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March 30, 2004

Internal Revenue Service
Attn: Grace Robertson, C9-466
500 Ellin Road
Lanham, MD 20706

Dear Ms. Robertson,

Thank you for this opportunity to comment on the draft *Guide for Completing Form 8823*. As management agents and owners involved with the Section 42 Low Income Housing Tax Credit program, NAHMA members are interested in working with the Internal Revenue Service (IRS) to ensure that all compliance-related guidance is clear, consistent and transparent. We believe soliciting public comments on this document facilitates a valuable dialogue between the IRS and the affordable housing industry. We respectfully offer the following public comments for your consideration.

Overall Impressions

NAHMA believes the guide is a great step forward toward standardizing the compliance process across state agencies. It is very helpful when a regulatory body communicates the intent behind regulations and clearly states how they intend to monitor compliance. We strongly urge the IRS to make the completed guide available to owners and management agents. We believe it would be a valuable tool for training and for self-monitoring of the compliance process.

In reviewing the document, we felt somewhat disadvantaged by the absence of key information. For instance, several key chapters which are still under development were not included. Likewise, we believe it would have been helpful to have the draft Form 8823 published as well. Nevertheless, we look forward to the release of these additional documents, and we urge the IRS to provide the same opportunity for comment.

Chapter 1

Page 1-2: Back in Compliance

The guide notes, "Treas. Reg 1.42-5(e)(4) allows a corrective action period, not to exceed 90 days, for the owner to remedy the noncompliance. The state agency can extend this period up to six months if there is good cause." We recommend clarifying this sentence to specify the maximum timeframe for the compliance period is six months (as noted in Chapter 2, page 2-1).

Exhibit 1-1 Reports of Noncompliance (Form 8823) Process Map Explanations

Page 1-1 of Exhibit 1-1: Step One

The guide indicates that the state agency conducts a “desk audit.” We recommend including a short explanation of what a desk audit entails.

Page 1-2 of Exhibit 1-1: Step Four

Item (1) states that if clarification is provided establishing that the owner was always in compliance, then no further action is required by the state. NAHMA recommends revisiting this provision to require the state agency to notify the owner that the issue is considered “closed” and no 8823 will be filed.

Chapter 2

Page 2-1: Correction Period

The guide does not specify a timeframe by which the state agency must notify the owner of any noncompliance findings. Adding this information, such as a 30 day timeframe, would be helpful.

Page 2-2: Guidelines

Item (4) does not specify whether an 8823 showing partial correction of noncompliance should also include the outstanding issue(s) of noncompliance. We recommend clarifying these instructions to specify whether the remaining items to be corrected should be included.

Chapter 3

Page 3-1: Overview

The sentence, “This chapter includes guidelines to assist the state agencies meet these responsibilities,” should read, “...to assist the state agencies in meeting these responsibilities,” or similar wording.

Page 3-4: Documentary Evidence

An example or two explaining how the “Cohan Rule” pertains to Section 42 compliance would be helpful.

Chapter 4

Page 4-1: Determining Income Limits

The third paragraph advises...“refer to HUD Manual 4350.3 for complete discussion”. This caveat appears several times throughout chapter 4, but it is unclear whether the IRS is deferring to the guidelines in HUD 4350.3, or if it is simply referring to HUD 4350.3 for discussion purposes.

Page 4-2: Determining Income

As currently worded, the sentence, “The addition of another member to the household changes the composition and triggers the immediate income certification of a new household,” is confusing. It would appear to say that if a household adds a member that they must be certified as a new household – i.e. income qualify all over again at 50% or 60% of median – rather than at 140% of the current income limit for the new family size. We request clarification of the wording and intention of this sentence.

Page 4-2: Employment Income

The last paragraph on the page advises, “...if [the third party] indicates how long the tenant will receive a certain income, then a projected calculation for the specified time period should be used instead [of annualizing].” This last sentence is totally rational and makes perfect sense. However, it conflicts with the instructions in HUD’s 4350.3 manual, which requires owners to annualize and then do an interim certification. The guide should specifically state that this is an instance where previous directions to follow the 4350.3 guidance for calculating income are not applicable.

