

## Key Housing Credit Compliance Issues

December 5, 2012



## Utility Allowances

Presented by Grace Robertson  
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Internal Revenue Service



## Law

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### IRC §42(g)(2)(B)(ii)

(B) Gross rent. For purposes of subparagraph (A), gross rent--

(i) does not include any payment under section 8...

(ii) includes any utility allowance determined by the Secretary after taking into account such determinations under section 8 of the United States Housing Act of 1937 [42 USCS § 1437f],

(iii) does not include any fee for a supportive service..., and

(iv) does not include any rental payment to the owner...to the extent such owner pays an equivalent amount to the Farmers' Home Administration.

## Treas. Reg §1.42-10

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- RHS-assisted buildings
- RHS-assisted tenants
- HUD-regulated buildings
- Tenants with HUD rental assistance
- “Other”

- 1. Applicable PHA utility allowance**
- 2. Utility company estimate**
- 3. Housing agency estimate**
- 4. HUD Utility Schedule Model**
- 5. Energy Consumption Model**

- Implementing changes
  - Annual review
  - Record retention
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## Treas. Reg §1.42-10(a)

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### **As amended in 2008**

(a) Inclusion of utility allowances in gross rent. If the cost of any utility (other than telephone, cable television, or Internet) for a residential rental unit **is paid directly by the tenant(s), and not by or through the owner of the building**, the gross rent for that unit includes the applicable utility allowance determined under this section. This section only applies for purposes of determining gross rent under section 42(g)(2)(B)(ii) as to rent-restricted units.

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## What if utilities are submetered?

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1. Measures tenant's actual consumption
  2. Tenants pay for utilities actually used
  3. Payment is made to building owner
  4. Overall utility consumption billed to the owner based on "master" meter
  5. Owner uses unit-based meters to measure consumption and bill tenant for actual consumption
  6. Owner maintains records and tenants receive documentation of consumption
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## Notice 2009-44

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Utility costs paid by a tenant based on actual consumption in a sub-metered rent-restricted unit are **treated as paid directly by the tenant**, and not by or through the owner of the building.

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- ▶ The utility rates charged to tenants must be limited to the utility company rates incurred by the building owners (or their agents);
  - ▶ If tenants are charged a **reasonable** fee for the administrative costs of sub-metering, then the fee will not be considered gross rent. The fee must not exceed an aggregate amount per unit of 5 dollars per month unless State law provides otherwise; and
  - ▶ If sewerage costs are based on the tenants' actual water consumption and the sewerage costs are on a combined water and sewerage bill, then the tenants' sewerage costs are also treated as paid directly by the tenants.
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## Notice 2009-44

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- ▶ Notice can be relied on for any utility allowances effective no earlier than the first day of the building owner's taxable year beginning on or after July 29, 2008.
  - ▶ The utility allowance regulations will be amended to incorporate the guidance provided in the notice.
  - ▶ Treasury Department and IRS invited taxpayers to submit written comments on issues relating to this notice.
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- ▶

## Proposed Changes to Regulation §1.42-10



## Treas. Reg §1.42-10(a)

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### **As Proposed (August 2012)**

**(a) Inclusion of utility allowances in gross rent. If the cost of any utility (other than telephone, cable television, or Internet) for a residential rental unit is paid directly by the tenant(s), and not by or through the owner of the building, the gross rent for that unit includes the applicable utility allowance determined under this section. For purposes of the preceding sentence, if the cost of a particular utility for a residential unit is paid pursuant to an actual-consumption submetering arrangement within the meaning of paragraph (e)(1) of this section, then the cost is treated as being paid directly by the tenant(s) and not by or through the owner of the building. This section only applies for purposes of determining gross rent under section 42(g)(2)(B)(ii) as to rent-restricted units.**

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## New Treas. Reg. §1.42-10(e)

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- ▶ (e) Actual-consumption submetering arrangements – (1) Definition. For purposes of this section, an actual-consumption submetering arrangement for a utility in a residential rental unit possesses all of the following attributes:
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- (i) The building owner (or its agent or other party acting on behalf of the building owner) pays the utility provider for the particular utility consumed by the tenants in the unit;
  - (ii) The tenants in the unit are billed for, and pay the owner (or its agent or other party acting on behalf of the building owner) for, the unit's consumption of the particular utility
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- (iii) The billed amount reflects the unit's actual consumption of the particular utility. In the case of sewerage charges, however, if the unit's sewerage charges are combined on the bill with water charges and the sewerage charges are determined based on the actual water consumption of the unit, then the bill is treated as reflecting the actual sewerage consumption of the unit; and
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(iv) The utility rate charged to the tenants of the unit does not exceed the utility company rate incurred by the building owner for that particular utility.

