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# average income compliance monitoring policy for housing tax credit developments

## CHFA Asset Management

Effective January 1, 2023

This policy outlines Colorado Housing and Finance Authority's (CHFA's) Average Income Compliance Monitoring Policy (the "Policy") for Housing Tax Credit [HTC; also known as Low Income Housing Tax Credit (LIHTC)] projects that have elected the Average Income test as the minimum set-aside test option. CHFA's policy is based on the applicable federal statute [IRC Section 42(g)(1)(C)], federal regulations (26 CFR Sections 1.42-15, -19, and -19T, as updated 10.12.2022), and various guidance published by the Internal Revenue Service.

### Average Income (AI) minimum set-aside election

The Consolidated Appropriations Act of 2018 signed into law on 03.23.2018, established the Average Income (AI) test as a third minimum set-aside election to the IRC Section 42. Under this election, the owner must identify a group of low-income units that constitutes 40 percent or more of the residential units in the project and for which the average of the income designations of all of the units in the group does not exceed 60 percent AMI.

The AI option enables Housing Tax Credit projects to offer deeper levels of affordability and serve a broader range of low- and moderate-income households, including those earning as much as 80 percent of Area Median Income (AMI). Owners must select rent and income levels in 10 percent increments beginning at 20 percent AMI. The allowable income/rent designation levels are 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, and 80 percent AMI.

### Eligible projects

For projects in Colorado, the AI minimum set-aside may be elected with 9 percent federal Housing Tax Credit, 4 percent federal Housing Tax Credit, and 4 percent federal/state Housing Tax Credit applications only if 100 percent of residential units in the project are designated as low-income units. Refer to [CHFA's QAP](#) for further guidance.

### Multiple building election

Owners of projects with multiple buildings that elect AI as the minimum set aside are required to do so for each building in the project.

Owners must elect to treat each building as part of a multiple-building project on line 8b of the IRS Form 8609.

### Unit parity

Refer to [CHFA's QAP](#) for further guidance on CHFA's requirements regarding equitable distribution of unit and affordability mix.

## Compliance monitoring timeframe

CHFA's preliminary monitoring of AI compliance will begin with the Initial Inspection of the project.

Formal monitoring of AI compliance will begin with the first year of the Credit Period and will continue through the end of the Extended Use Period.

## Effective date and implementation date

The effective date of the IRS final and temporary average income test regulations is 10.12.2022. The temporary regulations at 26 CFR § 1.42-19T regarding procedures for identifying, recording, and reporting qualified groups apply to taxable years beginning after 12.31.2022.

CHFA is applying this policy retroactively to AI projects with taxable years beginning prior to 12.31.2022, beginning with calendar year 2022. For all such projects, qualified groups as of 12.31.2022 must be reported to CHFA by the annual reporting deadline as explained below.

## Qualified group of units: average income test and applicable fractions

For each taxable year in the Extended Use Period, the owner must identify and report to CHFA two separate qualified groups of units: one for the Average Income set-aside and one for the applicable fraction determination. Both groups must have an average imputed income designation that does not exceed 60 percent AMI. The average is **not** based on the actual income of households occupying the units.

Below is a basic summary of the two qualified group definitions in 26 CFR § 1.42-19. Owners should ensure their identified qualified groups meet the exact definitions as specified in the regulation.

### **Average Income test qualified group definition**

- A group of low-income units that constitutes 40 percent or more of the residential units in the project and for which:
  - each unit in the group is
    - correctly rent-restricted,
    - occupied by a household that is income-qualified, and
    - otherwise meets all other requirements under IRC Section 42 and in the regulations under Section 42, and
  - the average of the income designations of all of the units in the group does not exceed 60 percent AMI.

### **Applicable fraction qualified group definition**

- Includes the same residential units counted in the Average Income test qualified group for the project.
- The owner may include additional units in the applicable fraction qualified group for the project provided that the resulting group has an average imputed income designation that does not exceed 60 percent AMI.

- Note:** Although the applicable fraction qualified group for a multi-building project must have an Average Income designation of 60 percent AMI, individual buildings are **not** required to have an Average Income designation that averages 60 percent or less. Each individual building must simply meet its required applicable fraction, as specified in the Land Use Restriction Agreement, using the units that are in that particular building and that are also in the applicable fraction qualified group of units for the overall project.

