

March 14, 2006

SUBJECT: Federally Subsidized Housing for the Elderly

TO: Mary Ann Ferris, Director
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ISSUE:

The Food and Nutrition Service (FNS) has reviewed the issue of whether a facility that receives tax credits under the Low-Income Housing Tax Credits (LIHTC) program (26 U.S.C. §42) meets the exception to the institution rule as being federally subsidized housing for the elderly pursuant to Section 3(h)(5) of the Food Stamp Act of 1977, (7 U.S.C. 2012(h)(5)).

BACKGROUND:

Christopher Heights operates residential care facilities which provide assisted living services to elderly residents in Massachusetts. A resident currently can opt to have meals provided, in which case the individual will get three meals daily, or the individual can opt not to have any meals provided by the facility. Because the individual can opt out of having its meals provided by Christopher Heights, FNS authorized the facility as a retailer based on the facility's representation of providing an alternative meal plan of less than 50 percent of three meals daily. However, because the assisted living facilities provide all of its residents the majority of its meals (over 50 percent of three meals daily) as part of the institution's normal services, the residents are ineligible for Food Stamp Program benefits. Low-income residents of Christopher Heights are currently receiving all meals at no cost.

The provider claimed that its residents should meet the exception to the institution rule as federally subsidized housing for the elderly because its facilities receive federal tax credits under the LIHTC program.

The LIHTC offers federal tax credits to private investors for developing low income housing. 26 USC §42. To be eligible for LIHTC, a certain number of housing units must be rent-restricted, as is the case for the Christopher Heights facilities. The applicability of or the amount of the tax credit is not affected by the age of the residents.

ANALYSIS:

Sections 3(h)(4) and (5) of the Food Stamp Act of 1977, as amended provide, in pertinent part:

- (4) In no event shall any individual or group of individuals constitute a household if they reside in an institution or boarding house, or else live with others and pay compensation to the others for meals.

The contents of this guidance document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

- (5) For the purposes of this subsection, the following persons shall not be considered to be residents of institutions and shall be considered to be individual households:

(A) Residents of federally subsidized housing for the elderly, disabled or blind recipients of benefits under title I, II, X, XIV or XVI of the Social Security Act.

At issue is what is “federally subsidized housing for the elderly” and specifically, if the LIHTC qualifies as “federally subsidized housing for the elderly”.

For guidance on this issue, FNS reviewed the legislative history of the Food Stamp Act. The Food Stamp Act of 1964 prohibited residents of institutions and boarding houses from participating in the Food Stamp Program. The 1973 Food Stamp Amendments to the Food Stamp Act of 1964, however, provided for an exception for “residents of federally subsidized housing for the elderly under provisions of the Housing Act of 1959 or the National Housing Act.” Specifically, the 1973 amendments provided, in pertinent part:

Residents of federally subsidized housing for the elderly, built under provisions of Section 202 of the Housing Act of 1959 or Section 236 of the National Housing Act shall not be considered residents of an institution or boarding house for purposes of eligibility for food stamps under this act.¹

Pub. L. 93-86, 87 Stat. 221, §3(P) (1973).

The Food Stamp Act of 1977, however, amended this language to delete the specific references to the housing acts. The 1977 Act provided that “residents of subsidized housing for the elderly. . . shall not be considered residents of institutions.” Pub. Law 95-113, 91 Stat. 913, §1301 (1977). Although the Food Stamp Act of 1977 deleted specific references to the Housing Acts, the legislative history of the Food Stamp Act of 1977 does reference the 1973 amendments to the Act and states that, “The Committee bill would continue to exclude from the definition of a boarding house or institution residents of federally subsidized housing for the elderly. . . this is in keeping with the current law.” See H.R. 95-464, 141-145 (1978). It is also important to note that the long standing FNS interpretation of the statute and legislative history as reflected in the program regulations, has applied the exception strictly to federal housing subsidies focused on the elderly. Specifically, the 2000 regulations provided at 7 C.F.R. §273.1(e)(1):

Residents of institutions are not eligible for participation in the program with the following exceptions:

(i) Residents of federally subsidized housing for the elderly built under section 202 of the Housing Act of 1959.

The specific reference to the Housing Act of 1959 was not deleted until the 2001 CFR (7 C.F.R. §273.1(b)(7)(vi)(A))². However, even with this regulatory change, FNS did not

¹Section 202 of the Housing Act of 1959 exclusively references supportive housing for the elderly; Section 236 of the National Housing Act specifically references housing designed primarily for the use of the elderly (12 USC §1715z-1(j)(5)).

² 7 C.F.R. 273.1(b)(7)(vii)(A) addresses residents in federally subsidized housing and provides “individuals who are residents of federally subsidized housing for the elderly” shall not be considered residents of an institution. This regulation currently does not reference the Housing Act of 1959.

express any intent to broaden the meaning of the regulation under the Act. See 64 F.R. 64581 (2000).

Based on the construction of the Food Stamp Act and its accompanying legislative history, as well as the longstanding policy of FNS, we interpret the Food Stamp Act to exclude only federal subsidized housing expressly *for* the elderly from the institution exclusion. Accordingly, federal tax-subsidized housing for low income individuals only does not qualify for the exclusion.

If you have any questions, please contact Patrick Waldron at (703) 305-2495.

/s/

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Director

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cc: OGC