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▶ (e)(2) Special Rules – (i) Fees. If the owner charges a unit’s tenants an administrative fee for the owner’s actual monthly costs of administering an actual-consumption submetering arrangement, then the fee is not considered gross rent for purposes of IRC §42(g)(2).

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The preceding sentence, however, does not apply unless the fee is computed in the same manner for every unit receiving the same submetered utility service, nor does it apply to any amount by which the aggregate monthly fee or fees for all of the unit's utilities under one or more actual-consumption submetering arrangements exceeds the lesser of:

- (A) Five dollars per month; or
- (B) The owner's **actual monthly costs** paid or incurred for administering the arrangement.



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- ▶ (e)(2)(ii) Actual costs. For purposes of paragraph (e)(2)(i)(B) of this section, the owner's actual costs of administering an actual-consumption submetering arrangement include amounts paid to employees, independent contractors, and service providers for administering the submetering arrangement and allocable costs that relate to submetering equipment and that are not included in the building's eligible basis under IRC §42(d).



Explanation: The goal of these restrictions is to disallow any exclusion from gross rent beyond the extent to which a fee represents a reasonable reimbursement to the owner for the owner's otherwise unreimbursed actual cost for administering the submetering arrangement .....the proposed regulations merely require inclusion in gross rent for any amounts charged in excess of the lesser of five dollars or actual administrative costs



Treas. Reg. §1.42-10(b)(4)(ii)

As amended in 2008

....If none of the rules of paragraph (b)(1), (2), (3) and (4)(i) of this section apply to any rent-restricted units in a building, the appropriate utility allowance for the units is the applicable PHA utility allowance.....



Treas. Reg. §1.42-10(b)(4)(ii)

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As proposed in 2012

....If none of the rules of paragraph (b)(1), (b)(2), (b)(3) and (b)(4)(i) of this section apply to determine the appropriate utility allowance for a [any] rent-restricted unit[s] [in a building], then the appropriate utility allowance for the unit[s] is the applicable PHA utility allowance.....

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Treas. Reg. §1.42-10(b)(4)(ii)

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As proposed in 2012

....If none of the rules of paragraph (b)(1), (b)(2), (b)(3) and (b)(4)(i) of this section apply to determine the appropriate utility allowance for a rent-restricted unit, then the appropriate utility allowance for the unit is the applicable PHA utility allowance.....

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## Summary of Comments

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- ▶ The proposed regulations do NOT permit utility allowances for RUBS, which allocates a property's utility bill among its units using a measurement other than actual consumption by the units.
  - ▶ An owner must retain any utility consumption estimates and supporting data as part of the taxpayer's records.
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- ▶

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- ▶ Owners not wishing to expend the costs to obtain a permissible utility allowance can use PHA utility allowances for units not subject to other criteria.
  - ▶ Depending on the particular utility allowance method, state housing agencies may require certain information before a method can be used, or they may disapprove the use of a method.
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# Questions?

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## Contact Information

- ▶ E-mail [Grace.F.Robertson@irs.gov](mailto:Grace.F.Robertson@irs.gov)
  - ▶ Phone (202) 283-2516
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**Thank You &  
Happy Holidays!**



**Owner's Year End  
Certification**

*Karen J. Newsome, Vice President-Compliance  
WinnResidential*



## Year End Reporting to State Monitoring Agencies

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- Although state monitoring agencies' requirements of owners vary, their monitoring protocols generally include requiring owners to provide data in the form of an event history report for each LIHTC unit, certifying annually that they are in compliance with Section 42, systematic review of tenant files, physical inspection of the units and a desk audit of all applicable site-specific tax credit information.
  - In this segment, we are going to review the questions typically asked on the Annual Owner's Certification and discuss their relevance to LIHTC management company professionals.
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## Certification Statement

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The undersigned \_\_\_\_\_ (the "Owner"), hereby certifies to the enter name of state housing credit agency ("the Authority") that:

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## Statements to be Certified