## Unit designations

### Floating designations

After each new Housing Tax Credit unit is qualified as a low-income unit and the initial AMI designation is made by the owner, CHFA permits AMI designations to float over time in certain circumstances, as explained below.

### Recording designations

CHFA requires owners to record unit designations both in tenant files and online in CHFA’s NextGen occupancy data reporting system as follows. Note that each unit’s designations must be identical for income and rent. For example, if the income designation is 40 percent AMI, the rent designation must also be 40 percent AMI.

Designation Type	Tenant File Documentation	NextGen
Newly occupied unit	<ul style="list-style-type: none"> <li>Move-in or Initial Tenant Income Certification</li> </ul>	Move-in or Initial Certification
Household transfers units	<ul style="list-style-type: none"> <li>Unit Transfer Tenant Income Certification</li> </ul>	Unit Transfer Certification
Redesignated unit permitted under 26 CFR § 1.42-19(d)	<ul style="list-style-type: none"> <li>Interim Tenant Income Certification</li> <li>Clarification record explaining the specific reason for the redesignation</li> </ul>	Interim Certification

### Timing of designations

Before a unit is first occupied as a low-income unit, the owner must designate the unit's designation.

For an occupied unit that is subject to a permitted change in designation, the owner must record the unit's changed designation not later than the end of the taxable year in which the change occurs.

However, as specified under 26 CFR § 1.42-19(c)(4) and described further below, on a case-by-case basis, CHFA may waive a failure to comply with the regulation’s identification, notification, and recording requirements up to 180 days after discovery of the failure, whether the failure is discovered by the owner or CHFA. Therefore, CHFA may agree to allow owners to make permitted changes to unit designations **later** than the end of the taxable year in which the change applies up to 180 days after discovery of the failure.

## Changing designations

As specified under 26 CFR § 1.42-19(d), the owner may change the designation of a unit only in the following circumstances and subject to the timing of designations requirements described above and the reporting requirements described below.

- Federally permitted changes. Permission for the change is contained in IRS forms, instructions, or guidance published in the Internal Revenue Bulletin.
- CHFA-permitted changes. As of this policy effective date, CHFA has specified one condition for a permitted change not identified in the regulation. If CHFA identifies other conditions for a permitted change that apply to all projects, they will be incorporated into this policy.
  - Other federal housing programs under which the project operates that require redesignation of a unit or household to comply with the rules of that program. Examples of such programs include: Section 8, HOME, USDA Rural Development, National Housing Trust Fund, and CDBG.
- Certain laws. The change in designation is required or appropriate to enhance protections contained in the following, as amended.
  - The Americans with Disabilities Act of 1990
  - The Fair Housing Amendments Act of 1988
  - The Violence Against Women Act of 1994
  - The Rehabilitation Act of 1973
  - Any other state, federal, or local law or program that protects tenants and that is identified as a federally permitted change or a CHFA-permitted change.
- Tenant movement/Unit transfers.
  - If a current income-qualified tenant moves to a different unit in the project, the unit to which the tenant moves has its income designation changed to the limitation of the unit from which the tenant is moving and the vacated unit takes on the prior limitation of the tenant's new unit.
  - In other words, the two units swap designations.
- Restoring compliance with Average Income requirements.
  - If one or more units lose low-income status or if there is a change in the designation of some unit **and** if either event would cause a previously qualifying group of units to have an average designation that exceeds 60 percent AMI, then the owner may reduce the existing designation of one or more other units in the project to restore compliance with the Average Income requirement.
  - The rule in this paragraph may be applied to vacant or low-income units.
  - When changing an occupied unit to a lower AMI designation, the current household income must be verified to be at or below the applicable income limit for the new, lower AMI designation, and gross rent must be reduced to be at or below the applicable maximum rent for the new AMI designation. An interim Tenant Income Certification is required at the time of unit redesignation.

## Reporting requirements

### **Annual Owner Certification**

Owners must complete CHFA's LIHTC Owner Certification of Continuing Program Compliance, annually by February 15th for the previous calendar year, which will include a certification of the owner's compliance with the AI minimum set-aside and CHFA's Average Income Policy each year.

### **Annual qualified group of units and Average Income designation reporting**

Annually by February 15th, owners must submit a spreadsheet using CHFA's Average Income Qualified Groups Report to report the following as of December 31st of the previous calendar year.

