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people live and work*

to: Owners and Management Agents of Tax Credit Developments

from: Liz Smith, Manager Program Compliance, Asset Management

date: January 1, 2015

subject: IRS Treasury Regulation 26 CFR 1.42-10 Utility Allowance Requirements

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Published 7.29.2008 in the Federal Register for immediate effect, the IRS issued the final regulation update for utility allowances (U/A), changing the way rents are adjusted on Low Income Housing Tax Credit (LIHTC) properties where residents pay for their own utilities. The memorandum provides an explanation of the changes to the 2008 IRS regulations and Colorado Housing and Finance Authority (CHFA) policy related to these changes. <http://edocket.access.gpo.gov/2008/pdf/E8-17268.pdf>.

Also, published in the Internal Revenue Bulletin on May 26, 2009, at 2009-21 I.R.B. 1037, the IRS issued Notice 2009-44 clarifying guidance under Treas. Reg. §1.42-10 with respect to application of utility allowances in sub-metered properties. The memorandum allows properties to apply the provisions of Notice 2009-44.

utility allowance options

Properties financed with LIHTC calculate rents to include a utility allowance for resident-paid utilities. Owners have the option of obtaining annual allowances from the applicable (1) Public Housing Authority (PHA) that oversees the location where the building resides, (2) Local Utility Company estimates based on actual usage, (3) HUD Model utility estimates, or (4) Energy Consumption Model.

gross rents in compliance

Low income housing projects are in compliance when the appropriate utility allowance is calculated and used, gross rents are reduced for a utility allowance when utilities are paid directly by the tenant and the maximum gross rent does not exceed the current applicable income limits.

annual updates required

Owners are required to obtain and analyze a utility allowance schedule from their source and demonstrate that the basis on which utility allowances have been established (consumption and rates) have been reviewed at least once during each calendar year. Building owners may choose, however, to calculate new utility allowances more frequently than once during the calendar year provided the owner complies with the requirements of these regulations, including the notification requirements to the tenants. **Property owners must document on an annual basis and update accordingly regardless of any changes to utility rates.**

first year of credit period

Effective/Applicability Date

In order to allow a building owner to implement the utility allowances as of the first day of the owner's taxable year, taxpayers may rely on the rules for determining utility allowances before the first day of the owner's taxable year provided that any utility allowances calculated are effective no earlier than the first day of the owner's taxable year.

Application of Newly Calculated Utility Allowances

To bring financial stability to a project during the beginning of its operations, building owners are not required to review or implement new utility allowances until the building has achieved 90 percent occupancy for a period of 90 consecutive days, **or** the end of the first year of the credit period, whichever is earlier.

Example

An owner acquired an existing building and completed substantial rehab. The building has 100 units and placed in service on November 1, 2012. The owner elected to begin the credit period the year after the building was placed in service, on January 1, 2013.

The owner chose to use the energy consumption model and correctly determined the utility allowance using consumption data for similarly sized and constructed units in the geographical area for the period November 1, 2011, through October 31, 2012, and the utility rate was established on November 1, 2012.

The owner rented the ninety-first unit in May of 2013 and maintained an occupancy rate of at least 94 percent through the end of August 2013. Since the owner had achieved 90 percent occupancy for 90 consecutive days, the owner was required to conduct a utility allowance review.

the 90-day period

Under §1.42-10(c) of the regulations, if the applicable utility allowance changes, the new utility allowance must be used to compute gross rents of rent-restricted units due 90 days after the change, known as “the 90-day period”. Regardless of which option the owner selects as their utility source, the 90-day period is applicable to all LIHTC properties where residents are required to pay utilities. The owner must demonstrate that: (1) tenants have been timely notified of any changes (the 90-day period), and (2) the new utility allowance was used to compute gross rents for LIHTC units due the first day immediately following the 90-day period. This is applicable any time during the extended use period (as defined in Section 42(h)(6)(D)).

effective date of annual utility allowance schedule

The effective date is the date indicated/published on the utility schedule.

Examples of effective dates:

- PHA: If utility schedule indicates January 2015, the effective date is January 1, 2015, the first day of the 90-day period.
- Local Utility Company Estimates: Utility allowance is obtained when the building owner received in writing information from the utility company providing the estimated per unit cost of the utility. Receipt of information from the utility company begins the 90-day period.
- HUD Model: The date entered as the “Form Date” on the Location Spreadsheet of the Utility Schedule Model and reflected on the Form 52667 is the effective date.
- Energy Consumption Model: The effective date is 60 days after the end of the last month of the 12-month period for which data was used to compute the estimate.

