

Key Housing Credit Compliance Issues

Presenters:

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Income Limits

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Law

IRC §142(d)(2)(B):

...The income of individuals and AMGI shall be determined...in a manner consistent with determinations of lower income families and AMGI under section 8 under the United States Housing Act of 1937 (or successor program).

IRC §42(g)(4):

...IRC §142(d)(2)(B) applicable to IRC §42.



For IRC §42 and §142(d) housing projects:

- ▶ HUD provides separate income limit tables
- ▶ Applies "hold harmless rules" not applied to income limits used for HUD housing programs
- ▶ Refers to IRC §42 and §142(d) collectively as "Multifamily Tax Subsidy Program"
- ▶ The MTSP income limit for the 1st year of the credit period equals the section 8 income limit
- ▶ Transitional rules for locations where the income limits did not decrease in 2007 or 2008 (HERA Special)
- ▶ AMGI is equivalent to MTSP; both are measurements of "average" income



National Nonmetropolitan Median Gross Income

- ▶ Placed in service in 2006, 2007, or 2008
 - ▶ Located in the Gulf Opportunity Zone
 - ▶ Located in a nonmetropolitan area; i.e., any county (or portion thereof) which is not within a metropolitan statistical area
 - ▶ IRC 1400N(c)(4)
- OR
- ▶ Located in rural area (Section 520 of the Housing Act of 1949)
 - ▶ The NNMGI income limit is greater than the AMGI (MTSP) income limit
 - ▶ IRC 42(i)(8)



What you need to know:

- ▶ When placed in service (relied on income limits to determine if household is income-eligible)
- ▶ First year of the credit period
- ▶ Where located (HERA Special)
- ▶ Designation (rural or metropolitan)



Q1: What happens when the method of determining the income limit changes over time; i.e., AMGI, HERA, HERA Special, MTSP, & NNMGI income limits?

A1: For purposes of IRC §§ 42 and 142(d), you always look to the current income limit to make a decision. It doesn't matter which method was used to compute the income limit.



- ▶ Annual Income Recertifications (as needed)
- ▶ Available Unit Rule
- ▶ Testing income at the beginning of the 1st year of the credit period
- ▶ Determining the Maximum Gross Rent
- ▶ Determining the Maximum Gross Rent floor (Rev. Proc. 94-57)
- ▶ Designation (metropolitan or rural) changes
- ▶ Alternating between location's income limit and NNMGI



[HUD's Income Documentation System](http://www.huduser.org/portal/datasets/il.html)

<http://www.huduser.org/portal/datasets/il.html>



Q2: What happens when HUD updates the income limits?

A2: As explained in Rev. Rul. 94-57, you may rely on the income limits published by HUD until the later of:

- 45 days after HUD releases a new list of income limits
- OR
- The effective date for the new income limits

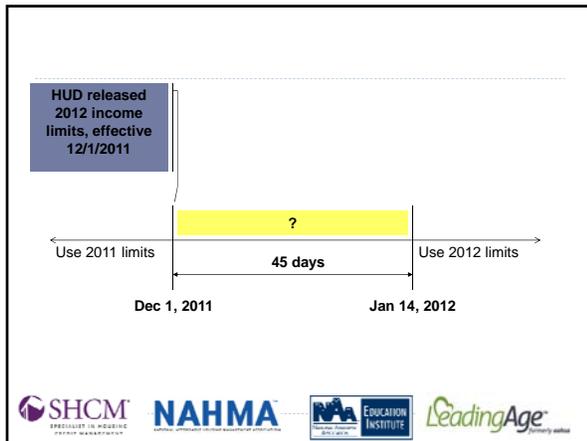


Q3: What does it mean to "rely" on the income limits?

A3: You may rely on the "old" income limits:

- For all purposes
- AND
- May choose which income limit to choose based on which provides the greater tax benefit





- ▶ Income Certifications
 - ▶ Gross Rent Floor (Rev. Proc. 94-57)
 - ▶ Designation as rural area changes
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- References
- ▶ Newsletter #47 (December 2011)
 - ▶ Newsletter #48 (January 2012)
- SHCM NAHMA EDUCATION INSTITUTE LeadingAge

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WINDSOR COMPLIANCE

SHCM Webinar Series
Key Housing Credit Compliance Issues

Gregory Proctor
Utility Allowances

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- Background
- An allowance for the cost of any utilities, other than telephone, cable television, or Internet paid directly by the tenant and not by or through the owner of the building is included in the computation of gross rent under IRC §42(g)(2)(B).
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Background

- ▶ A separate estimate is computed for each utility and different methods can be used to compute the individual utility allowances.
- ▶ The utility allowance is computed on a building-by-building basis.
- ▶ The maximum rent that may be paid by the tenant must be reduced by the utility allowances.