- Average Income Test qualified group of units
- Applicable Fraction qualified group of units
- Units that were redesignated during the year and the reason for the redesignation
- Owner's average income designation calculation for each qualified group

### **Unit occupancy data reporting - NextGen**

Occupancy and demographic data for all Housing Tax Credit projects must be submitted utilizing CHFA's online NextGen system, as soon as the project begins leasing up.

NextGen data must be maintained monthly thereafter.

Annually by February 15, all occupancy records through December 31 of the previous calendar year must be entered and finalized in NextGen.

### **Waiver for failure to comply with procedural requirements**

As specified under 26 CFR § 1.42-19(c)(4), on a case-by-case basis, CHFA may waive in writing any failure to comply with these reporting requirements up to 180 days after discovery of the failure, whether by the owner or CHFA. If the owner discovers any noncompliance with the regulation's unit identification, agency notification, and recording requirements and wishes to request such a waiver, the owner must report the failure to CHFA within 30 days after discovery of it. Regardless of whether the owner or CHFA discovers the failure, CHFA's determination will depend in part on the owner satisfactorily correcting the procedural noncompliance by the cure date set according to CHFA's noncompliance policy.

## Compliance testing

Each year CHFA will use NextGen occupancy data along with the owner's certification and report to test for compliance with the AI minimum set-aside as of December 31 of the previous year.

Testing for compliance with the AI minimum set-aside will also be conducted as part of each Housing Tax Credit program compliance review by CHFA.

Note: AI projects with tax-exempt bonds must meet both the minimum set-aside elected in the CHFA Bond Regulatory Agreement and the AI minimum set-aside.

## Rent and income limits

CHFA uses the Multifamily Tax Subsidy Program (MTSP) methodology to calculate rent and income limits for the 20 percent, 70 percent, and 80 percent AI AMI designations. CHFA's calculation may not align with the IRS and/or HUD methodology until formal federal guidance is issued, which could impact household qualification and monitoring.

## Annual resident recertifications

AI projects are required to follow CHFA's existing annual recertification policy for 100 percent low-income projects. See [CHFA's Multifamily Program Compliance Manual](#), Section 7.4.

## Training

AI-specific compliance training for all onsite and corporate staff involved in compliance and tenant file preparation as well as members of the ownership and management teams must be completed before CHFA will issue IRS Form(s) 8609. This training can be delivered by a third-party compliance consultant that is acceptable to CHFA. Training certificates must be submitted to CHFA prior to issuance of IRS Form(s) 8609. Refer to [CHFA's QAP](#) for additional guidance.

After IRS Form(s) 8609 have been issued, additional AI compliance training will be required upon any change in the compliance staff, owner, and/or management agent, and upon the request of CHFA as necessary.

## Noncompliance

Noncompliance with the AI election will be treated in the same manner as the other minimum set-aside elections and reported on IRS Form 8823. Failure to meet the AI election for the first year of the Credit Period will result in the permanent loss of the entire Housing Tax Credit allocation. Failure to maintain the AI election for any year after the first year of the Credit Period will result in no allowable Housing Tax Credits for that tax year.

For developments with state Affordable Housing Tax Credits, whenever CHFA files an IRS Form 8823, CHFA will forward the 8823 filing to the Colorado Department of Revenue.

Uncorrected noncompliance with CHFA's requirements that is not reportable via IRS Form 8823 will be addressed according to CHFA's noncompliance policy as outlined in [CHFA's Multifamily Program Compliance Manual](#), Chapter 17, and may result in a "Not in Good Standing" with CHFA Programs Designation.

## Disclaimer

This policy is not intended to provide, and should not be relied on for, tax, legal, or accounting advice. Any project considering the AI election should do so in consultation with its tax, legal, and accounting advisors.

## For more information

For additional information, including CHFA's Average Income Policy and Frequently Asked Questions (FAQs), please visit [www.chfainfo.com/rental-housing/housing-credit/average-income](http://www.chfainfo.com/rental-housing/housing-credit/average-income).

## References

- 26 CFR §§ 1.42-15, 1.42-19, and 1.42-19T
  - Treasury regulations regarding available unit rule and average income test
- 87 FR 61489
  - Federal Register notice publishing and explaining final and temporary Average Income Test regulations
- IRC § 42(g)(1)(C)
  - Internal Revenue Code regarding average income option for minimum set-aside test