# Dissecting the IRS' Form 8823 Guide & Other Examination Activity

**NCSHA's Winter Conference**
**January 11, 2009**
**Washington, DC**

# Agenda

- Utility Allowances
- Rents
- Income (Re)Certifications
- Household Transfers
- Additional Credit Allocations
- General Public Use
- Examination Activities

# Chapter 18: Utility Allowances

- RHS assisted buildings or RHS tenant assistance, follow RHS rules
- HUD regulated buildings, use HUD utlity allowance
- HUD rental assistance, use PHA utility allowance
- If none of the above apply (beginning in July 2008), use……

- **PHA**
- **Utility Company**
- **State or Local Housing Agency**
- **HUD’s Utility Model**
- **Energy Consumption Model**

- **Notice 2009-44, Clarification of Regulation**

**Utility costs paid by a tenant based on actual consumption in a sub-metered rent-restricted unit as described herein are treated as paid directly by the tenant for purposes of IRC §42(g)(2)(B)(ii)**

- **Allowance is building-based rule**
- **Review allowances annually**
- **New allowance must be used to determine gross rent due 90 days after the change**
- **May use different methods for different utilities**
- **May change method used for calculating an allowance**
- **Buildings owner pays all costs incurred to obtain estimate**

- **Record Retention… “must retain any consumption estimates and supporting data…keep such permanent books as are sufficient…[to] enable the IRS to determine whether or not the taxpayer is liable for tax…books and records shall be kept at all times available for inspection by the IRS and retained so long as the contents may become material…”**

# Comments & Questions

# Chapter 11: Rents

## In Compliance

- The rent does not exceed the gross rent limitations on a monthly basis

## Out of compliance:

- The rent exceeds the rent limit on a monthly basis
- The rent exceeds the rent limit on a tax year basis
- Impermissible fees are charged

## Fees:

- Provision of services other than housing - Treas. Reg. §1.42-11
- Refundable Fees (e.g., security deposits)
- Fees for failure to perform according the lease (e.g., late fees)
- Application Fees (reimbursement)

## Problematic Fees

- Condition of Occupancy
- Use of tenant facilities included in Eligible Basis
- Impermissible Fees
- Fee for providing medical care rather than assisted living - Treas. Reg. §1.42-9(b)

## Back in Compliance:

- Once a unit is out of the compliance, the unit ceases to be a low-income unit for the remainder of the owner's tax year
- An owner cannot avoid disallowance of the credit by rebating excess rent or fees to the affected tenants
- A unit is back in compliance on the first day of the owner's next taxable year if the rent charged on a monthly basis does not exceed the limit

# Comments & Questions

# Chapters 4 & 5: Income (Re)Certifications

**Income limits dependent on:**

- **where the project is located (metropolitan, nonmetropolitan, rural, GO-Zone)**
- **when determined (AMGI, MTSP, HERA Special, GO-Zone)**

# Chapters 4 & 5: Income (Re)Certifications

**Income definitions changed:**

- **Based on historic earnings, current earnings (extrapolated), anticipated changes**
- **Method used is a matter of <u>JUDGEMENT</u> applied to the <u>FACTS</u> to compute BEST <u>ESTIMATE</u> of future earning**

# Chapters 4 & 5: Income (Re)Certifications

## Treatment of Income:

- Military Basic Housing Allowances
- Families of deployed military personnel
- Office in the home
- Annuities
- Educational Scholarships and Grants

## Annual income recertifications:

- No longer required for 100% LIHC projects no longer required
- Income eligibility determined based on initial income certification, at the time of the initial certification with consideration of due diligence
- State agencies impose recertification requirements
- Owners and investors impose recertifications

- **Impacts procedures when increasing the household's size and transferring a household to a different unit**
- **Impacts the application of the (Next) AUR**
- **Refer to LIHC Newsletter #32**

# Comments & Questions

# Chapter 4: Household Transfers

- Within a building or between buildings in a project
- Mixed-use or 100% LIHC project
- Character of units “swap”
- Household continues to be qualified without recertification or new certification

# Situations

- **Lease-Ups: Swapping between LIHC unit and never occupied unit during the first year**
- **Additional Qualified Basis: Swapping between LIHC unit and never occupied unit aft the end of the first year**
- **Move-Out for Rehabilitation: Tenant retains low-income status (no certifications required) but unit is no longer in service and is not considered suitable for occupancy (not reportable)**

# Comments & Questions

# Chapter 4:
# Additional Credit Allocations

**Situation:**

- **Same owner receives subsequent allocation of credit to rehabilitate an existing LIHC building**
- **New owner receives allocation of credit based on acquisition and rehabilitation of an existing LIHC building**
- **After the end of the 15-year compliance period**
- **Project subject to extended use agreement**

# Conclusion:

- **Income-qualified households (extended use agreement) are qualified households for any subsequent allocation of IRC §42 credit**
- **If same owner receives allocation, vacant low-income units that are suitable for occupancy qualify as low-income unit, and the project is subject to the Vacant Unit Rule**
- **If new owner receives allocation of credit, treat the same as the acquisition/rehabilitation of a building that has never received an allocation of credit, except existing low-income tenants are protected**

# Comments & Questions

# Chapter 12: General Public Use

- **IRC §42(i)(9) Clarification: A project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants**
  **(1) with special needs,**
  **(2) who are members of a specific group under a Federal or state program or policy that supports housing for such group, or**
  **(3) are involved in artistic or literary activities.**

- **Marketing:**
  1. **Reasonable attempts to make vacant units available to the public for rent**
  2. **Advertising methods designed to be accessible to all prospective tenants**
  3. **Reasonable attempts will vary based on factors unique to the low-income project**
  4. **Rev. Rul. 2004-82, Q&A #9**

## Qualifying Student Households

**Question: Is it acceptable to rent low-income units exclusively to student households if the 100% full-time student households meet one of the exceptions under IRC §42(i)(3)(D)?**

**Answer: No. Although compliant with the rules for 100% full-time student households, the General Public Use Rule is violated when renting units exclusively to student households.**

# Comments & Questions

# Examination Activities

- Updating the LIHC audit technique guide
- Examination activities

# Audit Technique Guide

- Companion to Form 8823 Guide, but does not duplicate information
- Intended audience is IRS examiners
- First draft completed by Sept. 30, 2010
- First review: Chief Counsel and examiners
- Second review: State agencies and “industry”

## Outline (sections)

- Introduction
- “Project” Issues
- Eligible Basis
- Applicable Fraction
- Qualified Basis and Applicable Fraction
- Computing LIHC Adjustments and Reports
- Penalties
- Auditing Investors
- References (citations)
- Glossary of Terms

# Examination Activities

## Minimum Audit Requirements

- Eligible Basis
- Physical Condition
- Tenant Eligibility
- Rent Restrictions
- Identified Issues (Forms 8823)

# Taxpayers Examined

- Partnerships owning LIHC projects
- Investors
- “Syndicated” Investment Groups
- Syndicators
- Project Developers

# Comments & Questions

# Thanks!

Thanks