



Oregon
Theodore R. Kulongoski, Governor



Housing and Community Services

North Mall Office Building
725 Summer Street NE, Suite B
Salem, OR 97301-1266
(503) 986-2000
FAX (503) 986-2020
TTY (503) 986-2100
www.ohcs.oregon.gov



To: LIHTC Owners and Management Agents
From: Tonya Evans, LIHTC Lead Compliance Officer
Program Analysis & Enforcement Section
Date: 10/19/09
Re: Program Updates

As you may already be aware, on September 25, 2009 the Internal Revenue Service (IRS) released the highly anticipated revision of the Guide for Completing Form 8823: Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition. The Guide is intended to provide state housing finance agencies (HFAs) a reference on how to interpret definitions of the findings categories listed on Form 8823. The Guide is available for viewing on [Novogradac & Company LLC LIHTC](#) website. The goal is to enable HFAs to provide consistent application of Internal Revenue Code §42 requirements and to consistently report noncompliance findings to the IRS.

Oregon Housing and Community Services echoes what the IRS stresses in that the 8823 Guide has no legal authority. It does, however, reference and cite formal IRS guidance and the Internal Revenue Code that can be relied upon, as well as provide additional examples that may be used by state HFAs to determine whether or not noncompliance exists.

Any changes, clarifications or additions made to the 8823 Guide are marked throughout with surrounding asterisks (there were no changes made to Chapters 3, 7, 13, 19, 20 and 22), and takes into account the following items:

- Legislative mandates stated within the Housing and Economic Recovery Act (HERA) of 2008 (or H.R. 3221). This act is also commonly referred to as the Housing Assistance Tax Act of 2008 (HATA). OHCS has already addressed these changes with the mailing that was sent to [Owners/Agents on December 1, 2008](#), as well as incorporated them into the OHCS LIHTC Manual,
- Revisions made to Treasury Regulation 1.42-10, Section 42 Utility Allowance Update, which became effective July 29, 2008 (also included with the mailing listed above),
- HUD revisions made to the 4350.3 Handbook since the 2007 8823 Guide release, including the June 23, 2009 issuance of [HUD Change 3](#) (implementation took effect 08/01/09), and
- The introduction of the Multifamily Tax Subsidy Program (MTSP) income and rent limits, as well as when to apply the National Non-metro income limit, as explained in the April 7, 2009 OHCS mailing to owners/agents ([2009 MTSP Limits Letter to Owner-Agent](#)).

Although many of the 8823 Guide revisions involve grammatical corrections or the expansion of existing guidance, several changes involve new guidance that **OHCS has adopted (effective 10/01/09)** and include, but are not limited to, the following:

Chapter 4 – Category 11a

➤ **Increases in Family Size** (pg. 4-4)

For clarification purposes, OHCS does NOT allow new additions to a household within the initial 6 month lease term. The only exception to this rule would be the birth or adoption of a child by an original household member. Should an existing household want to add a new family member to the household prior to fulfilling the initial 6 month lease term, **a brand new move-in certification will need to be completed**, which would include obtaining source documentation to verify the income and assets of all household members to ensure the newly formed household qualifies under the current Section 42 income limits per household size.

In Oregon, once a household has fulfilled the initial 6 month lease term, the new member's income and asset information should be added to the **most recent** certification completed. The member would then sign and date (actual signature date) the certification.

Should no original member exist, the remaining members must be income-certified as a new LIHTC household unless (1) for a mixed-use property, the remaining household members were income qualified at the time they moved in (independently or as a newly formed household) or (2) for a 100% LIHTC property, at the time they moved in, the remaining members were independently income-qualified.

➤ **Determining Annual Income** (pg. 4-7)

Typically, annual income is determined for the 12-month period following the effective date of the certification. However, in the event that the owner/agent cannot adequately determine a household's upcoming 12-month annual income based on current circumstances (due to a lack of income or income is sporadic), the household's annual income can be based upon actual income earned or received from the previous 12-month period.

➤ **Income from Business** (pg. 4-12)

Include as income any cash or assets withdrawn from the business by household members unless the withdrawal is to reimburse for an investment made (into the business).

In-Home Office (pg. 4-13) - the IRS now clarifies that a LIHTC household can “use a portion of a low-income unit exclusively and on a regular basis as a principle place of business, and claim the associated expenses as tax deductions, as long as the unit is the tenant's primary residence.” The owner/agent should obtain a copy of the Schedule C, along with IRS Form 8829, “Expenses for Business Use of Your Home”, for any household claiming in-home business office expenses (including daycare businesses).

Furthermore, “if the tenant is providing daycare services, the tenant must have applied for (and not have been rejected), be granted (and still have in effect), or be exempt from having a license, certification, registration, or approval as a daycare facility or home under state law.” A copy of the current state license/certification must be placed in the tenant file.

