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To: Owners and Managers of Tax Credit Communities
From: Brian Carnahan, Director, Office of Program Compliance
Re: IRS 8823 Guide
Date: May 15, 2007

Introduction

In January 2007, the Internal Revenue Service issued the “Guide for Completing Form 8823 Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition”. Commonly referred to as the “8823 Guide.” The purpose of the document is to provide guidance to state housing finance agencies and owners and managers of tax credit communities. As the 8823 Guide clearly notes, it cannot be “used or cited as authority for setting or sustaining a technical position”. This caveat is important, as it instructs state agencies and the owners and managers of tax credit communities to rely upon the Internal Revenue Code for guidance. Thus, based upon an interpretation of the Internal Revenue Code, OHFA may elect to establish policies and procedures that conflict with the 8823 Guide.

As a matter of policy, the Office of Program Compliance will implement the 8823 Guide as written, with some exceptions or different interpretations, as noted below. Owners and managers should keep in mind that the 8823 Guide is intended to be a “living” document. As such, updates may be released from time to time. In addition, as the industry becomes more familiar with the 8823 Guide and the implications of some of the guidance, Program Compliance may elect to make changes in its policies and procedures.

Discussion

Important information from relevant chapters of the 8823 Guide is discussed below. Guidance from the 8823 Guide is in italics. Program Compliance’s interpretation or intended plan of action is included in the bullet statements below the guidance from the 8823 Guide.

This summary covers a limited number of topics from the 8823 Guide. Owners and managers are strongly encouraged to read the 8823 Guide and seek guidance from OHFA.

Chapter 3

The state agency should not report non-compliance corrected before the date of the notification of a compliance review.

- Program Compliance will note findings in the compliance report. The report is useful for quality control at the project and for use in analyzing patterns of non-compliance that might require additional assistance from OHFA.
- The Agency may issue IRS Forms 8823 if patterns of non-compliance are identified.



The state agency should exercise significant flexibility. Owner due diligence should be a key factor in determining the extent of non-compliance.

- Program Compliance has generally exhibited this philosophy, and will continue to do so.

Chapter 4

When a household increases in size, a new Tenant Income Certification (TIC) should be completed. If the household is over income, the Available Unit Rule should be followed.

- Program Compliance suggests completing a new certification only when an adult or child with unearned income joins the household, and only for that member. The new member's income should be added to the household's income and compared to the current year income limit. If the households "combined" income exceeds 140%, the Available Unit Rule must be applied. All members of the household should be included on the TIC when the income recertification is completed on or before the household's original certification anniversary date.
- A handwritten TIC may be used to certify the new members income. OHFA may explore creating a "new addition to household" certification.
- Owners and managers should communicate to tenants the importance of abiding by the lease or house rules that govern the addition of household members.
- Compliance Analysts will pay attention to changes in household size and inquire about certifications completed at the time of change when conducting reviews.
- Owners and managers are strongly encouraged to establish policies that limit household additions during the first six months after move-in. Non-compliance may result in instances when it is apparent the household was aware of an addition to the household at the time of the initial certification.

"Totem pole" concept - A household with composition changes (e.g. roommates) continues to qualify provided at least one original qualifying member resides in the unit. Changes in composition, e.g. where members are replaced until no original members remain, are not a compliance issue, provided the household remains qualified.

Decreases in household size do not require a new certification. The recertification should be completed on the anniversary date.

The TIC effective date should be the move- in date.

Households may move between buildings without a new certification, provided the household's income is below 140% of AMGI. Units simply swap status. A household with an income above 140% cannot transfer to a unit in another building. Such a transfer would result in a possible violation of the available unit rule. Transfers within a building are acceptable, even if the household's income is over 140%.

- Program Compliance has changed its policy to allow for eligible tenants to transfer between buildings without a new income certification.

Verifications are valid for 120 days.

- Program Compliance has applied this standard since November 2003. We expect to make no changes.
- The 60-day period for TIC signatures will be retained.

Verification of tenant income should be sufficient, not perfect.

- This has generally been Program Compliance's practice, and will remain so.

Chapter 5

If a tenant vacates a unit before recertifying, the unit is not out of compliance if the owner can provide evidence of attempts to recertify the tenant's income (e.g. letters or notices to the tenant, dates of calls, etc.). Owners who file for eviction will not be penalized for not completing a certification.

- Retroactive recertifications (sometimes termed "true and correct" certifications) are acceptable. Such certifications may result in the issuance of a corrected Form 8823.

Chapter 6

The IRS should be notified of all physical inspection findings using Form 8823.

- Program Compliance plans no change in its current policy. Physical findings will continue to be noted in the compliance report and reported to the IRS if uncorrected.

Chapter 8

Charging rent for an employee unit may be viewed as non-compliance. Payment of rent may imply that the unit is not really necessary to the project. Treating the rent as income for the manager is not addressed. Employee units can be leased to low-income households if not needed for an employee.

- Model units are generally acceptable during lease up. The unit should be available. Larger projects, typically, 300 units or more, can maintain a model unit, and include the costs for the model in basis, but the applicable fraction must be calculated without the model unit, i.e. the fraction cannot exceed 100%. The rationale is that a model unit may, as a marketing technique, increase the viability of a project.
- OHFA will consider creating a standard for model units similar to the standard for employee units. A likely standard will be no more than one model unit per 100 units.
- OHFA requires the Owner complete and submit a Notification of Removal of Unit form before designating a unit for use by a manager, security personnel, service coordinator, or as a model unit. This form is available on our website at www.ohiohome.org. The form was updated to include model and service coordinator units and charges for employee units.

Chapter 10

A project can fail minimum set-aside after year one, and return to compliance.

- OHFA may require the owner to submit IRS Form 8611, as well as correct outstanding non-compliance before considering a minimum set-aside violation corrected.

Chapter 11

Rebating rent does not limit credit disallowance in instances where rents exceeded the allowable gross rents.

- OHFA will require reimbursement of excess rent and will report the non-compliance to the IRS as corrected.

Chapter 13

Immigration status/citizenship is not a tax credit issue. Apartment communities should apply consistent policies that conform to fair housing laws.

- OHFA will not monitor for immigration or citizenship status.

Chapter 17

Students in kindergarten through grade twelve students are considered full time students.

- OHFA will maintain its current policy of not monitoring for full- time students in grades K-12, but will add a caveat to trainings and written guidance regarding the possibility that the IRS will consider K-12 students full- time students during an IRS audit.
- The Guide appears to expand on the current exemptions by using the “entitled” regarding joint tax returns. Past interpretation has viewed this exemption as requiring that the household filed a joint return.

Chapter 18

An owner- prepared utility allowance based on consumption is acceptable provided the state agency approves.

- The IRS position roughly mirrors the utility allowance policy issued by Program Compliance in December 2006 (available for download at www.ohiohome.org). Owners should be sure to retain documentation to evidence the need for a consumption-based allowance.

Chapter 24

The IRS wishes to be notified of changes in general partner.

- Program Compliance will continue its current policy of issuing disposition 8823s only when the limited partner changes.