

Chapter 7
Category 11d
Owner Failed to Provide Annual Certifications
or Provided Incomplete or Inaccurate Certification

Definition

This category is used to report owners of low-income housing properties who fail to submit annual certifications, or any other required reports and documentation, to the state agency as described in Treas. Reg. §1.42-5(c). Monitoring procedures require certifications (and state agency reviews of the certifications) at least annually for each year of the 15-year compliance period. Monitoring procedures may require certifications (and state agency reviews) more frequently than annually, provided that all months within each 12-month period are subject to certification.

Owners are responsible for reporting to the state agency annually that their projects were in compliance with IRC §42 for the preceding 12-month period. They must report in the form and manner the state agency specifies and must certify, under the penalty of perjury, that the information provided is true, accurate, and in compliance with the requirements of IRC §42. The owner must certify that:

1. The project met the requirements of the minimum set-aside test applicable to the project; i.e., the 20-50 test, the 40-60 test, or the 25-60 test for New York City.¹ See chapter 10.
2. If applicable, the 15-40 test under IRC §§42(g)(4) and 142(d)(4)(B) for deep rent skewed projects was met.
3. There has been no change in the applicable fraction (as defined in IRC §42(c)(1)(B)) of any building in the project, or that there was a change and a description of the change is included with the certification.
4. The owner has an annual income certification from each low-income tenant (Tenant Income Certification) and documentation to support that certification at initial occupancy and subsequent years during the compliance period. Tenants receiving Section 8 housing assistance payments may satisfy the documentation requirement by submitting a statement provided by a public housing authority (see Treas. Reg. §1.42-5(b)(1)(vii)). For an exception to this requirement, see IRC 42(g)(8)(B) and Rev. Proc. 94-64², or Rev. Proc. 2004-38³, which provide rules for 100 percent low-income buildings when the owner has received a waiver from the annual recertification requirements.
5. Each low-income unit in the project was rent restricted.
6. All units in the project were for use by the general public⁴, including the requirement that no finding of discrimination under the Fair Housing Act, 42

¹ See IRC §§42(g)(1)(A) and (B), 42(g)(4), 42(g)(4) and 142(d)(6).

² Rev. Proc. 94-64, 1994-2 C.B. 797.

³ Rev. Proc. 2004-38, 2004-2 C.B. 10.

⁴ As defined in Treas. Reg. §1.42-9.

U.S.C. 3601-3619, has occurred for the project. A finding of discrimination includes an adverse final decision by the Secretary of the Department of Housing and Urban Development, 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.

7. The buildings and low-income units in the project were suitable for occupancy, taking into account local health, safety and building codes (or other habitation standards), and the state or local government unit responsible for making local health, safety, or building code inspections did not issue a violation report for any building or low-income unit in the project. If a violation report or notice was issued by the governmental unit, the owner must attach a statement *summarizing* the violation report or notice or attach a *copy* of the violation notice or notice to the annual certification submitted to the state agency. In addition, the owner must state whether the violation has been corrected.
8. There has been no change in the eligible basis (as defined in IRC §42(d)) of any building in the project (determined at the end of the first credit year), or if there was a change, the nature of the change (e.g., a common area has become commercial space, or a fee is now charged for a tenant facility formerly provided without charge).
9. All tenant facilities included in the eligible basis of any building in the project (such as swimming pools, other recreational facilities, or parking areas, etc.) were provided on a comparable basis without charge to all tenants in the buildings.
10. If a low-income unit in the project became vacant during the year, reasonable attempts⁵ were or are being made to rent that unit (or the next 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.
11. If the income of tenants of a low-income building in the project increased above 140% of the applicable income limit (or 170% for deep rent skewed projects), the next available unit of comparable or smaller size in the building was or will be rented to tenants having a qualifying income. See IRC §42(g)(2)(D)(ii), Treas. Reg. §1.42-15, and chapter 14 for guidance on the available unit rule.
12. An extended low-income housing commitment is in effect including the requirement⁶ 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. This requirement is not applicable to buildings receiving allocations before 1990 or bond-financed buildings placed in service before 1990.

