

Exhibit 4-1
CCA 2009090416224806

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From: [...]

Sent: Friday, September 04, 2009 4:22:51 PM

To: [...]

Cc: [...]; [...]

Subject: Increases in Family Size under §42(g)(2)(D)(ii)

This e-mail responds to your request for assistance regarding increases in family size under §42(g)(2)(D). You have asked on behalf of revenue agents and state housing agencies whether addition of a new member to an existing low-income household requires the household to be treated as a new household for purposes of §42(g).

Chapter 4 of the Guide for Completing Form 8823 (revised January 2007) on pages 4-3 & 4-4 provides that the addition of new member(s) to an existing low-income household requires the income certification for the new member of the household. The new member's income is added to the income disclosed on the existing household's tenant-income certification. A household may continue to add members as long as at least one member of the original low-income household continues to live in the unit. Once all the original tenants have moved out of the unit, the remaining tenants must be certified as a new income-qualified household unless the remaining tenants were income qualified at the time they moved into the unit. The household continues to be income qualified and the income of the new member is taken into consideration for purposes of the available-unit rule under §42(g)(2)(D). If a state agency determines that the tenants manipulated the income limitation requirements, then the unit should not be treated as a low-income unit as of the date the household initially occupied the unit.

Section 42(g)(2)(D)(i) states that, except as provided in §42(g)(2)(D)(ii), notwithstanding an increase in the income of the occupants of a low-income unit above the income limitation, such unit shall continue to be treated as a low-income unit if the income of such occupants initially met such income limitation and such unit continues to be rent-restricted.

Section 42(g)(2)(D)(ii) provides that if the income of the occupants of the unit increases above 140% of the income limitation under §42(g)(1), §42(g)(2)(D)(i) shall cease to apply to any such unit if any residential rental unit in the building (of a size comparable to, or smaller than, such unit) is occupied by a new resident whose income exceeds such income limitation.

The legislative history of §42 provides that, for purposes of the available unit rule, if the tenant's income increases to a level more than 40 percent above the otherwise applicable ceiling (or if the tenant's family size decreases so that a lower maximum family income applies to the tenant) that tenant is no longer counted in determining whether the project satisfies the set-aside requirement. No penalty is assessed in such an event, however, provided that each residential rental unit that becomes vacant (of comparable or smaller size to the units no longer satisfying the applicable income requirement) is rented to tenants satisfying the qualifying income until the project is again in compliance. Joint Committee on Taxation Staff, General Explanation of the Tax Reform Act of 1986, 99th Cong., 2d Sess. 162 (1987).

The above cited legislative history demonstrates that decreases in family size are subject to the available-unit rule in §42(g)(2)(D)(ii). We see no reason why increases in family size should not be subject to the same rule. For example, if an existing low-income household's income increases above 140% of the applicable income limitation, then the unit continues to be treated as a low-income unit if the available-unit rule under §42(g)(2)(D)(ii) is met. Yet, if the addition of a new member to an existing low-income household results in the household being treated as a new household, then any increases in income above the applicable income limitation, no matter how small, would result in the unit not being a low-income unit. Provided the household is not manipulating the income limitation requirements, we see no difference between increased household income and increased household income resulting from the addition of a new member to the low-income household.

Accordingly, we continue to believe that rule for increases in family size in the Guide for Completing Form 8823 is correct. The new member of the existing low-income household must complete an initial income certification and provide third party verification regardless of whether §142(d)(3)(A), as amended by section 3010(a) of the Housing Assistance Tax Act of 2008, applies to the project.