Subsidy Impact

- ▶ If a building receives assistance from the Rural Housing Service (RHS-assisted building) then the utility allowance is determined using the method prescribed by the Rural Housing Service (RHS) for the building, regardless of whether the building or its tenants also receive other state or federal assistance.



Subsidy Impact

- ▶ If any tenant in a building receives RHS rental assistance payments (RHS tenant assistance), the applicable utility allowance for all rent-restricted units is the applicable RHS utility allowance, including any units occupied by tenants receiving rental assistance payments from the Department of Housing and Urban Development (HUD).



Subsidy Impact

- ▶ If neither a building nor any tenant in the building receives RHS housing assistance, and the building's rents and utility allowances are reviewed by HUD on an annual basis (HUD-regulated building), then the applicable HUD utility allowance is the utility allowance for all rent-restricted units in the building.



Subsidy Impact

- ▶ If a building is neither an RHS-assisted nor HUD-regulated, and no tenant receives RHS tenant assistance, the applicable utility allowance for any rent restricted unit occupied by tenants receiving HUD rental assistance payments (HUD tenant assistance) is the applicable Public Housing Authority (PHA) utility allowance established for the Section 8 Existing Housing Program.



Subsidy Impact

- ▶ If neither the building nor tenants are subject to the rules described above, then the local public housing authority (PHA) allowance is used. However, if an estimate is obtained for any unit in the building, that estimate is used as the utility allowance for all similar units in the building. Estimates may be obtained from a local utility company or a state or local housing credit agency, or calculated using HUD's Utility Schedule Model or an energy consumption model.



Utility Allowance Estimates

- The IRS allows five different Utility Allowances as noted on the previous slide.

1. Public Housing Authority (PHA) Utility Allowance
2. Utility Company Estimate
3. Agency Estimate
4. HUD Utility Schedule
5. Energy Consumption Model



Public Housing Authority (PHA)

- ▶ The PHA must provide a utility allowance for utilities and services that are necessary in the locality to provide housing that complies with the housing quality standards. The PHA must classify utilities and other housing services according to specific categories and the allowance for each category must be separately stated.



Utility Company Estimates

- ▶ Under Treas. Reg. §1.42-10(b)(4)(ii)(B), any interested party (tenant, owner, or state agency) may request a written estimated cost of that utility for a unit of similar size and construction for the geographic area in which the building is located. The estimate becomes the appropriate utility allowance for all rent-restricted units of similar size and construction in the building.



Agency Estimate

- ▶ The utility allowance must take into account, among other things, (1) local utility rates, (2) property type, (3) climate and degree-day variables by region in the state, (4) taxes and fees on utility charges, (5) building materials, and (6) mechanical systems.
- ▶ The state agency may use actual utility company usage data and rates of the building for which the utility allowance is requested.
- ▶ A state agency may also use an agent or private contractor to calculate the estimates. The contractor must be a properly licensed engineer or a qualified professional and must not be related to the building owner.

HUD Utility Schedule Model

- ▶ Under Treas. Reg. §1.42-10(b)(4)(ii)(D)9, a building owner may calculate a utility allowance using the "HUD Utility Schedule Model" that can be found on HUD's Internet site, the Low-Income Housing Tax Credits page at www.huduser.org/datasets/lihtc.html or successor URL.



Energy Consumption Model

- ▶ Under Treas. Reg. §1.42-10(b)(4)(ii)(E)10, a building owner may calculate a utility allowance using an energy and water and sewage consumption analysis model.
- ▶ The energy consumption model must, at a minimum, take into account specific factors including, but not limited to: unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of the building location.
- ▶ The utility allowance must be prepared by a properly licensed engineer or qualified professional, must be approved by the agency having jurisdiction over the building, and must not be related to the building owner.

Annual Updates

- ▶ Under Treas. Reg. §1.42-10(c)(2)12, a building owner must review the basis on which utility allowances have been established at least once during each calendar year and must update the allowance if required.
- ▶ Building owners may choose to calculate new utility allowances more frequently than once during a calendar year, provided the owner complies with the requirement of Treas. Reg. 1.42-10, including the requirement to notify the agency and tenants.



