

Compliance Monitoring Procedures

The Budget Reconciliation Act of 1990 adopted by Congress amended Section 42 of the IRS Code to require that state tax credit agencies provide a procedure for monitoring developments for compliance with the requirements of the law and for notifying the IRS of any non-compliance discovered.

In order to implement this responsibility, all HC recipients will be required to execute and record a HC Housing Subsidy Covenant (the Covenant). The Covenant must be approved by VHFA. The Covenant must be signed by the Owner and returned to VHFA for recording prior to VHFA issuing a Carryover Allocation or IRS Form 8609. The Covenant will, at a minimum, require conditions wherein the developer and the development must continuously comply with Section 42 and other applicable Sections of the Internal Revenue Code of 1986, as amended, and the Treasury regulations issued thereunder and will bind any successors' interest for the specified time period. In the event that a project's funding source requires its own Housing Subsidy Covenant, the provisions of the HC Housing Subsidy Covenant may be incorporated into such Covenant and the requirement of a separate HC Housing Subsidy Covenant may be waived by VHFA. In addition, owners are required to provide VHFA with a copy of the IRS Form 8609, with Part II, and IRS Form 8586 completed by the Owner, for the first year of the credit period. Finally, a copy of VHFA's LIHTC Compliance Manual is available from VHFA's website at www.vhfa.org.

- a. VHFA is required to monitor compliance with the provisions of Section 42 and to notify the Internal Revenue Service of non-compliance and will charge fees to cover costs related to this monitoring. The fee structure is four dollars (\$4.00) per housing credit unit per month.

Housing Credit developments are very management-intensive and require a thorough understanding of the Section 42 regulations. The owner and/or management agent is required to attend compliance training or document that they have received training prior to lease up.

- b. Record Keeping and Record Retention

The owner of a Housing Credit-eligible development must keep records for each qualified tax credit-eligible building in the project showing:

- i. The total number of residential rental units in the building, including square footage;
- ii. The percentage of residential rental units in the building that are Housing Credit-eligible units (square footage fraction vs. unit fraction);
- iii. The rent charged on each residential rental unit in the building, including utility allowance;

- iv. The Housing Credit eligible unit vacancies in the building and the occupancy of the next available units;
- v. The income certification of each Housing Credit eligible tenant;
- vi. Documentation to support each Housing Credit eligible tenant's income certification (for example, a copy of the tenant's federal income tax return, W-2 Forms, or verifications of income from third parties such as employers or state agencies paying unemployment compensation; owners should retain the right in their leases to obtain this documentation at any time, even after tenants have moved into the unit); and
- vii. The character and use of the nonresidential portion of the building included in the building's eligible basis under Section 42(d) (*e.g.* tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities or facilities reasonably required by the project).

The owner of a Housing Credit eligible development must retain the records specified in this Section b (Record Keeping and Record Retention) for each building in the project for a period of at least 6 years beyond the end of the compliance period for each building.

Annually, the owner must provide a project status report that summarizes the activity of the development. The format for this report is included in this application in Appendix L.

c. Certification and Review Procedures

The Agency will utilize a certification procedure as set forth by the IRS under their monitoring regulations.

i. Certification Procedure

Under the certification procedures, the owner of a Housing Credit eligible development is required to certify to the Agency, under penalty of perjury, at least annually, that:

- (a). The project meets the requirements of the 20-50 test under Section 42(g)(1)(A) or the 40-60 test under Section 42(g)(1)(B), according to the election made by the sponsor at the time of the allocation;
- (b). There has been no change in the applicable fraction of any building in the project or, when there has been a change, a description of the change; and
- (c). The owner has received an annual income certification from each Housing Credit eligible tenant and documentation to support that certification or, in the case of a tenant receiving Section 8 housing assistance payments, a statement from the appropriate public housing authority declaring that the

tenant's income does not exceed the applicable income limit under Section 42(g);