⁵ See Rev. Rul. 2004-82, 2004-2 C.B. 350, Q&A #9.

⁶ See IRC §42(h)(6)(B)(iv), effective August 10, 1993.

13. All low-income units in the project were used on a non-transient basis, except for transitional housing for the homeless⁷ or single-room occupancy units rented on a month-by-month basis⁸.

The state agency may also require additional reporting items. However, unless noncompliance with these reporting requirements constitutes noncompliance with IRC §42, noncompliance with these state agency reporting requirements should not be reported to the IRS.

In Compliance

Owners are in compliance, for federal tax purposes, when annual certifications have been submitted timely⁹, accurately, and completely.

Disclosure of Noncompliance

If the owner's certification discloses noncompliance with the requirements under IRC §42, the noncompliance must be reported to the IRS using Form 8823 and identifying the appropriate category of noncompliance.

Example 1: Owner Discloses Decrease in Eligible Basis

The owner of an LIHC building correctly submitted the annual certification and reported that the swimming pool had been closed and would no longer be available for use by the tenants. The owner is in compliance with the annual certification requirements, but the reduction in eligible basis should be reported to the IRS on Form 8823, line 11e, Changes in Eligible Basis or the Applicable Percentage.

Example 2: Compliance With Extended Use Agreement Requirements

As documented in the extended use agreement, the owner of an LIHC building agreed to dedicate 25 percent of the units in a 100 unit building to households with incomes less the 30 percent of the Area Median Gross Income. For purposes of IRC §42, the owner elected the 40/60 minimum set-aside on Form 8609. On the 2006 annual certification, the owner noted that the minimum set-aside had been met, but that only 20 of the units were occupied by households with incomes less than 30% of AMGI.

The nonperformance of the terms of the extended use agreement should not be reported to the IRS.

⁷ See IRC 42(i)(3)(B)(iii).

⁸ See IRC §42(i)(3)(B)(iv).

⁹ The state agencies should establish timeframes for submission of annual certifications.

Documentation Requirements

State agencies may require the use of standardized forms or submission of additional documentation to ensure compliance with the certification requirements. The state agencies may establish administrative policies and procedures such as requiring the original signature of the managing general partner or allowing facsimiles, the manner in which certifications are perfected if errors are identified, submission of additional information to clarify issues, etc.

Example 1: Change in Eligible Basis

To help evaluate the owner's compliance with the eligible basis certification, the state agency requires owners to provide information on any modification to the building that may result in changes to eligible basis. The owner failed to provide the information.

The state agency should report the owner's failure to provide a complete annual certification. The owner has not certified to the state agency's satisfaction that there has been non change in the eligible basis under IRC §42(d) of any building in the project as required under Treas. Reg. 1.42-5(c)(1)(vii).

Out of Compliance

If the owner fails to certify as required under Treas. Reg. §1.42-5(c)(1), submits inaccurate or incomplete certifications, or the certifications and documentation discloses noncompliance with the requirements under IRC §42, the state agency must report the owner using Form 8823. Similarly, an owner must be reported if the state agency does not receive or is not permitted to inspect the tenant income certifications, supporting documentation, and rent records described in Treas. Reg. §1.42-5(c)(2)(ii), or if the state agency learns that the project is not in compliance with the provisions of IRC §42.

To the extent that inadequate documentation from the owner prevents a state agency from determining whether a project is in compliance with IRC §42, the state agency can treat the project as out of compliance.

Out of Compliance Date

If an owner fails to complete or submit any of the certification items listed above, the date each building ceased to comply would be the first day of the reporting year for which such information was due. For example, if an owner does not submit the annual certification package for the 2006 calendar year, the first day of the reporting year date of noncompliance is January 1, 2006.

Back In Compliance

The owner is considered back in compliance when a perfected annual certification (and any other required documentation) is received by the state agency. Corrections may include submission of the required documentation or answering all the questions.

References

1. IRC § 42(m)(1)(B)(iii).
2. Treas. Reg. §1.42-5(c).