Annual Updates

- ▶ If the applicable utility allowance for a unit changes, the new utility allowance must be used to compute gross rents of LIHC units due 90 days after the change.
- ▶ An owner is not required to implement new utility allowances until the building has achieved 90 percent occupancy for a period of 90 days or by the end of the first year of the credit period, whichever is earlier.



Non Compliance

- ▶ Low income housing projects are considered out of compliance when:
 1. The appropriate utility allowance is not used.
 2. The utility allowance is not properly calculated.
 3. Rents are not reduced for a utility allowance when utilities are paid directly by the tenant to the utility provider.
 4. The owner did not review the basis on which the utility allowance is established at least once during the calendar year.
 5. The owner failed to update rents for a revised utility allowance after the 90-day period.
 6. The owner failed to maintain adequate documentation regarding the computation of utility allowances; without proof of the amount of the allowance and how it was estimated, there is no way to correctly compute the rent.



Additional Notes

- ▶ The building owner must pay all the costs incurred in obtaining the estimates from a utility company or state/local housing credit agency, HUD's Utility Schedule Model, or an energy consumption model. The building owner also bears the costs of notifications to the tenants and state/local agency.



Additional Notes

- It is permissible to change calculation methods from year to year.
- With the exception of HUD and RD-regulated properties, owners may combine any methodology for each utility service type.
- Be advised, that the effective date of the PHA allowance will likely be different than the Owner's Average of Actual Consumption resulting in adjustments to utility allowances and, potentially, rents multiple times during the year.



QUESTIONS?

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Low Income Housing Tax Credit Compliance Issues

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Building Regulations

- ▶ The Credit amount allocated to each building in a project is partially calculated on the following factors:
 - ▶ Eligible Basis
 - ▶ Fees
 - ▶ Resident Manager Units
 - ▶ Model Units
 - ▶ Applicable Fraction
 - ▶ Extended Use Period



Building Regulations

▶ Eligible Basis

- ▶ Defined as a component of the Qualified Basis of a Low Income Housing Tax Credit (LIHTC) development. The Eligible Basis is generally equal to the adjusted basis of the building, excluding land but including most amenities and common areas.



Building Regulations

▶ Eligible Basis

- ▶ Assigned to a building at the time of final credit allocation, via the issuance of the IRS Form 8609 – “Low-Income Housing Credit Allocation Certification”.
- ▶ Manipulation of the maximum qualified basis by artificially raising the Eligible Basis and lowering the Applicable Fraction is a violation of Section 42 and could result in recapture of Tax Credits.



Building Regulations

▶ Fees

- ▶ Full inclusion in Eligible Basis – if the costs of facilities and/or amenities for use by residents has not been fully excluded from Eligible Basis there cannot be a separate fee and/or charge.
- ▶ Facilities and/or amenities that cannot be determined to have been excluded from Eligible Basis are considered to have been included in Eligible Basis.
- ▶ Note, development documents are extremely important!



Building Regulations

▶ Fees

- ▶ Partial inclusion in Eligible Basis – an owner included the cost of a laundry facility in Eligible Basis. The owner installed coin operated laundry equipment that is available to everyone in the property.
- ▶ The owner can include the cost of the laundry facility in Eligible Basis because all residents have access. However, because the resident pay a fee to use the equipment, the appliances must not be included in Eligible Basis.



Building Regulations

▶ Optional Services

- ▶ A service is optional when the service is not a condition of occupancy and there is a reasonable alternative. Charges for non-optional services such as a washer / dryer hook-up fee and built-in/on storage sheds (paid month-to-month or a single payment) would always be included with gross rent.



Building Regulations

▶ Condition of Occupancy

- ▶ Under Treasury Regulation 1.42-11(a)(3), the cost of services that are required as a condition of occupancy must be included in gross rent even if federal or state law required that the services be offered to residents by owners.



Building Regulations

▶ Condition of Occupancy

- ▶ Refundable fees associated with renting a LIHTC units are not included in the rent calculation. For example, security deposits and fees paid if a lease is prematurely terminated are one time payments that are not considered in the rent calculation.
- ▶ Required costs or fees, which are not refundable, are included in the rent calculation. An example is a fee for renter's insurance.



Building Regulations

▶ Condition of Occupancy

- ▶ Fees for preparing a unit for occupancy must not be charged. Owners are responsible for maintaining the LIHTC units in a manner suitable for occupancy.
- ▶ Background Check fees may be charged to cover the actual cost of checking a prospective resident's credit, criminal and/or eviction history. The fee is limited to recovery of actual out of pocket costs. No amount may be charged in excess of the average expected out of pockets costs of checking a resident's qualifications.



