

# Appropriation Act of 2018 Could Benefit Some Affordable Housing Credit Projects

**By: Douglas J. Antonio<sup>1</sup>**

Recently enacted legislation provides new opportunities for real estate projects that benefit from the low-income housing tax credit (“LIHTC”). The Consolidated Appropriations Act of 2018 (the “Appropriations Act”) was signed into law on March 23, 2018. The Appropriations Act includes two changes to Section 42 of the Internal Revenue Code of 1986, as amended (the “Code”), relating to the LIHTC. The enacted provisions had been, in some form, part of the proposed Affordable Housing Credit Improvement Act (the “AHCIA”).<sup>2</sup> First, the Appropriations Act increases LIHTC allocations by 12.5 percent starting in 2018 and lasting until 2021 (the AHCIA would have made a permanent 50 percent increase).<sup>3</sup> The second LIHTC change under the Appropriations Act allows a third way to qualify as a “qualified low-income project”<sup>4</sup> by adding an income averaging election. The new option expands the opportunity for certain projects to qualify for the LIHTC and is the focus of this article.

## **Qualified Low-Income Projects**

Prior to this change, a project had meet one of two tests to be a Qualified Low-Income Project eligible for LIHTC’s. The first test (the “20-50 Test”) is met if 20% or more of the residential units in the project are both rent-restricted and occupied by individuals whose income is 50% or less of area median gross income (“AMI”). The second test (the “40-60 Test”) is met if 40% or more of the residential units in the project are both rent-restricted and occupied by individuals whose income is 60% or less of AMI. The Appropriations Act creates a third option (the “New Test”) that allows certain apartments in a LIHTC property to be available to residents earning up to 80 percent of AMI, so long as the development-wide average is 60 percent or less. The taxpayer must elect the qualification method to apply to a project (the “Election”), and the New Test is available for Elections made after March 23, 2018.

## **The New Test**

The New Test allows the owner to designate the imputed income limitation. The imputed income limitation is determined in 10-percentage-point increments, and may be designated as 20,

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<sup>2</sup> Most of the provisions of the AHCIA that were not included in the Appropriations Act. Unfortunately, one of the most important provisions of AHCIA that would have increased the credit rate for tax-exempt bond generated LIHTC transactions from a floating rate, that as of April 2018 is 3.28%, to 4.0% was also not included in the Appropriations Act.

<sup>3</sup> While this is a welcome change, it does not make up for the loss in the value of the credits due to corporate tax rate reductions under the 2017 Tax Cuts and Jobs Act was enacted in December.

<sup>4</sup> Code Section 42(g).

30, 40, 50, 60, 70, or 80 percent. The average of the imputed income limitations designated must not exceed 60 percent of AMI. This seems to provide greater flexibility in potentially renting to higher income tenants than previously permitted. The catch may be that to designate a unit at say 80% of AMI, there would need to be two units designated at 50% of AMI or one at 40% of AMI.

In projects already designated at lower AMI thresholds under the 20-50 Test or the 40-60 Test, there would appear to be no reason from the owner's stand point not to designate some higher income units and make an Election under the New Test. It remains to be seen how state housing credit agencies ("Allocating Agencies") will view such elections, especially where the allocation plans seem to incentivize lower and lower AMI thresholds to get points and allocations, thereby increasing the amount of the available LIHTC's for the project. Bond generated credits may not have such impediments, but must still satisfy the allocation plan, which at this time has no provision for the New Test. In theory, however, the New Test could apply to any project that has not yet made the Election.

### **Election of the New Test**

The Election is made on the Form 8609, after the project is placed in service and cost certification is completed. The Allocating Agencies, however seem to require that the developer designate what Election will be made at the time it applies for credits. It is unclear whether the Allocating Agencies will be flexible in allowing a change in these designations made on the LIHTC application and generally incorporation in a recorded Extended Use Agreement ("EUA"). In appropriate cases, perhaps the Allocating Agencies would allow amendments of the EUAs and LIHTC applications prior to making an Election. However, once an Election is made, it is irrevocable.

Since the Code does not require the Election to be made until filing of the Forms 8609s, it would appear possible for projects that have not been placed in service to use the New Test. Allocating Agencies would have to cooperate in making this change because the Allocating Agency may consider the Election fixed at the time of award of credits in the case of allocated credits or with the filing of the EUA, that would need to be amended. Where a good case can be made that the New Test would truly benefit the project, the Allocating Agencies might be willing to cooperate in allowing the change. Otherwise, the New Test would be relegated to newly closed (for Bond deals) or newly allocated credits. The Allocating Agencies are going to need to develop policies as to when the New Test would be appropriate and how, it might fit into the existing Allocation Plans, Allocating Agencies should embrace the New Test and allow it to benefit projects that have not yet made the Election.

### **Prompt Action Needed**

If Allocating Agencies act quickly and favorable to the New Test, the legislation could result in much needed assistance to many projects that have not yet been placed in service.