Example

Data was collected September 1, 2013, through August 31, 2014. November 1, 2014, (effective date) is the first day of the 90-day period to notify LIHTC units of any utility changes that will take place on February 1, 2015.

tenant notification period

The notification period begins the first day of the effective date of the utility schedule and continues for a period of 90 calendar days. If there are any changes to the utility allowance, the owner is required to notify LIHTC tenants of any utility changes regardless of what utility option is selected.

implementation date

Any changes to the utility amount must be implemented the first day following the 90-day period. Failure to implement any changes to the utility allowance may affect the monthly gross rents, which could cause the gross rents to exceed the applicable rent limit creating noncompliance.

noncompliance

Noncompliance due to gross rents exceeding the maximum allowed based on the applicable rent limit is a reportable deficiency to the IRS and will result in a loss of credits.

utility allowance calculations required per property type

Rural Housing Services (RHS) properties or any building in which any resident received Rural Housing rental assistance and operating in combination with Section 42/LIHTC	Use the applicable RHS utility allowances
HUD Section 8 properties operating in combination with Section 42/LIHTC	Use the applicable HUD utility allowances
HUD Section 8 tenant-based vouchers operating in combination with Section 42/LIHTC	Use the applicable local Public Housing Authority (PHA) utility allowances
Section 42/LIHTC Properties	Applicable utility allowances for rent restricted units in the building are determined by using the one of the following options: <ol style="list-style-type: none">1. Applicable local PHA Utility Allowances2. Local Utility Company Estimates3. HUD Utility Schedule Model4. Energy Consumption Model

option 1

public housing authority (pha) utility allowance schedule

Owners and/or management using this option must obtain a copy of the PHA's utility allowance schedule in the jurisdiction where the property resides. If the PHA directs the owner to utilize a utility allowance schedule from sources other than the local PHA, (i.e., state or DOLA) owner must have this in writing from the PHA. The utility allowance schedule must reflect the most current year's effective date. The new utility allowance must be used to compute gross rents of rent-restricted units due the first day immediately following the 90-day period.

option 2

local utility company estimates (owner's average of actual consumption)

These estimates are based on actual utility company data. The utility allowance schedule must reflect a current effective date. Owners must obtain copies of actual usage data from the applicable utility company (local utility provider for the building). The actual usage includes only continuously occupied units (50 or more weeks) in the most recent 12-month period. The most recent month data is no older than 60 days from the effective date. (Refer to sample timeline). Data is required for at least 25 units, representing each bedroom size geographically dispersed across the property, or all units if the property has less than 25 units. The owner must itemize the monthly usage by unit into a spreadsheet, including building address, unit number, unit size, and square footage, then average by unit type. Newly constructed or renovated buildings with less than 12 months of data may use units of similar size and construction characteristics within the same geographical area of the subject property.

option 3

hud utility schedule model

These estimates are based on information entered by the owner into the HUD Utility Schedule Model. The HUD Utility Schedule Model is a tool that provides Location and Heating Degree Data that requires input to the model. Information regarding the use of this model can be found at www.huduser.org/datasets/lihtc.html. The HUD Utility Schedule Model uses rates that are no older than the rates in place 60 days prior to the effective date. Refer to sample timeline below.

option 4 energy consumption model

Under Treas. Reg. §1.42-10(b)(4)(ii)(E), a building owner may calculate a utility allowance using an energy and water and sewage consumption analysis model (Energy Consumption Model). The Energy Consumption Model must, at a minimum, take into account specific factors including, but not limited to: (1) unit size; and (2) building orientation, design and materials, mechanical systems, appliances, and characteristics of the building location.

- Newly constructed or renovated: For newly constructed or renovated buildings with less than 12 months of consumption data, the engineer may use consumption data for the most recent 12-month period for similarly sized and constructed units in the geographical area in which the building is located.
- Estimates provided by licensed engineer or qualified professional: The utility allowance must be prepared by a properly licensed engineer or a qualified professional. A qualified professional must not be related to the building owner within the meaning of IRC 267(b) or 707(b).
- The data used to compute the estimate is limited to the building's consumption data for a 12-month period ending no older than 60 days prior to the date the utility allowance will change (effective date). Refer to sample timeline below.

changes to utility allowance source

Any changes to your current utility allowance source require written approval by CHFA. Please contact your Program Compliance Officer (PCO) immediately for approval.

documentation required

For utility Options 2, 3, and 4, all supporting data received by owner's utility source must be submitted to CHFA along with the Owner's Certification of Utility Estimates, Engineer's Certification, and a copy of engineer's license (if applicable). In addition, submit the appropriate review/processing fee for Options 3 and 4. Requests must be sent to your Program Compliance Officer at:

Colorado Housing and Finance Authority
Attn: (indicate name of Program Compliance Officer)
1981 Blake Street, Denver CO 80202

Please allow 14 business days for review and approval.

fees

Currently, a \$2.00 per low income unit processing fee will apply to all owner estimate submissions choosing Options 3 and 4. A minimum \$50.00 processing fee applies. No processing fee will be charged for the selection of Option 1 (PHA estimates) or Option 2 (Local Utility Company Estimates). The property owner is responsible for all costs incurred in obtaining utility allowance estimates. Fees may change from time to time. Contact your PCO for current fee pricing.

review, approval, or denial of owner's estimates

Owners using Options 2, 3, or 4 that submit complete and accurate data, the Owner Certification of Utility Estimates form, and the applicable processing fee to the PCO will receive notification of the approval or denial within 14 business days of receipt of the information. The owner must notify all rent-restricted residents of any utility change 90 days prior to implementing new gross rents (the 90-day period).

CHFA staff may deny owner estimate submissions if:

- the owner fails to provide complete and accurate information and fees;
- the subject property is not eligible;
- the owner includes utility costs other than what is paid directly by the resident;
- the owner includes costs such as cable or satellite television, telephone, and internet into the utility allowance calculations; or
- the owner fails to submit the Owner Certification Of Utility Estimates form.

record retention requirements

The property owner is responsible for the accuracy of all data submitted and is responsible for ensuring their LIHTC properties remain in compliance with all Section 42 requirements as well as retain any utility consumption estimates and supporting data as part of the taxpayer's records. At all times, a current utility allowance must be available for review and inspection per the record retention requirements.

excluded utilities

Optional cable television, telephone, and internet costs are not included in utility allowance calculations. Subject to the sub-metering discussion below, only utility costs (other than an excluded utility noted above) paid directly by the resident(s) and not by or through the owner are included in the utility allowance calculation and any such utilities paid by the owner cannot be charged to the resident.

sub-metering

If the cost of a particular utility for a residential unit is paid pursuant to an actual consumption sub-metering arrangement, then that cost is treated as being paid directly by the tenant and not through the owner of the building.

For RHS-assisted buildings, HUD-regulated buildings, and rent-restricted units in other buildings occupied by tenants receiving HUD rental assistance, the applicable RHS or HUD rules apply. For all other tenants in rent-restricted units, or to the extent that no RHS or HUD rules govern pursuant to the foregoing sentence:

1. The utility rates charged to tenants in each sub-metered rent-restricted unit must be limited to the utility company rates incurred by the building owners (or their agents);
2. If building owners (or their agents) charge tenants a reasonable fee for the administrative cost of sub-metering, then the fee will not be considered gross rent. The fee must not exceed an aggregate amount per unit of \$5.00 per month; and
3. If the costs for sewerage are based on the tenants' actual water consumption determined with a sub-metering system and the sewerage costs are on a combined water and sewerage bill, then the tenants' sewerage costs are treated as paid directly by the tenants for purposes of the utility allowances regulations.

ratio utility billing system (rubs)

IRS regulations ended the ability of owners to use a utility allowance if they employ a RUBS in their building. Owners will have to pay the utilities, but may charge full gross rents to the tenants based on the applicable rent and income limits provided by CHFA.

when to begin your data collection process when using options 2, 3, or 4

In order to comply with the data collection and resident notification, it is recommended to begin your data collection process at least 30 to 60 days prior to your annual utility effective date.

Timeline of Data Collection and Resident Notification

Data collected to calculate utility rates must be no older than the rates in place 60 days prior to the beginning of the 90-day period. All rent-restricted residents must be notified of utility allowance changes 90 calendar days prior to implementing. **Please note:** CHFA may require additional information from the owner during the 90-day period.

Sample Timeline for Notification of Utility Allowance Change for **All** Utility Options

utility allowance annual effective date: june 1, 2014	
April 1, 2014 – May 31, 2014	Begin obtaining utility data for the previous 12-month period (April 1, 2013, through March 31, 2014). Remember, data cannot be older than the rates in place 60 days prior to the beginning of the 90-day period. Calculate the utility allowance.
June 1, 2014: Effective date	Owner notifies all LIHTC residents of utility allowance changes (the 90-day period).
June 1, 2014 – August 31, 2014 (approximately 90 calendar days)	CHFA to review options 2, 3, and 4 only. Option 1 (PHA) does not require CHFA approval or review.
CHFA sends notification in writing approving utility allowance generally within 14 business days of receipt of request. Once approved, owner must begin implementing utility changes on September 1, 2014.	
Each June 1 in subsequent years	A new utility allowance schedule must be reviewed by the owner. If Option 2, 3, or 4 is selected, submit for annual review and approval. Include the 12-month data collected that must be no older than the rates in place 60 days prior to the effective date.