Building Regulations

▶ Resident Manager Unit(s)

- ▶ The unit must be reasonably required by the property and only those employees that work full time exclusively for said property are eligible. For example, on-site management, maintenance or security staff.
- ▶ If the property is charging rent for the unit, the Monitoring Agency and/or the IRS may determine the unit is not reasonably required by the property because the employee is not required to occupy the units as a condition of their employment.



Building Regulations

▶ Resident Manager Unit(s)

- ▶ A unit for a full time security officer may occupy a designated management unit when reasonably required by the property because of the level of crime in the area. See Revenue Ruling 2004-82, A-1.



Building Regulations

▶ Resident Manager Unit(s)

- ▶ Following is Footnote #8 of Chapter 8 in the Guide for Completing Form 8823 – Revision 01-2011 (page 8-5)
 - ▶ “The rental value of the housing provided to a full-time resident manager required to live on-site as a condition of employment is considered to be wages. In this situation, however, the wages are not taxable income and are not subject to employment taxes. See IRC 119(a)(2) and 3121 (a)(19).



Building Regulations

▶ Model Unit

- ▶ If a unit is never rented or available to a qualified household, it could be considered a market rate unit and not part of the numerator of the Applicable Fraction.
- ▶ However, if the property is 100% LIHTC then the Model Unit must be able and eventually occupied by a qualified household. Failure to do so could result in the recapture of credits.



Building Regulations

▶ Applicable Fraction

- ▶ Defined as the percentage of the building that is treated as low income use and generally eligible for LIHTC. The Applicable Fraction is the lesser of the unit fraction and the floor space fraction.
- ▶ Assigned to a building at the time of final credit allocation, via the issuance of the IRS Form 8609 – “Low-Income Housing Credit Allocation Certification”, by the owner.



Building Regulations

▶ Applicable Fraction

- ▶ Determining which units to include as LIHTC units in the numerator of the fraction and the total unit in the denominator of the fraction:
 - ▶ Units Never Occupied – cannot be included in the numerator (LIHTC units), but must be included in the denominator (total units).
 - ▶ Vacant Units – at the end of the initial tax year which previously were qualified as LIHTC units can be considered to be low income for determining the amount of credit claimed, only if the units were occupied for a minimum of 1 month. IRC 42 (f)(2)(A)(i)(1994).



Building Regulations

▶ Applicable Fraction

- ▶ *Units Never Occupied* – cannot be included in the numerator (LIHTC units), but must be included in the denominator (total units).
- ▶ *Vacant Units* – at the end of the initial tax year which previously were qualified as LIHTC units can be considered to be low income for determining the amount of credit claimed, only if the units were occupied for a minimum of 1 month. IRC 42 (f)(2)(A)(i)(1994).
- ▶ *Transferring LIHTC households to never occupied units* – is not allowed. Any household that transfers to a different unit during the initial year of the Compliance Period will only be counted as qualifying one unit. IRS Revenue Ruling 2004-82, A-8.



Gross Rent Exceeds Tax Credit Limits

- ▶ Overcharging Residents for rent in the first year of the Compliance Period can disqualify the Owner from claiming any credits.
- ▶ The Guide for Completing Form 8823, page 11-1 indicates that an Owner can not avoid the disallowance of the Credit by rebating excess rent to the affected Residents in any year of the Compliance Period.



Guidelines for Determining Noncompliance

- ▶ The State Agency is responsible for determining whether the Owner is compliant with IRC 42 and its regulations.
- ▶ At least once every three years, a minimum of 20% of all LIHTC resident files and units must be reviewed by the State Agency.
- ▶ In the event that extensive noncompliance is identified, State Agencies will consider expanding the number of units inspected & files reviewed beyond the 20%.



Guidelines for Determining Noncompliance

- ▶ In many instances, the 8823 Guide states that when noncompliance is discovered and corrections are made prior to notification of the State Agency's audit, it will not be considered noncompliance.
- ▶ Self-audits should be done periodically to discover and correct noncompliance items.



Correcting Noncompliance

- ▶ Document, document, document - leave a paper trail of steps taken to correct noncompliance findings.
- ▶ Remember, noncompliance is not solely related to Occupancy/Compliance area. Noncompliance includes violations of the Fair Housing Act and HUD's Uniform Physical Conditions Standards (UPCS).