➤ **Income from Investments** (pg. 4-15)

Clarification added to direct owners/agents to include as income from assets any interest or dividends earned from assets (stocks, bonds, T-bills, CDs, mutual funds and money market accounts) even if the earnings are reinvested.

➤ **Educational Scholarships or Grants** (pg. 4-19)

With new interpretation and guidance, “The treatment of educational scholarships or grants is dependent on whether the student is receiving Section 8 assistance.”

For LIHTC units that **DO NOT receive Section 8 assistance**, "all forms of student financial assistance, no matter how it is used, are **EXCLUDED** from annual income. Financial assistance includes grants, scholarships, educational entitlements, work study programs, and financial aid packages. It doesn't matter whether the assistance is paid to the student or directly to the educational institution."

For LIHTC units that **receive Section 8 assistance**, **include all financial assistance received in excess of tuition** as income unless:

- "1. The student is over the age of 23 with dependent children, or
2. The student is living with his or her parents who are *applying for or* receiving Section 8 assistance.*"

For purposes of complying with existing Section 42 rules, owners/agents must still verify student status for each household on an annual basis (as well as at the time of move-in). OHCS will be revising the current mandated forms (OHCS.5 and OHCS.6) used to verify student status and financial assistance at a later date and posted to the OHCS website. Student loans continue not to be included as income.

➤ **Resident Services Stipend** (pg. 4-21)

Resident stipends are now acknowledged by the IRS as an exclusion from household income, provided the monthly amount of the stipend does not exceed \$200.00. If the monthly stipend does exceed \$200.00 per month, the entire amount must then be included as income.

Chapter 6 – Category 11c

➤ **Vacant Units** (pg. 6-5)

Vacant units must be made suitable for occupancy and ready to rent in a reasonable amount of time. OHCS has defined "reasonable amount of time" to be within 30 days from the move-out date. Vacant units will be considered noncompliant should it be discovered they were not made suitable for occupancy within 30 days from the date the last household moved out. The effective date of the noncompliance finding will be retroactive back to the move-out date (not the date of the audit).

Chapter 8 – Category 11e

➤ **Federal Grants** (pg. 8-2)

Projects that were placed in service prior to July 31, 2008 could not receive federal grants to fund building costs (or operations) without being required to reduce the eligible basis by the amount of the federally funded grant.

With the passage of the Housing Assistance Tax Act of 2008 (HATA), projects placing in service on or after July 31, 2008 will be allowed to apply these grants to be used in the operation of the building(s) without needing to reduce the eligible basis.

Please refer to pages 8-4 and 8-5 of the 8823 Guide to view a list of funds that are NOT considered to be federal grants.

Chapter 11 – Category 11g

➤ **Fees – Application Processing** (pg. 11-3)

Although not a new issue presented within the 8823 Guide, there is growing concern that owner/agents are charging application fees in excess of the actual processing costs. Per the Guide,

“Application fees may be charged to cover the actual cost of checking a prospective tenant’s income, credit history, and landlord references. The fee is limited to recovery of the actual out-of-pocket costs.”

➤ **Assistance Provided Under the HOME Investment Partnership Act of NAHASDA**

Per the 8823 Guide (pg. 11-7),

“***For buildings placed in service on or before July 30, 2008,*** IRC §42(i)(2)(E)(i) generally provides that assistance provided under the HOME Investment Partnerships Act (HOME) *or the Native American Housing and Assistance and Self-Determination Act (NAHASDA) of 1996* with respect to any building will not be treated as a below market Federal loan if 40 percent or more of the residential units *in the building* are occupied by individuals whose income is 50 percent or less of the Average Median Gross Income (AMGI). *The rule is applicable for the entire extended use period under IRC §42(h)(6)(D).*”

“**For buildings placed in service after July 30, 2008,** assistance under HOME and NAHASDA are not characterized as below market Federal loans and IRC §42(i)(2)(E) was removed from the Code under section 3002(b) of the Housing Assistance Tax Act of 2008.*”

Chapter 12 – Category 11h

➤ **Marketing** (pg. 12-2)

Please remember that owners/agents should make reasonable attempts to market vacant LIHTC units to the general public with some form of advertising (signs, banners, electronic pamphlets, newspapers, etc.) that is accessible to all potential residents.

Chapter 15 – Category 11j

➤ **Comparable Units** (pg.15-1)

The definition of a comparable unit has now been expanded to “a residential unit with *the same number of bedrooms (or fewer)*and *comparable* amenities...*”

➤ **Out of Compliance** (pg.15-3)

Under this category, the following two issues are revisited:

“***Note 1:** Vacant units that are not available for rent because the units are not prepared for immediate occupancy are reported as unsuitable for occupancy under Category 11c. See Chapter 6.*”

“***Note 2:** If the owner fails to market vacant low-income units, the owner has violated the General Public Use Rule, which should be reported as noncompliance under Category 11h. See Chapter 12.*”

Chapter 17 – Category 11l

➤ **Verification and Documenting Student Status** (pg.17-2)

This section emphasizes that owners/agents must address the issue of student status for each household at move-in and annually, regardless of whether or not a formal certification process is conducted. Student status of each household must be verified within 120 days prior to move-in, and within 120 days prior to each anniversary of the move-in date. OHCS requires owners/agents to verify household student status by using the Certification of Student Status form ([OHCS.5](#)).

