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May 1, 2015

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2015-27)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2015-27 Recommendations for 2015-2016 Guidance Priority Plan

Thank you for this opportunity to submit recommendations for the 2015-2016 Guidance Priority Plan on behalf of the National Affordable Housing Management Association (NAHMA). NAHMA members manage and provide quality affordable housing to more than two million Americans. The membership of NAHMA is comprised of the presidents and executives of property management companies, owners of affordable rental housing, public and national housing agencies, and providers of supplies and services to the affordable housing industry. In addition, NAHMA serves as the national voice in Washington for 19 regional, state and local affordable housing management associations ([AHMAs](#)) nationwide. NAHMA's comments will focus on important matters related to the management of Section 42 Low Income Housing Tax Credit (LIHTC) properties.

Utility Allowances (UA) Submetering

On August 7, 2012, the Internal Revenue Service (IRS) – Treasury Department issued the “Utility Allowances Submetering Notice of Proposed Rulemaking and Notice of Public Hearing” [REG–136491–09], RIN 1545–BI91. NAHMA respectfully requests that IRS-Treasury add finalization of this rule, with certain changes, to its 2015-2016 Guidance Priority Plan.

Before releasing the final rule, NAHMA strongly urges IRS-Treasury to revise its interpretation of State housing agencies' authority to disapprove UA estimation methods permitted under current policies. Under the section, “Summary of Comments on Notice 2009-44 and Explanation of Provisions,” the August 7 Notice states:

“A commentator asked whether State housing agencies are allowed to disapprove of certain methods for determining utility allowances listed in § 1.42–10(b)(4)(ii). Existing rules address the role of the State housing agencies in determining utility allowances. Thus, depending on the particular method under § 1.42-10(b)(4)(ii), State housing agencies may require certain information before a method can be used, or they may disapprove of a method.”

NAHMA stands by the position articulated by nine national organizations which represent property owners and managers, developers and lenders who participate in the LIHTC program. The joint industry comments, submitted on October 4, 2012, stated:

“We disagree with the general implication of this language that State housing agencies may arbitrarily choose to disapprove any method described in the regulation....”

“As written, the language in the August 7, 2012, proposed rule would give State housing agencies authority to ignore the intent of the existing regulation, which is to recognize accurate estimates that encourage energy efficiency and are based on reliable methods that are easily verifiable. We are concerned that agencies may impose less accurate methods for calculating utility allowances on an arbitrary basis. We recommend that the IRS direct State housing agencies to review the data and information provided by project sponsors and make a determination based on the facts of the individual project submission. Applicants for LIHTC credits should be encouraged to engage with the State housing agency to determine what, if any, issues or concerns the approving agency may have.”

NAHMA urges IRS-Treasury to issue a final rule that reaffirms LIHTC property owners' options for selecting an appropriate UA estimation method available under current IRS policies.

Section 42 Low Income Housing Tax Credit Buildings Damaged by Casualty Events

NAHMA respectfully requests that IRS-Treasury include harmonization of casualty loss policies for LIHTC properties on its 2015-2016 Guidance Priority Plan.

Under current policies, casualties are treated differently depending on whether they are the result of a presidentially declared disaster. As described in Revenue Procedure 2007-54, a taxpayer can continue to claim the credits for casualty events in presidentially declared disaster areas. Low Income Housing Tax Credits will not be subject to recapture or loss of credit if the building's qualified basis is restored within a reasonable restoration period—which may not exceed 24 months after the end of the calendar year in which the president issued a major disaster declaration for the area where the building is located. However, properties that suffer casualty losses outside of these declared disaster areas operate under different terms. Internal Revenue Code 42(j)(4)(E) provides relief from recapture of previously earned credits if the building is restored by reconstruction or replacement within a reasonable time. However, it does not provide authority for claiming the credit during the time that the building is being restored.

As stated by the IRS, the credit is determined at the close of the taxable year under IRC §42(c)(1). Credit is determined on a monthly basis only for the first year of the credit period under IRC §42(f)(2)(A), and for additions to qualified basis under IRC §42(f)(3)(B). Otherwise, there is no authority to disallowing credits on a monthly basis. Owners of buildings in presidentially declared disaster areas will not lose credits if the building is not placed back in service by the end of the year. However, owners of buildings not in a declared disaster area will lose credits for the year if their units are not back online by December 31. This means an owner could have a unit that was in compliance for the entire year, but have a fire in December that is not restored by December 31, and the owner would not be eligible to take credits for the entire year. If this is not done on December 31, then credits cannot be claimed for the entire year, no matter if the units were in compliance every other day of the calendar year.

NAHMA urges IRS-Treasury to apply the same casualty loss policies across the board. Properties should be able to continue to take the credits during the restoration period, regardless of whether or not the property is in a presidentially declared disaster area. It is reasonable, however, for IRS to

establish criteria for owners to demonstrate they took prompt action to begin the restoration process following the casualty event when the loss occurs outside of a presidentially declared disaster area.

Student Occupancy Rule

The student occupancy rules for the LIHTC program are intended to ensure that qualified families are not displaced by college students who need affordable off-campus housing. While NAHMA supports the goal of these restrictions, we strongly believe the LIHTC student occupancy policies require comprehensive modernization. Under the current laws, owners and managers of LIHTC properties have had to deny tenancy to applicants who are full time students—even if the applicant is 50 years old and is employed. Similarly, LIHTC residents risk the loss of their housing if they become a full-time student household while living on the property. Once again, this policy adversely affects independent adults who are the sole member of the household. Ideally, NAHMA would like Treasury-IRS to pursue reasonable statutory changes that preserve the intent of the student occupancy restrictions, but allow otherwise qualified independent adults to pursue greater economic opportunities through education.