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- ▶ I. The project met the minimum requirements of:  
(check one)

- 20 - 50 test under Section 42(g)(1)(A) of the Code  
 40 - 60 test under Section 42(g)(1)(B) of the Code

And, if applicable to the project: (check)

- 15 - 40 test for "deep rent-skewed" projects under  
Section 42(g)(4) and 142(d)(4)(B) of the Code;



## Statements to be Certified

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- ▶ II. There has been **no change in the applicable fraction** (as defined in Section 42(c)(1)(B)) of any building in the project, or that there was a change and description of the change;

**NO CHANGE      CHANGE**

If "**Change**" list the applicable fraction to be reported to the IRS for each building in the project for the certification year on page 3.



### Statements to be Certified

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- ▶ III. The owner has received an annual income certification from each low-income tenant, and documentation to support that certification; or, in the case of a tenant receiving Section 8 housing assistance payments, the statement from a public housing authority described in paragraph (b)(1)(vii) of Section 1.42-5;

**YES**

**NO**



### Statements to be Certified

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- ▶ IV. Each low-income unit in the project has been rent-restricted under Section 42(g)(2);

**YES**

**NO**



## Statements to be Certified

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- ▶ V. All units in the project were for use by the general public (as defined in Section 1.42-9), including the requirement that no finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, occurred for the project. A finding of discrimination includes an adverse final decision by the Secretary of the Department of Housing and Urban Development (HUD), 24 CFR 180.680, an adverse final decision by a substantially equivalent state or local fair housing agency, 42 U.S.C. 3616a(a)(1), or an adverse judgment from a federal court;

**YES**

**NO**

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## Statements to be Certified

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- ▶ VI. The buildings and low-income units in the project were suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards), and the State or local government unit responsible for making local health, safety, or building code inspections did not issue a violation report for any building or low-income unit in the project. If a violation report or notice was issued by the governmental unit, the owner must attach a statement summarizing the violation report or notice or a copy of the violation report or notice to the annual certification submitted to the Authority under paragraph (c)(1) of Section 1.42-5. In addition, the owner must state whether the violation has been corrected;

**YES**

**NO**

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## Statements to be Certified

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- ▶ VII. There was no change in the eligible basis (as defined in Section 42(d)) of any building in the project, or if there was a change, the nature of the change (e.g., a common area has become commercial space, or a fee is now charged for a tenant facility formerly provided without charge);

**NO CHANGE**

**CHANGE**

If “**Change**”, state nature of the change on page 3.



## Statements to be Certified

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- ▶ VIII. All tenant facilities included in the eligible basis under Section 42(d) of any building in the project, such as swimming pools, other recreational facilities, and parking areas, were provided on a comparable basis without charge to all tenants in the building;

**YES**

**NO**



## Statements to be Certified

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- ▶ IX. If a low-income unit in the project has been vacant during the year, reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income;

**YES**

**NO**



## Statements to be Certified

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- ▶ X. If the income of tenants of a low-income unit in the building increased above the limit allowed in Section 42(g)(2)(D)(ii), the next available unit of comparable or smaller size in the building was or will be rented to tenants having a qualifying income;

**YES**

**NO**



## Statements to be Certified

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- ▶ XI. An extended low-income housing commitment as described in Section 42(h)(6) was in effect (for buildings subject to Section 7108(c)(1) of the Omnibus Budget Reconciliation Act of 1989, 103 Stat. 2106, 2308-2311), including the requirement under Section 42(h)(6)(B)(iv) that an owner cannot refuse to lease a unit in the project to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f (for buildings subject to Section 13142(b)(4) of the Omnibus Budget Reconciliation Act of 1993, 107 Stat. 312, 438-439);

**YES                      NO                      N/A**

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## Statements to be Certified

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- ▶ XIII.a            The owner received its credit allocation from the portion of the state ceiling set-aside for a project involving “qualified non-profit organizations” under Section 42 (h)(5) of the code.

**YES                      NO (if NO, skip to question XIV)**

- ▶ XIII.b If the answer to XIII.a was yes, is that participation ongoing?

**YES                      NO**

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## Statements to be Certified

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XIV. There has been no change in the ownership or management of the project;

NO CHANGE

CHANGE

If "Change", complete page 3 detailing the changes in ownership or management of the project.