- (d). Each Housing Credit eligible unit in the project is rent-restricted under Section 42(g)(2);
- (e). All units in the project are for use by the general public and are used on a non-transient basis;
- (f). No finding of discrimination under the Fair Housing Act, 42 U.S.C 3601-3619 has occurred for this project. A finding of discrimination includes an adverse final decision by the Secretary of Housing and Urban Development (HUD), 24 CFR 180.680, an adverse final decision by a substantially equivalent state or local fair housing agency, 42 U.S.C 3616a(a)(1), or an adverse judgment from a federal court;
- (g). Each building in the project is suitable for occupancy, taking into account local health, safety, and building codes (or habitability standards), and the state or local government unit responsible for making building code inspections did not issue a report of a violation for any building or low-income unit in the project;
- (h). There has been no change in the eligible basis (as defined in Section 42(d)) of any building in the project or, when there has been a change, a description regarding the nature of the change;
- (i). All tenant facilities included in the eligible basis under Section 42(d) of any building in the project (such as swimming pools, other recreational facilities, and parking areas) are provided on a comparable basis without charge to all tenants in the building;
- (j). If a Housing Credit eligible unit in the project became vacant during the year, reasonable attempts were or are being made to rent that unit or another available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income.
- (k). If the income of tenants of a Housing Credit eligible unit in the project increases above the limit allowed in Section 42(g)(2)(D)(ii), the next available unit of comparable or smaller size in the project will be rented to tenants having a qualifying income.
- (l). An extended Low-Income Housing Tax Credit (Subsidy Covenant) commitment was in effect, including the requirement under section 42(h)(6)(B)(iv) that an owner cannot refuse to lease a unit in the project to an applicant because the applicant holds a voucher or certificate of

eligibility under Section 8 of the United States Housing Act of 1937, 42 U.S.C 1437s. Owner has not refused to lease a unit to an applicant based solely on their status as a holder of a Section 8 voucher and the project otherwise meets the provisions, including any special provisions, as outlined in the Subsidy Covenant. (This requirement is not applicable to buildings with credits from years 1987-1989.)

- (m). The owner received its credit allocation from the portion of the state ceiling set-aside for a project involving “qualified non-profit organizations’ under Section 42(h)(5) of the code and its non-profit entity materially participated in the operation of the development within the meaning of Section 469(h) of the Code.
- (n). There has been no change in the ownership or management of the project.

ii. Review Procedure

Under the review procedure, the Agency will review at least twenty percent (20%) of tax credit files at least once every three years.

iii. Exception for Certain Buildings

The review procedure outlined above may not apply to the following types of Housing Credit eligible buildings, which are subject to other monitoring programs:

- (a). Buildings financed by the Rural Development (RD) under its Section 515 program; and
- (b). Buildings in which 50 percent or more of the aggregate basis (taking into account the building and the land) is financed with the proceeds of obligations the interest on which is exempt from tax under Section 103 of the Internal Revenue Code.

- iv. The certifications required under paragraph i. of this Section c. (Certifications and Review Procedures) must be made at least annually through the end of the 15-year compliance period under Section 42(i)(1) and be under penalty of perjury. Annually, the owner must provide an Owner’s Certificate of Continuing Program Compliance. This form is included in this application as Appendix M.

d. Auditing Procedure

The Agency has the right to perform an audit of any eligible Housing Credit development at least through the end of the compliance period of the buildings in the project. An audit includes a physical inspection of any building or buildings in the project, as well as a

review of the records described in Section b. The audit may be performed in addition to any inspection of income certifications and documentation under the review procedure. The regulations require the Agency to conduct an initial physical inspection by the end of the second calendar year following the year the last building in the project is placed in service. The physical inspection is performed every three years.

e. Notification of Non-compliance

- i. If the Agency does not receive the certification described in paragraph i. of Section c. or discovers upon audit, inspection, review, or in some other manner that the project is not in compliance with the provisions of Section 42, the Agency will provide prompt written notice to the owner of the project.
- ii. The Agency will file Form 8823, Low-Income Housing Credit Agencies Report of Non-compliance, with the Internal Revenue Service no later than 45 days after the end of the correction period described in paragraph c. of this Section, whether or not the non-compliance or failure to certify is corrected. The Agency must explain on Form 8823 the nature of the non-compliance or failure to certify and indicate whether the owner has corrected the non-compliance or failure to certify.
- iii. The correction period shall be up to 90 days from the date of the notice to the owner under paragraph a. of this Section and, during that period, the owner must supply any missing certifications and bring the project into compliance with the requirements of Section 42. For good cause shown, the Agency may extend the correction period for up to six months.

f. Delegation of Authority

The Agency may retain an agent or other private contractor to perform compliance monitoring. VHFA will retain the responsibility to notify the Internal Revenue Service under paragraph ii. of Section e. (above).

g. Liability

Compliance with the requirements of Section 42 is the responsibility of the owner of the building for which the credit is allocated. The Agency's obligation to monitor for compliance does not make the Agency liable for an owner's non-compliance.