To manage mixed-finance properties, housing providers must walk a very fine line between satisfying IRS student occupancy restrictions to maintain the LIHTCs and satisfying the U.S. Department of Housing and Urban Development's (HUD) Project-Based Section 8 program requirements. There is a clear statutory conflict between the Project-Based Section 8 and LIHTC student occupancy restrictions, and NAHMA understands that the action necessary to definitively solve this problem will require a statutory change. In the meantime, Treasury-IRS and HUD should release official guidance in the form of a memorandum of understanding (MOU) which instructs taxpayers, state agencies, HUD staff and housing providers about which student occupancy policies prevail when there is a conflict on mixed-finance properties.

The conflicts between these laws are stark. The LIHTC program prohibits full-time student households from living in a low-income unit unless they satisfy one of the statutory exemptions. Only narrow exceptions exist under Internal Revenue Code Section 42(i)(3)(D) for families who are:

- Receiving Temporary Assistance to Needy Families (TANF);
- Enrolled in a federal, state or local job training program;
- Students leaving foster care;
- Single parents and their children, provided that such parents are not dependents of another individual and such children are not dependents of another individual except for their other parent; or
- Married full time students who file a joint return.

In comparison, HUD's policy establishes criteria which generally allow an adult resident to pursue an education as long as he or she meets the Section 8 program and income qualifications. If the resident is a tax dependent of his or her parents, the parents must also be income-qualified for Section 8. No distinction is made between part-time or full time students for HUD's occupancy requirements. The rules for Section 8 assistance, found at 24 CFR 5.612 and reiterated in the Consolidated Appropriations Act, 2014, apply to both Project-Based Section 8 and vouchers:

“SEC. 215. (a) No assistance shall be provided under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) to any individual who—
(1) is enrolled as a student at an institution of higher education (as defined under section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002));

- (2) is under 24 years of age;
- (3) is not a veteran;
- (4) is unmarried;
- (5) does not have a dependent child;
- (6) is not a person with disabilities, as such term is defined in section 3(b)(3)(E) of the United States Housing Act of 1937 (42 U.S.C. 1437a(b)(3)(E)) and was not receiving assistance under such section 8 as of November 30, 2005; and
- (7) is not otherwise individually eligible, or has parents who, individually or jointly, are not eligible to receive assistance under section 8 of the United States Housing Act of 1937 (42 USC 1437f).

(b) For purposes of determining the eligibility of a person to receive assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f), any financial assistance (in excess of amounts received for tuition and any other required fees and charges) that an individual receives under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.), from private sources, or an institution of higher education (as defined under the Higher Education Act of 1965 (20 U.S.C. 1002)), shall be considered income to that individual, except for a person over the age of 23 with dependent children.”

As LIHTCs are used to preserve and recapitalize older HUD-assisted properties, housing providers are concerned that residents who are full-time students may be displaced under the LIHTC rules. For example, if a single adult who is the sole member of the household is a full-time student living in a project-based Section 8 property that is awarded LIHTCs, the credits are jeopardized if the tenant continues to live in the building. Our members have reported that some state housing agencies press owners to pursue eviction if the tenant does not move voluntarily. In contrast, HUD maintains that the owner has no good cause to evict the tenant if he / she satisfies the requirements of its student rule.

In fact, HUD recently released a draft document for comment that acknowledged the conflict between the LIHTC and Project-Based Section 8 student policies on mixed-financed properties and asserted that HUD’s rules prevail when a Section 8 contract is in place. HUD is rewriting its Multifamily Asset Management Handbook (HUD Handbook 4350.1, Multifamily Housing Asset Management & Servicing). The current version of Draft Chapter 12.10, Tax Credits and Subsidy Layering, for inclusion in the revised Asset Management Handbook, states:

“Section 8 policy has certain restrictions prohibiting full-time students from receiving subsidy. These restrictions are not identical to the LIHTC student restrictions. Additionally, the “exceptions” under the Section 8 program for certain students do not match the LIHTC program. **Owners and Management Agents should be advised to adhere to the Section 8 student rule policy if there is a HAP contract in place;** otherwise, the Owner could be denying assistance to otherwise eligible potential residents.” (Emphasis added.)

NAHMA agrees that independent adults should not be discouraged from pursuing educational opportunities that will improve their financial situations and allow them to eventually rent conventional apartments or buy homes. Nevertheless, we are gravely concerned that HUD’s proposed language effectively advises owners and managers to disregard the statutory LIHTC requirements. Violating the LIHTC student rule jeopardizes the very tax credits necessary to preserve and recapitalize HUD-assisted properties. While we are hopeful that this draft language will be revised or removed prior to release, it demonstrates the need for joint guidance from HUD and Treasury-IRS.

Both short-term and long-term measures are necessary to help housing providers navigate the conflicting student requirements. In the short term, NAHMA recommends that Treasury-IRS and HUD release an MOU to provide guidance on treatment of full-time student residents and applicants at mixed-financed properties. In the long-term, NAHMA recommends that Treasury-IRS, HUD and the U.S. Department of Agriculture-Rural Development utilize the Rental Policy Working Group and stakeholders to propose a uniform student occupancy policy for all federal multifamily housing programs. This policy should permit occupancy by full-time student households in LIHTC, HUD and RD properties, provided that the full-time students are independent adults who are otherwise income-qualified and who meet the program requirements.

Conclusion

Thank you again for the opportunity to offer these recommendations for the Guidance Priority List.

Sincerely,

A handwritten signature in black ink, appearing to read "Kris Cook".

Kris Cook, CAE
Executive Director