Page 4-3: Net Income from Self-Employment

There is a typographical error in last sentence in the first paragraph which reads, “Business Expenses *to do* include....” (Italics added.)

There is another typographical error in the last sentence of the second paragraph which reads, “A negative amount must not be used to *office* other family income.” (Italics added.)

Page 4-4: Assets

In the last sentence of the first paragraph, the HUD passbook rate is quoted as “2%” (which is the current rate). We recommend changing this sentence to read “...using the published HUD passbook rate, which was 2% at the time of the publication of this guide. The effective HUD passbook rate should be verified annually.” The reader should then be directed to the source of the current rate.

Chapter 5

Page 5-1: Definition

The first paragraph discusses the Uniform Physical Condition Standards (UPCS) established by HUD. We recommend adding some discussion on how to obtain the current version of the UPCS.

Page 5-2: Differences Between Local Codes and the Uniform Physical Condition Standards

The first paragraph discusses how to handle differences between the two. The last sentence states that “In general, however, the state agency’s selected standard must be met regardless of local health, safety and building codes.” This sentence seems to suggest the state agency can take punitive action against an owner for following local code, even though the first paragraph of the second sentence states, “Even though the state agency uses UPCS to inspect for suitability of occupancy, the building owner must always comply with local health, safety, and building codes.” If the owner does not comply with local codes he or she is at risk of legal action by local authorities for code violation.

We recommend establishing a clear and transparent standard for handling conflicts between local codes and the UPCS. We urge the guide to follow the standard established by HUD REAC; that is, the local code must prevail when there is a conflict.

Page 5-3: HUD's Uniform Physical Condition Standards (UPCS)

In items (4) and (5) the standard “functionally adequate” is used to describe minimum standards. Please provide a citation for and definition of “functionally adequate.”

Page 5-5: Back in Compliance

The text notes, “Acceptable evidence of the corrected violations includes items such as a certification from an appropriate licensed professional that the item now complies with the inspection standard, or other documentation demonstrating that the violation had been corrected.” Please consider including an additional sentence or two reiterating that easily correctable violations such as replacement of a smoke detector battery or a blocked egress in the unit do not require certifications from licensed professionals as evidence of correction.

Chapter 8

Page 8-1

This chapter is titled “Changes in Eligible Basis or Applicable Percentage” on page 8-1, but it is listed as “Changes in Eligible Basis or Applicable Fraction” on page iv of the Table of Contents.

Page 8-1, 8-2: Definition

Please consider adding a sentence to clarify whether laundry rooms qualify as part of the eligible basis to the last paragraph on page 8-1. The paragraph begins with the sentence, “Eligible Basis may not include any parts of the property used for commercial purposes.”

Page 8-3: Community Service Facilities

There is a typographical error on the last sentence on the page. It should be corrected to read “...Facilities that are...”

Page 8-4: Changes in Applicable Percentage

The Table of Contents on page iv, mistakenly refers to this section as “Applicable Fraction” (which is a different topic).

Chapter 10

Page 10-2: Rent Calculation Methods

Additional discussion of Rev. Proc. 94-9, which allowed owners of developments with pre-1990 allocations a one-time opportunity to base maximum rents on the bedroom size as opposed to the household size, would be helpful. It would also help explain Example 1.

Page 10-3: Section 8 Tenants, Example 2: Insufficient Rental Assistance, NOTE.

It is indicated that “the portion of the rent paid by Section 8 tenants can exceed the LIHC rent ceiling. However, Section 8 tenants usually give up their vouchers if their portion of the rent exceeds the LIHC rent.” NAHMA members disagree with this statement. In their experience, vouchers and the protection they provide a household are jealously guarded. Our members’ observations suggest tenants are unlikely to give up the long-term protection of their voucher for a lower tax credit rent, which represents short-term protection in the current unit.

Some additional examples would be helpful to discuss cases in which a Section 8 tenant’s rent exceeds gross rent. The guide indicates that Section 8 tenants can pay more than the tax credit rent ceiling, but Example 2 provides a scenario in which the tenant is not approved for occupancy. NAHMA members have reported that state agencies will permit Section 8 tenants to pay more than the gross rent, and we believe it is important to discuss these situations.