As previously discussed, LIHTC units that **DO NOT receive Section 8 assistance**, "all forms of student financial assistance, no matter how it is used, are **EXCLUDED** from annual income."

OHCS will still require owner/agents to use the Verification of Student Status/Financial Assistance form ([OHCS.6](#)), but for those households not receiving Section 8 assistance, owners/agents can simply cross out or insert "N/A" for the areas requesting financial assistance information. Should there be future modifications to either of these two forms, the newest revision(s) would be posted on our website, under the "Required Forms" section of our [LIHTC Compliance Manual](#) web page.

Additionally, "A unit is also considered out of compliance if the owner fails to verify the household's student status at the time of move in, or an annual student status verification was performed late *and after notification of a state agency review.*"

Chapter 23 – Category 11q

➤ **100% Low-Income Projects: Failure to Complete Annual Recertifications** (pg.23-2)

As stated within the OHCS LIHTC Compliance Manual, in [Chapter 4](#) (pg. 4-9), although legislation passed in 2008 (HATA, or HERA) waives the requirement for 100% LIHTC properties to complete annual certifications, OHCS continues to exercise their right to mandate the completion of move-in and first-year annual certifications. The 8823 Guide now provides the following language on page 23-2:

"*Under IRC §142(d)(3)(A) and IRC §42 (per IRC §42(g)(4)), owners of 100 percent low-income *projects* are no longer required to complete annual income recertifications. **State agencies, however, have authority to impose additional requirements** upon IRC §42 projects and may require income recertifications after completing the initial income certification at the time the household moves into the low-income unit. For example, a state agency may require a one-time income recertification after the first year of occupancy."

Chapter 26 – Tenant Good Cause Eviction and Rent Increase Protection

The 8823 Guide now includes the following language:

➤ **Eviction or "Termination of Tenancy"** (pg.26-3)

"The owner of an IRC §42 property must be able to demonstrate if challenged in state court that **good cause** existed to support the eviction or termination of a tenant from a low-income unit. For purposes of IRC §42(h)(6)(E)(ii)(I), **good cause is determined by the state and local law** applicable to the location in which the IRC §42 property is located."

➤ **Owner Fails to Renew Lease** (pg.26-4)

*A lease to rent low-income housing is a contract. A lease contract expires at the end of the time period specified in the lease. At that time, the tenant surrenders the low-income housing unit to the owner and the owner accepts it back. The owner and tenant may renew the contract (or enter into a new contract), thereby allowing the tenant to continue occupying the low-income unit, but **the owner is not obligated to renew a lease or enter into a new one, and failure to do so does not, per se, constitute an eviction without good cause.** However, the owner must be prepared to **demonstrate if challenged in state court that the nonrenewal of a lease is not a “termination of tenancy” for other than good cause** under IRC §42.

The owner must provide the tenant with timely notice that the lease will not be renewed as required under state law.*

OHCS strongly urges all owners/agents to consult with their legal counsel to ensure that compliance with state and local laws with respect to tenant-landlord relations is met.

Miscellaneous Issues

➤ **Claiming Credits Prior to Issuance of Form 8609**

As reported by the IRS, one of the most common noncompliant events discovered from year to year is when an owner tries to claim credits before the Housing Finance Agency (HFA) has issued Form 8609, “Low-Income Housing Credit Allocation Certification”, for the LIHTC building. If you are nearing the point of claiming credits for the first year of the credit period and you have not yet received Form 8609 for you tax credit building, please contact your assigned Compliance Officer (CO).

➤ **Social Security - Cost of Living Adjustments**

On October 15, 2009, the Social Security Administration issued a news release announcing that for the first time since cost-of-living adjustments went into effect (in 1975) there will be no increase adjustments available for 2010. For more information please visit Social Security Online at <http://www.ssa.gov/cola/>.

Again, the information contained within this mailing does not include all clarifications, changes and additions that were made to the 8823 Guide. OHCS will be revising the LIHTC Compliance Manual at a later date to reflect the changes detailed above, as well as any others that are considered to be relevant to the compliance manual. Should you have questions or concerns regarding this mailing, or other questions are raised as a result of reviewing the remainder of the 8823 Guide, feel free to contact your assigned Compliance Officer, myself, or Heather Pate, PCS Manager (Heather.Pate@hcs.state.or.us).

Sincerely,

Tonya Evans

LIHTC Lead Compliance Officer
Program Compliance Section (PCS)
Tonya.Evans@hcs.state.or.us