

Ensuring NAHMA Members Receive the Latest News and Analysis of Breaking Issues in Affordable Housing

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E-NAHMAanalysis 2005-0621: Safe Harbor for Review of Section 42 Commitments

Late last summer, the IRS issued Revenue Ruling 2004-82, Answering 12 Questions About Low-Income Housing Credit Under I.R.C. Section 42. The answer to Question 5 (Q&A-5) in this policy statement raised considerable concern throughout the industry. Specifically, the IRS determined 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 the 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 Section 42.” State agencies were directed to review the commitments to determine whether they were in compliance with these requirements.

NAHMA members have reported widely diverse methods employed by State Agencies to fulfill this requirement. In fact, this subject will be a topic for discussion at our Summer Meeting.

Today, the IRS has informed the industry that it is providing a safe harbor for State Agencies to satisfy the review requirements under Q&A-5 (of Rev. Rul. 2004-82, 2004-35 I.R.B. 350...pursuant to section 42(h)(6)(J)). The safe harbor may address some concerns about the administrative burden of reviewing thousands of commitments. Again, Section 42(h)(6)(B)(i) requires commitments to include prohibitions--which are applicable throughout the entire commitment period--against eviction or termination of tenancy of an existing tenant of any low-income unit (other than for good cause) and against any increase in the gross rent with respect to a low-income unit not otherwise permitted by Section 42.

The Safe Harbor provides that State agencies may satisfy the review if:

- Commitments entered into before January 1, 2006 include general catch-all language requiring owners to comply with requirements of Section 42, and
 - a. Agencies must give owners written notice on or before December 31, 2005 that, consistent with Q&A-5, the catch-all language prohibits eviction / termination of tenancy except for good cause and prohibitions against increases in gross rent not permitted by Section 42 throughout the entire commitment period;
 - b. Owners must certify annually that these prohibited actions did not occur in the preceding 12 months;
 - c. If the owner fails to make this certification or an Agency discovers these actions occurred, the State Agency must file an 8823.
- Commitments entered into before January 1, 2006 that do not prohibit these actions or do not include satisfactory catch-all language must be amended to prohibit them by December 31, 2005.

- Commitments executed after December 31, 2005 must clearly provide prohibitions against eviction / termination of tenancy except for good cause and prohibitions against increases in gross rent not permitted by Section 42. The express prohibition is also required for amendments to commitments if the amendment is executed after December 31, 2005.

This Revenue Procedure will be published in Internal Revenue Bulletin 2005-28, July 11, 2005. For more information, please see: <http://www.irs.gov/pub/irs-drop/rp-05-37.pdf>.