Please note: Gross rents are to be changed the first day of the month following the 90-day period. Therefore, 90 days may not be exact from month to month.

expenses of obtaining costs

The owner must pay for all costs incurred in obtaining utility allowance estimates and provide notification to both CHFA and building residents. This cost cannot be passed onto the residents.

resources and references

To learn more about Utility Allowance Requirements, search IRS Treasury Regulation 1.42-10 (26 CFR, Part I) or refer to <http://edocket.access.gpo.gov/2008/pdf/E8-17268.pdf>.

- Treas. Reg. §1.42-10
- 24 CFR 982.517, Utility Allowance Schedule, paragraph (4)(c)(1)
- § 1.42-10(b)(4)(ii)(B): Proposed Utility Allowance Changes and Notification
- 267(b) or 707(b): Energy Consumption/Qualified Professional
- Notice 2009-44
- Treas. Reg. §1.6001-1(a) and §1.6001-1(e)
- www.huduser.org/datasets/lihtc.html: HUD Model



owner certification of utility estimates

Property	Date
Owner	Phone

supporting documentation

This Utility Allowance Certification includes supporting documentation from the following source:

- Local Utility Usage.** Owner’s average of actual consumption using actual data and rates for the building(s). (No cost for review).
- HUD Utility Schedule Model** from www.huduser.org/datasets/lihtc.html. (Review fee required)
- Energy Consumption Model** using an energy and water and sewage consumption and analysis model from a properly licensed mechanical engineer. (Review fee required).

effective date

Effective Date of proposed utilities:

- Review fee attached for HUD Utility Model and Energy Consumption Model Review in the amount of \$ _____
- Were residents properly notified by providing 90 days to comment on proposed utility changes prior to any utility change which will take effect 90 days after the effective date? Yes No

signature

By signing below, Owner hereby certifies that the documentation is complete and accurate regarding utility costs associated with the above named property. Owner understands that CHFA may require additional information to substantiate the allowances provided herein and will promptly submit to determine approval. Owner **must initial and certify** the following:

_____ I am an authorized signor for the above named Owner of the property.

_____ I have personally reviewed the documentation provided for this Utility Allowance.

_____ The local utility company estimate of average actual consumption includes only continuously occupied units (50 or more weeks) in the most recent 12-month period (most recent month data is no older than 60 days from the effective date) for at least 25 units and representing each bedroom size, geographically dispersed across the property or all units if the property has less than 25 units.

_____ The HUD Utility Schedule Model uses rates that are no older than the rates in place 60 days prior to the effective date.

_____ The Energy Consumption Model was completed by a mechanical engineer properly licensed and at a minimum takes into account specific factors including, but not limited to, unit size, building orientation, design and material, mechanical systems, appliances, and characteristics of the building location. Utility rates are based on local rates and utility supplier(s) for the above property and the 12-month data is no older than the rates in place 60 days prior to the effective date. The engineer and owner are not related within the meaning of IRC section 267(b) or 707(b).

_____ Estimates are based only on utilities that are metered to residents where residents receive a monthly bill specific to usage in their unit.

_____ For newly constructed buildings- First year of the credit period. Owner is not required to review or implement new utility allowances until the building has achieved 90 percent occupancy for a period of 90 consecutive days, or by [at] the end of the first year of the credit period, whichever is earlier.

Based on the supporting documentation, I certify that the combined monthly average utility estimates for the above named project are complete, accurate, and are as follows:

studio _____ 1 bd _____ 2 bd _____ 3 bd _____ 4bd _____ 5bd _____

Print Owner Name

Signature of Owner

HUD Utility Schedule Model: Utility Allowance based on Owner's Average of Actual Consumption of HUD Utility Schedule Model was compiled by (if different than the person signing above).

Company Name

Phone Number

Print Your Name

Signature



engineer's certification

Required only when the Energy Consumption Model is used

I hereby certify that I am a mechanical engineer properly licensed and the Energy Consumption Model complies with the minimum requirements listed in the Owner Certification of Utility Estimates form and that I am not related to the owner within the meaning of IRC section 267(b) or 707(b).

Company Name	
Print Name of Engineer	License Number
Phone Number	Date of Review
<input type="checkbox"/> Copy of License Attached (required)	

signature

Signature of Engineer