



September 17, 2007

CC:PA:LPD:PR (REG-128274-03)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Proposed Update to Utility Allowance Regulations, RIN 1545-BD20

To Whom It May Concern:

Thank you for the opportunity to comment on the proposed utility allowance regulations update (the proposed regulations). The National Council of State Housing Agencies (NCSHA) represents the Housing Finance Agencies (HFAs) of the 50 states, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, and the District of Columbia. HFAs allocate Low Income Housing Tax Credit authority (Housing Credit) for the construction and rehabilitation of affordable apartments for low-income families. Over the past two decades, the Housing Credit has been responsible for about 2 million affordable apartments, and each year the Housing Credit induces several billion dollars of private investment to produce about 130,000 units for low-income families, the elderly, and other special needs populations.

On behalf of NCSHA and its members, we are pleased that the Service has issued proposed regulations on determining utility allowances for Housing Credit properties, especially to the extent that they allow for more accurate utility allowance determinations and greater flexibility for HFAs to oversee such determinations. More accurate utility allowances help keep Housing Credit properties financially sustainable. The proposed regulations will also help HFAs promote energy efficiency in Housing Credit properties.

However, NCSHA also believes the proposed regulations could be improved so that the utility allowance determinations do not unnecessarily add complexity and regulatory burdens to the Housing Credit program.

Background

Under section 42 of the Internal Revenue Code of 1986, as amended, low-income qualified units in Housing Credit properties must limit gross rents to no more than 30 percent of the applicable percentage of the area median gross income limits (income limits) published annually by HUD. The gross rent limit must include an allowance for any utilities directly paid

by the tenants.

Current regulations require buildings with HUD or USDA Rural Development (RD) assistance to use the applicable HUD or RD methodology to establish the utility allowance. Buildings without HUD or RD assistance may obtain the applicable utility allowance from the local Public Housing Authority (PHA) or obtain a local utility provider estimate. The utility provider estimate is based on usage information for units of similar size and construction for the geographic area in which the building is located.

PHA utility allowances and utility provider estimates are often inappropriate for Housing Credit properties. PHA utility allowances are based on the energy usage history of the local PHA's public housing portfolio, which tends to be much older and less energy efficient than the Housing Credit properties located in the same area. Owners choosing to use PHA utility allowances for their Housing Credit properties often leads to higher utility allowances than are necessary to cover the actual utility cost for their low-income qualified units. Unnecessarily high and inaccurate PHA utility allowances unfairly reduce property rental income to levels that may undermine the financial viability of some properties, particularly in areas where—and during periods when—utility costs unexpectedly and dramatically increase.

In addition, obtaining estimates from the local utility providers is often difficult or impossible. Many local utility providers refuse to provide usage history for similarly sized and constructed units or issue a written estimate to determine the appropriate utility allowance. Furthermore, NCSHA is concerned that local utility providers have inadequate guidelines to determine appropriate utility allowances.

Recommendations

The proposed regulations provide two additional alternatives to determining utility allowances. One option is the HUD-determined Utility Schedule model which allows the owner to calculate the utility allowance, even if the property does not have HUD assistance. HUD develops this model based on data from the Residential Energy Consumption Survey (RECS), which is conducted by the U.S. Department of Energy. Owners may access the HUD Utility Schedule via the internet. NCSHA supports the inclusion of this option.

The second option allows a building owner to obtain a utility estimate from the HFA. The proposed regulations allow HFAs to use actual utility usage data to determine the utility allowance, but also require that the estimate take into consideration climate and degree-day variables by region in the state, taxes and fees on utility charges, building materials, and mechanical systems.

While the inclusion of this option allows for more accurate local utility allowances, it places significant administrative burdens on HFAs. Establishing utility allowances is not currently a requirement of HFAs, and many HFAs currently lack the capacity and expertise to produce an appropriate utility allowance. The development of staff capacity is expensive and time-consuming. Many HFAs will need to rely on certified information supplied by owners, approved engineers, and contractors hired by the agency to calculate estimates, which, as the

proposed regulations explicitly points out, will result in higher compliance fees for owners.

In light of these concerns, NCSHA recommends the following changes to the proposed regulations:

Actual Use Estimate

The title of the section 1.42-10(b)(4)(C) should be changed from “Agency Estimate” to “Actual Use Estimate” or “Owner Estimate.” This title more accurately describes the nature of the utility allowance option. Furthermore, section 1.42-10(b)(4)(C) should allow HFAs or their agents to request additional relevant information, including engineer’s reports. The regulations should also state that HFAs may require owners to pay the costs incurred in obtaining an accurate estimate, including any additional relevant information. The regulations should also authorize HFAs to establish guidelines or methodology requirements for local utility providers to follow when estimating utility costs.

Alternatively, the regulations should permit HFAs to allow owners to obtain a utility estimate for each building from a registered engineer. The engineer would determine the amount of energy usage based upon factors approved by the HFA, including project features, area climate, construction type, and unit size. The energy usage amount may be multiplied by the local utility rate to establish the utility allowance.

Incorporating these changes to the “Agency Estimate” in the proposed regulations more closely aligns the utility allowance regulatory structure to the model established for the Housing Credit market study requirement.

Implementing Updated Utility Allowances

Utility allowances are updated annually within 45 days of the date HUD releases its income limits. Section 1-42-10(c)(1) of the proposed regulations further specifies that utility allowance changes be implemented 90 days after the building has achieved 90 percent occupancy or the end of first year of the Credit period, whichever is earlier. Section 1-42-10(c)(2) requires owners to review utility allowances annually and take into account any building changes, such as energy conservation measures that affect consumption and utility rate changes.

NCSHA recommends the regulations allow HFAs to update utility allowances on the same schedule as when they are updated for HUD’s annual income limits. Combining the implementation of the HUD limits and utility allowance update would reduce the number of times during the year that properties have to adjust rents.

NCSHA also recommends updating utility allowances at the end of the first year of the Credit period. Determining accurately and promptly when a building achieves 90 percent occupancy is difficult.

Oversight of Utility Allowance Determinations

NCSHA recommends the final regulations authorize HFAs to require properties to utilize one of the applicable utility allowance options. If the various allowable options result in widely varying utility allowances for a particular area, HFAs should be empowered to determine which option is the most appropriate and apply it to all properties. Similarly, the regulations should authorize HFAs to allow owners to change which utility allowance option they use, as circumstances warrant.

Thank you for the opportunity to share our comments.

Sincerely,

Barbara J. Thompson
Executive Director