Conquering LIHTC Utility Allowances

by Amanda Lee Gross, VP of Training and Compliance Policy

In article one of this series, we discussed the gross rent requirements applicable to the Low Income Housing Tax Credit (LIHTC) program as well as the utility allowance options found in Treasury Regulation 1.42-10. In this article we will be discussing the impact of other housing programs funding the project as it relates to utility allowances.

One of the ways to preserve our existing subsidized housing stock is to rehab aging Department of Housing and Urban Development (HUD) and Rural Development (RD) properties using Low-Income Housing Tax Credits. Treas. Reg. 1.42 -10 (a) and (b) specifies the utility allowance that must be used if a LIHTC project has RD or HUD funding.

LIHTC & RHS-Assisted Buildings and/or Tenants

RHS Multifamily Housing Programs

If a project receives assistance from a Rural Housing Service (RHS) program through Rural Development, the utility allowance for all LIHTC units in the project must be determined by using the method required by Rural Development.

Examples of RHS-assisted buildings include projects receiving any of the following forms of assistance:

- Section 515 Direct Loan Program
- Section 516 Off-Farm Labor Housing Loans and Grants
- Section 521 Rural Rental Assistance (RA)
- Section 538 Multi-Family Housing Loan Guarantee Program

Borrowers must have the project's utility allowance approved annually through the budget process using RD Form 3560-7.

Calculation Method

The method required to calculate utility allowances for RHS programs is not clearly defined in current RD regulations or guidance.

7 CFR 3560.11 defines a utility allowance as "*An amount determined by a borrower as the amount to be considered a tenant's portion of utility cost in the calculation of a tenant's total shelter cost when utility costs are not included in the rent.*"

7 CFR 3560.202 (d) only states: *"In projects where tenants pay the utilities, borrowers must establish utility allowances for each size and type of rental unit in the housing project based on estimated utility costs."*

However, former guidance found in *Exhibit A–6 of former 7 CFR part 1944, subpart E* provided that for existing construction, the method is to be based on average actual consumption for each unit size in the building, or if such data are not available, data from a similar project.

"The borrower will provide information which shows the utility bills and fees for public services which have been charged to units in the project in previous years. If possible, this historical data should cover a period of at least 24 months and should show billings to all types and sizes of units in the project. If data is not available on the specific project, data from similar projects may be substituted. Consideration should be given to making proper adjustments in the data caused by some tenants' excessive use of utilities. Current rate schedules and known rate increases will be used to estimate utility allowances."

LIHTC & HUD Regulated Buildings

HUD-Regulated Buildings

If a LIHTC building does not receive RHS assistance, but is a HUD-regulated building, the applicable HUD utility allowance is to be used for all LIHTC units in the building.

Specifically, Treas. Reg. 1.42-10(b) (3) states "*If neither a building nor any tenant in the building receives RHS housing assistance, and the rents and utility allowances of the building are regulated by HUD (HUD-regulated buildings), the applicable utility allowance for all rent-restricted units in the building is the applicable HUD utility allowance."*

It should be noted that this has not always been the text of (b)(3). Previously, a building was defined as being HUD-regulated if the *"rents and the utility allowances are reviewed by HUD on an annual basis."* The verb "reviewed" was replaced by the verb "regulated" and the phrase "on an annual basis" was removed with the publication of final regulations in 2016 to amend 1.42-10.

The change to (b)(3) resulted from a comment received in response to the proposed rulemaking amending 1.42-10. The commenter recommended revising the phrase *"rents and the utility allowances are reviewed by HUD"* as not all HUD programs have rents and utilities reviewed by HUD on an annual basis. In response to this comment, the final regulations were amended to define a HUD-regulated building to mean one in which the rents and utility allowances of the building are regulated by HUD.

This change to the definition of a HUD-regulated building did prompt discussion in the industry as to whether this change infers that LIHTC buildings with HOME-assisted units fall into this definition of HUD-assisted buildings. If so, this would have an impact on the utility allowance methodology used for LIHTC units that are HOME-assisted and occupied by a household that is receiving tenant-based Section 8 assistance through a Public Housing Authority. We will discuss the impact of the change to (b)(3) in the next article of this series, titled “Utilizing Public Housing Authority Utility Allowance Schedule.”

Calculation Method

HUD Multi-Family Housing

HUD Notice H 2015-04 provides detailed instruction to owner/agents how to calculate utility allowances for the following programs:

- Project-based Section 8
- Section 101 Rent Supplement
- Section 202/162 Project Assistance Contract (PAC)
- Section 202 Project Rental Assistance Contract (PRAC)
- Section 202 Senior Preservation Rental Assistance Contracts (SPRAC)
- Section 811 PRAC; Project Rental Assistance (PRA)
- Section 236
- Section 221(d)(3) Below Market Interest Rate (BMIR)

Note: The requirements in Notice H 2015-04 do not apply to the HOME Investment Partnership Program.

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