To: Owners and Managers of Tax Credit Communities
From: Brian Carnahan, Director, Office of Program Compliance
Re: Revised IRS 8823 Guide
Date: October 14, 2009

Introduction

In late September, the IRS issued a revised version of the 8823 Guide. The Guide is used by state housing finance agencies to report non-compliance in the Low Income Housing Tax Credit Program, but is generally viewed as the compliance handbook for the tax credit program. The Guide was originally issued in 2007.

The purpose of the 8823 Guide is to provide guidance to state housing finance agencies. By issuing this guidance, the IRS also provides guidance to 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.

Overall, the revised 2009 Guide differs relatively little from the original. Several recent changes, such as the passage of HR 3221, which included the income recertification exemption for 100% low income projects is included in the Guide. The revised utility allowance regulation is also highlighted. Examples and definitions have been expanded.

The Office of Program Compliance will implement the 8823 Guide as written, with some exceptions or different interpretations, as noted below. As the industry becomes more familiar with the revised 8823 Guide and the implications of some of the guidance, Program Compliance may elect to make changes in its policies and procedures.

The 8823 Guide can be downloaded at: www.ohiohome.org/compliance/IRS/8823guide_10-09.pdf.

Noteworthy Changes (Chapter/Page)

4-3: Earned and unearned income from foster adults and the unearned income of foster children is included in the income calculation, even though foster adults and foster children are not included in the household size for purposes of determining the appropriate income limit. OHFA Response: This guidance is derived from the HUD 4350.3. Follow the recommendation as outlined in the 4350.3.

4-7/8: If a household has little income, zero income, or the income fluctuates, the actual income earned currently or over the last twelve months may be used to qualify the household. OHFA Response: Implement as described in the 8823 Guide.

4-10/11: The Guide adopts the language regarding flexibility for households where a member is deployed by the military. OHFA Response: follow recommendation as outlined in the 4350.3.

4-13: Businesses operated from a tax credit unit are not a violation of the tax credit program. OHFA Response: The owner may establish rules regarding home businesses. In addition, any business use of the unit must conform to local ordinances.

4-19: Education assistance in excess of tuition is only counted as income for purposes of the tax credit program if the household is receiving Section 8 assistance and does not meet the Section 8 exception applicable to heads of household over age 23 with dependent children. Additionally, the excess assistance is not counted as income if the recipient of the financial aid is living in the unit with his or her parents. OHFA Response: This guidance is derived from the HUD 4350.3. Follow recommendation as outlined in the 4350.3.

4-27: Households previously qualified as low income under a prior tax credit allocation remain qualified as a low income household if a new allocation is issued for a property. OHFA Response: Projects seeking a new allocation of credits should acquire all records pertaining to the existing tax credit project to ensure the initial low income status of households can be properly documented.

6-7: State agencies must report all UPCS violations identified during a physical inspection. OHFA Response: No change to existing OHFA policy.

11-1: Compliance with rent limits can be determined on an annual and monthly basis. OHFA Response: This implies a unit could remain in compliance provided the annual rent does not exceed the aggregate maximum rent amount, even if the rent exceeds the limit in a given month(s). Owners and managers should ensure that monthly rent is at or below the applicable rent limit.

11-9/10: A unit is out of compliance if the unit on a monthly or annual basis exceeds the limit. Guide states that when a unit is out of compliance because of a rent limit violation, the unit is out of compliance for the entire tax year. The owner cannot avoid a disallowance of a credit by rebating rent. OHFA Response: This statement appears to be contradictory to the concept that a unit/building is in compliance provided it is in compliance by the end of the tax year. OHFA will continue to report rent limit violations to the IRS as required.

14-5: The Guide states that limited violations of the Available Unit Rule at 100% low income properties (e.g. an over-income household is moved in) can be considered de minimis, and thus not place credits at risk, if the manager can show appropriate policies and procedures are in place, and due diligence was conducted to ensure violations would not occur. OHFA Response: Owners and managers should establish clear policies and procedures to ensure units are leased appropriately to remain in compliance with the Available Unit Rule.

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17-2; 17-5: The student status of all households must be annually verified. The IRS has provided a recommended certification. OHFA Response: OHFA will create a recommended certification form. The form will be made available by January 1, 2010.

23-2: The Guide affirms the right of state agencies to require additional income certifications at 100% low income properties. For example, a state agency could require projects to conduct a second year recertification to ensure residents were properly qualified with the initial certification. Additionally, the state agency could require an owner to continue completing recertification until the agency is confident residents are being properly certified. OHFA Response: We anticipate making no changes in how the recertification waiver exemption is applied in Ohio. Owners of 100% low income projects may use the waiver without prior approval. OHFA reserves the right to require recertifications when a pattern of non-compliance is identified with initial tenant income certifications or a project is out of compliance as a result of leasing units to households not income-qualified.

25-1: Tenant fraud can no longer be reported to the fraud hotline. The 8823 Guide instructs that tenant fraud be reported using IRS Form 211, not the hotline. Form 211 can be downloaded at http://www.irs.gov/pub/irs-pdf/f211.pdf.

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