## Statements to be Certified

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- ▶ XV. The Owner complies with Internal Revenue Service ("IRS") Revenue Ruling 2004-82, which at Question and Answer 5, states that Internal Revenue Code ("IRC") Section 42(h)(6)(B)(i) requires that "an extended low-income housing commitment include a prohibition during the extended use period against (1) the eviction or termination of tenancy (other than for good cause) of an existing tenant of any low-income unit (no-cause eviction protection) and (2) any increase in the gross rent with respect to the unit not otherwise permitted under § 42.

**YES**

**NO**



## Signature Page

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**Note: Failure to complete this form in its entirety will result in noncompliance with program requirements. In addition, any individual other than an owner or general partner of the project is not permitted to sign this form, unless permitted by the state agency.**



## Statements to be Certified

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The project is other wise in compliance with the Code, including any Treasury Regulations, the application State Allocation Plan, and all other applicable laws, rules and regulations. The Certification and any attachments are made UNDER PENALTY OF PERJURY.



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***Thank you for your attention***

*We hope that has added to or reinforced your knowledge of the  
Owner's Certification Statements.*

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## Disaster Relief

SHCM Webinar Series  
Key Housing Credit Compliance Issues

Gregory Proctor  
Windsor Compliance



## Disaster Relief

- The Internal Revenue Service has suspended certain requirements under Section 42 for low-income housing credit projects to provide emergency housing relief needed as a result of the devastation caused by Hurricane Sandy and associated storms.

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Slide 49

## Background

- The President issued major disaster declarations for several states because of the devastation caused by Hurricane Sandy.
- The Federal Emergency Management Agency (FEMA) designated jurisdictions in several states for Individual Assistance.
- The Service has determined that state housing agencies may provide approval to project owners in their respective states to provide temporary emergency housing for displaced individuals in accordance with this notice.

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Slide 50

## Background

- For purposes of this notice, the term "displaced individual" means an individual who resided in a jurisdiction designated for Individual Assistance and who has been displaced because his or her residence was destroyed or damaged as a result of the devastation caused by Hurricane Sandy.
- The Service has also determined that the projects to which this approval may be given may be located in any state, regardless of whether a major disaster declaration with Individual Assistance has been issued for that state.

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## Suspension of Income Limits

- The Service has determined that it is appropriate to temporarily suspend certain income limitation requirements for certain qualified low-income housing projects.
- The suspension will apply to low-income housing projects which are approved by the Agency with jurisdiction over the project and in which vacant units are rented to displaced individuals.
- The applicable Agency will determine the appropriate period of temporary housing for each project, not to extend beyond November 30, 2013.

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## 1<sup>st</sup> Year of Credit Period

- A displaced individual temporarily occupying a unit during the first year of the credit period under will be deemed a qualified low-income tenant for purposes of determining the project's qualified basis and for meeting the project's Minimum Set Aside as elected by the project owner.
- After the end of the temporary housing period established by the applicable Agency, a displaced individual will no longer be deemed a qualified low-income tenant.

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## Vacant Units after 1<sup>st</sup> Year

- During the temporary housing period established by the applicable Agency, the status of a vacant unit (that is, market-rate or low-income or never previously occupied) after the first year of the credit period that becomes temporarily occupied by a displaced individual remains the same as the unit's status before the displaced individual moves in.
- Displaced individuals temporarily occupying vacant units will not be treated as low-income tenants.

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## Vacant Units after 1<sup>st</sup> Year

- However, even if it houses a displaced individual, a low-income or market rate unit that was vacant before the effective date of this notice will continue to be treated as a vacant low-income or market rate unit.
- Similarly, a unit that was never previously occupied before the effective date of this notice will continue to be treated as a unit that has never been previously occupied even if it houses a displaced individual.

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## Vacant Units after 1<sup>st</sup> Year

- Thus, the fact that a vacant unit becomes occupied by a displaced individual will not affect the building's applicable fraction for purposes of determining the building's qualified basis, nor will it affect the Minimum Set Aside.
- If the income of occupants in low-income units exceeds 140 percent of the applicable income limitation, the temporary occupancy of a unit by a displaced individual will not cause application of the available unit rule.

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## Vacant Units after 1<sup>st</sup> Year

- In addition, the project owner is not required during the temporary housing period to make attempts to rent to low-income individuals the low-income units that house displaced individuals.

