

New York City's Department of Housing Preservation and Development

New York City Housing Development Corporation

Income Averaging Policy

As of June 25, 2019

The Federal government passed the Consolidated Appropriations Act of 2018 (the Act) on March 23, 2018. The Act modified the Minimum Set Aside elections and created a third election, Income Averaging. Below are the Federal requirements as well as the HPD/HDC policy regarding Income Averaging for Low Income Housing Tax Credit project (both 9% and 4%).

The Federal statute requirements:

1. The election is irrevocable once made on the Form 8609. Therefore, projects that have had their 8609s issued prior to March 23, 2018 are not eligible to change their minimum set aside election to Income Averaging. Projects with more than one building (as defined by the IRS) must elect to treat all of the buildings as part of a multiple building project on the Form 8609 (check Yes on line 8b of the current form).
2. Under Internal Revenue Code (IRC) Section 42(g)(1)(C)(ii)(I) owners designate the income and rent limitations of each unit. The income designations must average 60% AMI or less for the project. *(HPD generally underwrites slightly under 60% AMI as determined by funding programs.)*
3. The designated levels may be only 20%, 30%, 40%, 50%, 60%, 70% and/or 80% of AMI. *(HPD / HDC projects should refer to their funding program's term sheets to determine allowable AMI levels.)*
4. Under IRC Section 42 a property in New York City is qualified when 25% or more of the total units are rent restricted and occupied by households at or below the limitation designated for a particular unit.
5. IRC Section 42(g)(2)(D)(iii) contains distinct Next Available Unit Rule for Income Averaging. *(Owners should consult with compliance experts on how it will work with market rate units and with the next available unit rule under IRC Section 142(d) for 4% projects.)*
6. The 30% AMI level under the Housing Credit is not the same as the Extremely Low Income restriction under the National Housing Trust Fund. *(If a project has National Housing Trust Fund funding and LIHTC, note that the 30% AMI levels are different and the LIHTC AMI levels will be used for application purposes.)*

HPD / HDC Income Averaging policy and requirements:

1. Floating vs non-floating units: Applicants are required to designate units at a specific AMI by unit type at the time of application. An exception may be made for occupied preservation projects by the relevant HPD/HDC program and must be in writing. Please consult with program staff.
2. Applicant's request to use Income Averaging is subject to HPD/HDC's discretion. Requests will be evaluated based applicant's compliance and management history, detailed plan on how the proposed Project will be managed, and alignment with other City policy goals. If denied, the application must reflect the 20/50 or 25/60 Minimum Set Aside election.
3. If use of Income Averaging is approved, applicants must also submit the following documentation with the initial application (required for all 9% and 4% applications unless noted):
 - a. Letter from the applicant indicating the Income Averaging election, acknowledging the election is irrevocable and detailing a plan regarding long term compliance of the project.
 - b. Letter of support acknowledging Income Averaging selection from all lenders (excluding HDC).
 - c. Letter of support acknowledging Income Averaging selection from the investor/syndicator.
 - d. Letter of support acknowledging Income Averaging selection from the relevant HPD/HDC program. 9% project only. (Standalone 9% projects must discuss with HPD's Tax Credit Unit prior to submitting an application.)
4. Income Averaging may be used for resyndication projects on a case by case basis. Determination will be made by the relevant HPD/HDC program.
5. Projects must adhere to all Fair Housing and all other applicable laws.
6. The IRS makes the ultimate determination if a project is in compliance with Income Averaging. HPD is applying its interpretation of the Act but it is the IRS that makes the final determination. Applicants must consult with their legal counsel and investor counsel.
7. This policy is subject to change if the IRS issues future guidance on Income Averaging.