



October 4, 2012

Internal Revenue Service
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

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To Whom It May Concern:

We, the undersigned organizations, represent developers, owners, management agents and lenders, who participate in, and are strong advocates of the Low-Income Housing Tax Credit (LIHTC) Program, which has been highly successful in meeting the rental housing needs of low-income families. We appreciate the opportunity to provide comment on the August 7, 2012, Notice of Proposed Rulemaking (NPR) and Notice of Public Hearing (NPR) amending and clarifying how property owners or their agents determine the adjustments to gross monthly rent when residents pay for utilities. Our organizations have worked both individually and collectively with the Internal Revenue Service (IRS) since 2003 on this issue and support the need for alternative methods to address utility estimates due to the variance in data, building and property site design, building systems, materials, and the age of properties.

For the most part, the proposed modifications contained in the proposed rule are consistent with the intent of the original rule and the multifamily industry's support for more accurate information to better estimate utility adjustments. We agree with the clarification that owners of properties with rent restricted units, which are not subject to the Rural Housing Service (RHS) or Housing and Urban Development (HUD) rules, may use the range of options to estimate utilities provided in the original notice.

However, we are very concerned with the IRS' interpretation in the August 7, 2012, proposed rule regarding the approval of permitted estimation methods by State housing agencies. In the summary of comments on Notice 2009-44 and Explanation of Provisions, the IRS states,

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.

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

Also in August 2 proposed rule, the IRS provides two specific examples:

- 1) *...a building owner may obtain a utility estimate for each unit in the building from the agency that has jurisdiction over the building “provided the Agency agrees to provide the estimate.” That is, State housing agencies are not required to provide a utility estimate under § 1.42–10(b)(4)(ii)(C).*

We agree that State housing agencies are not required to provide utility estimates, and believe that the original language in the June 19, 2007 update of the regulation is clear on this point.

- 2) *§ 1.42–10(b)(4)(ii)(E) provides that, under the energy consumption model, utility consumption estimates must be calculated by “either a properly licensed engineer or a qualified professional approved by the Agency that has jurisdiction over the building.” Thus, State housing agencies are not required to provide the approval described in § 1.42–10(b)(4)(ii)(E). Comments are requested on whether approval by the agency with jurisdiction over the building should be necessary for both properly licensed engineers and qualified professionals or only for qualified professionals that are not properly licensed engineers.*

We agree that agency approval is necessary for professionals who are not properly licensed engineers. However, for utility estimates based on an energy consumption model that satisfy the rules specified in the July 29, 2008, notice, we strongly disagree with the suggestion that an agency may simply reject estimates if calculated by a properly licensed engineer. In fact, we believe that the agency should be accepting of the estimates prepared by a properly licensed engineer.

First, the language in the July 29, 2008, notice is clear and unambiguous on this point, stating that,

...the utility estimates must be calculated by either (1) a properly licensed engineer or (2) a qualified professional approved by the Agency that has jurisdiction over the building...

The structure of this sentence makes it clear that the regulation requires agency approval only for qualified professionals other than properly licensed engineers.

Second, the IRS developed the original version of this rule over an extended period with commendable opportunities for input from stakeholders. The comments submitted by the industry on the energy consumption model during that process remain valid. At the time, the industry was well aware that many State housing agencies have limited resources and specifically recommended energy consumption models run by certified engineers precisely because this method would not additionally burden the agencies.

The intent and benefit of a project sponsor using a licensed engineering professional is not only to receive the benefit of the third-party professional's expertise, but also to simplify evaluation of the third-party by the State housing agency. When reviewing consumption model estimates, the State housing agency primarily needs only to check for the seal of an engineer who is certified by another agency in the same State government. State certification brings with it standards for expertise, performance, and conduct; as it subjects the certified individual and/or firm to

sanctions through the professional certification and oversight process. This is analogous to the practice of processing building plans by checking for a State-certified architect's seal. In each case, the incentive to ensure the appropriateness and accuracy of the submission is a properly licensed professional putting his or her reputation and State-certification on the line.

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.

We greatly appreciate the opportunity to provide our input and guidance on this matter and welcome your questions. Please contact David Cardwell at the National Multi Housing Council at (202) 974-2336 or by email at dcardwell@nmhc.org with any questions.

Sincerely,

Council for Affordable and Rural Housing
Institute for Real Estate Management
National Affordable Housing Management Association
National Apartment Association
National Association of Affordable Housing Lenders
National Association of Home Builders
National Association of Housing Cooperatives
National Leased Housing Association
National Multi Housing Council