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## Non-Transient Rule

- The non-transient use requirement of Section 42 does not apply to any unit providing temporary housing to a displaced individual during the temporary housing period determined by the applicable Agency.

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## Other Requirements

- All other rules and requirements will continue to apply during the temporary housing period established by the applicable Agency.
- After the end of the temporary housing period, the applicable income limitations, the available unit rule, the non transient requirement, and the requirement to make reasonable attempts to rent vacant units to low-income individuals shall resume.

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## End of Housing Period

- If a project owner offers to rent a unit to a displaced individual after the end of the temporary housing period, the displaced individual must be certified under the requirements of Section 42 and Section 1.42.

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## Residency and Approval

- In the case of an individual displaced by the devastation caused by Hurricane Sandy, the displaced individual must have resided in a jurisdiction designated for Individual Assistance by FEMA as a result of the devastation caused by Hurricane Sandy.
- The project owner must obtain approval from the applicable Agency for the relief described in this notice. The applicable Agency will determine the appropriate period of temporary housing for each project, not to extend beyond November 30, 2013.

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## Required Information

- To comply with the requirements, project owners are required to maintain and certify certain information concerning each displaced individual temporarily housed in the project, specifically the following:
  - Name
  - Address of damaged residence
  - Social security number
  - A statement signed under penalties of perjury by the displaced individual that, because of damage to the individual's residence, the individual requires temporary housing.

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## Notification and Records

- The owner must notify the applicable Agency that vacant units are available for rent to displaced individuals.
- The owner must also certify the date the displaced individual began temporary occupancy and the date the project will discontinue providing temporary housing as established by the applicable Agency. The certifications and recordkeeping for displaced individuals must be maintained as part of the annual compliance monitoring process with the Agency.

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## Rents and Existing Residents

- Rents for the low-income units that house displaced individuals must not exceed the existing rent-restricted rates for the low-income units.
- Existing tenants in occupied low-income units cannot be evicted or have their tenancy terminated as a result of efforts to provide temporary housing for displaced individuals.

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## QUESTIONS?

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## Recurring Gifts, Grants and Contributions

Presented by:  
Anita Moseman



## 8823 Guide – Page 4-18

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- ▶ Regular, recurring monetary and nonmonetary gifts or contributions to residents from persons not living in the unit must be included in income.
    - ▶ This can include the payments of bills on behalf of a resident.
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- ▶

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- ▶ For example, if a parent or family member will be paying a resident's utility bill each month directly to the utility company, those payments are still counted as income for the tenant.
  - ▶ However, the value of groceries provided by someone outside the household, and the food portion of public assistance, even if provided routinely, is not included.
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- ▶

### Example 1: Use of Vehicle

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- ▶ A tenant uses her ex-husband's car to transport their son to medical examinations conducted on a regular basis. The title to the car is in the ex-husband's name, he makes the car payment, and he is responsible for maintenance.
  - ▶ The use of the car should not be considered a regular non-cash contribution to the household unless the tenant has exclusive use of the vehicle.
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- ▶

### 8823 Guide – Page 4-18

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- ▶ Grants received specifically for medical expenses
  - ▶ Set aside for use under a Plan to Attain Self Sufficiency (PASS) and excluded for purposes of Supplemental Social Security (SSI) eligibility
  - ▶ Out-of pocket expenses for participation in publicly assisted programs (expenses include the costs for special equipment, clothing, transportation, child care, etc.) are excluded.
- 
- ▶

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- ▶ Generally, “amounts” paid directly to a childcare provider by persons not living in the unit for a tenant’s childcare are not included in income.
  - ▶ Handbook 4350.3 indicates that childcare expenses that are not reimbursed are not included as annual income.
  - ▶ If such childcare is paid by a non-custodial parent in lieu of all, or part, of child support payments, then it should be included in income.
- 
- ▶

## HUD 4350.3 – Exhibit 5-2

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- ▶ Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member
- 
- ▶

## HUD 4350.3 – Page 5-11

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- ▶ Owners must count as income any regular contributions and gifts from persons not living in the unit. These sources may include rent and utility payments paid on behalf of the family, and other cash or noncash contributions provided on a regular basis



## Example

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- ▶ The daughter of an elderly tenant pays her mother's \$175 share of rent each month. The \$175 value must be included in the tenant's annual income.



▶ Rental Assistance

Thank you!