For instance, the Section 8 rent may exceed the tax credit gross rent limit in high cost areas. In some cases 30% of the tenant’s income may exceed the tax credit limit, although the tenant was income qualified at time of move-in.

Also, tax credits are being used for rehabilitation in older HUD project based Section 8 or Section 236 buildings. In Section 8 buildings where one or more members of the tenant household are not legally eligible tenants, HUD requires that owners and agents prorate the Section 8 and in older Section 236 buildings the IRP subsidy using the following formula:

$$\frac{\text{Number of eligible family members}}{\text{Number of total family members}} = \text{subsidy fraction}$$

In our members’ experience, when the subsidy is prorated, the required family rental payment will usually exceed the gross rent limit. NAHMA members have been advised they can accept more than the tax credit gross rent in accordance with HUD regulations for Section 8 or Section 236 for the IRP.

Page 10-5: Deep Rent Skewing

Please consider adding examples for bullets two and three.

Page 10-6: Back in Compliance, Example 2

The guide lists this example and then refers readers to Chapter 9 for explanation. We believe an explanation should immediately follow this example.

Chapter 11

Page 11-3: In Compliance, Example 1: Targeted Population

We are concerned that the example is worded in an overly prescriptive manner. It notes that the Fair Housing Act permits occupancy restrictions “...for elderly units *entirely occupied* by persons 62 year of age or older...” (Italics added).

In HUD senior buildings only the head of household or spouse must be 62 years of age or older. There is no requirement for all family members to be 62 or older. Occasionally, non-elderly handicapped also live in HUD senior buildings with accessible units. Finally, if a tenant in a HUD senior building has custody of minor children, they are permitted to occupy the unit. This last scenario is not common, but it occurs enough to pose a challenge where tax credit programs are added.

Exhibit 11-1 Fair Housing Act Accessibility Checklist

Accessible Building Entrance on an Accessible Route

We recommend changing the last bullet to read "...curb cuts *or ramps...*" (Italics added.)

Common and Public Use Areas

We believe the last bullet is incorrect. It is our understanding that where two similar facilities exist, such as laundries, only one must be accessible.

Exhibit 11-2 HUD's HUB Area Offices

Exhibit 11-2 names specific area FH&EO Directors. As this material is likely to change over time, we recommend adding a reference to the website where updated information can be found.

Exhibit 11-3 The Memorandum of Understanding (MOU)

We encourage revision of the MOU so that non-compliance would only be reported on a Form 8823 in cases where a final "finding" has been issued. The MOU appears to make conciliation agreements subject to non-compliance reporting; however, conciliation agreements and settlements often do not include any admission of discrimination or finding of discrimination. The MOU should be modified to remove 8823 reporting of settlements where there are no admissions and no findings, or at least clarified on this point.

Chapter 12

Page 12-2: In Compliance

The guide mentions that a unit is not considered an available unit for the purposes of the Next Available Unit Rule if "the unit is no longer available for rent due to contractual arrangements that are binding under local law." The guide uses the scenario of a lease for a market unit that is signed prior to discovery of over-income household in a tax credit unit. It may be worth including definitions of other types of "contractual arrangements" such as a holding deposit, signed application, etc.

Chapter 22

Page 22-1: Tenant Fraud

The guide states that if an owner discovers that a tenant has deliberately misrepresented their income level, student status, etc...the infraction "should" be reported to the IRS Criminal Investigation Department. It is further suggested that owners "should" report discovery of fraudulent tenant to the state agency immediately. Use of the word "should" suggests such reporting is a voluntary action on the owner's part. If the owner is required to report the fraud, we recommend using the word "must."

Conclusion

Thank you again for the opportunity to comment on this important document. We look forward to continuing to work with the IRS to bring this document to completion. If you have any questions or require addition information about the comments submitted, please feel free to contact NAHMA's Director of Government Affairs, Michelle Kitchen. Ms. Kitchen can be reached by phone at 703-683-8630, or by e-mail at michelle.kitchen@nahma.org.

Sincerely,

A handwritten signature in cursive script, appearing to read "Wayne Fox".

Wayne Fox, HCCP, NAHP-e
President