across buildings in multi-building projects.
- Units of different designated income tiers must be equitably distributed among unit types, with the exception of integrated supportive housing projects.
- Units must have substantially similar features, amenities and finishes and must be roughly comparable in size by unit type, regardless of the designated income tier.
- Projects utilizing the AI minimum set-aside must agree to comply with AI minimum set-aside requirements in their HCR regulatory agreement.
- Imputed income designations for the specific units included in the group of qualified units for the AI minimum set-aside must be made by the project prior to the following development milestones:
  - New Construction or Substantial Rehabilitation Projects: placed in service date (i.e., temporary or permanent certificate of occupancy).
  - Acquisition/Rehabilitation Projects: prior to owner-selected placed in service date for the rehab portion of the project.
- Such designations must be set forth in the following HCR documents:
  - 9% LIHTC Financed Projects:  
Mixed Income Chart  
<https://hcr.ny.gov/low-income-housing-credit-program-9pctRFP>
  - 4% LIHTC/Tax-Exempt Bond Financed Projects:  
Portfolio Buildings Unit Template  
<https://hcr.ny.gov/asset-management>
- Projects may not change an imputed unit income designation in an existing AI project without prior HCR authorization. Projects are encouraged to remarket or otherwise locate qualified prospective tenants prior to requesting consent for redesignation.

- 
- Projects requesting HCR consent for a change to an imputed income designation of a unit in an existing project subject to the AI minimum set-aside must contact their Statewide Asset Management Unit representative to request HCR approval of any such change. Projects will be required to document the rationale (e.g., financial hardship) for any requested change and approval will be at HCR's sole discretion.
  - HCR reserves the right to establish further guidance on the authorization for a project to make unit income designation changes, at its discretion.

### **Additional Considerations**

As project applicants consider whether to use the AI minimum set-aside, they should be aware of the potential compliance risks associated with this election. Once the minimum set-aside election is made in Part Two of the IRS Form 8609, it is irrevocable. Failure to satisfy the AI minimum set-aside throughout the initial 15-year compliance period may result in HCR's issuance of an IRS Form 8823 and IRS recapture of the project's LIHTC. Adherence to compliance requirements, such as the next available unit rule and maintaining the correct applicable fraction, may be more challenging than in a LIHTC transaction without AI. This is especially true for mixed-income developments that include market rate units. Furthermore, the IRS has issued temporary regulations regarding taxpayer AI reporting and record keeping requirements, which are not yet final.

HCR reserves the right to amend this guidance at any time, impose additional requirements, or require additional justification to utilize the AI minimum set-aside.