

Noncompliance with IRS Program Requirements

Noncompliance

If the Commission does not receive the certifications described in previous Chapters, or does not receive or is not permitted to inspect Household income certifications, supporting documentation, and rent records, or discovers by inspection, review, or in some other manner, that the property is not in compliance with the provisions of Section 42, the Regulatory Agreement, and/or other published guidance and procedures, it will notify the Owner and provide a correction period during which time the noncompliance must be corrected.

Any change in either the applicable fraction or eligible basis that results in a decrease in the qualified basis of the property is noncompliance that must be reported to the IRS.

The Commission will generally provide up to 30 days to correct documentation or reporting errors. However, the correction period is not to exceed 90 days from the date of the notice to the Owner.

For properties in their federal Compliance Period, the Commission files Form 8823, "Low-Income Housing Credit Agencies Report of Noncompliance," with the IRS at the end of the correction period, whether or not the noncompliance is corrected. It is to the Owner's advantage to fix all noncompliance as quickly as possible to ensure that a corrected Form 8823 is sent to the IRS.

The Commission explains on Form 8823 the nature of the noncompliance and indicates whether the Owner has corrected or not corrected the noncompliance.

Noncompliance with State Requirements

The Commission takes noncompliance with State requirements very seriously. Potential areas of noncompliance with Commission requirements include but are not limited to:

- Failure to correct findings from physical inspections
- Failure to maintain Additional Low-Income Set-Asides
- Failure to properly restrict rents on such units
- Failure to pay annual compliance fees
- Failure to maintain Special-Needs Commitments
- Failure to restrict upfront rental charges
- Failure to advertise and provide notice of affordable housing vacancies to the extent such commitments were made

Commencement of Correction Period

Note that failure to comply with Commission state requirements can jeopardize an Owner's ability to make future credit allocation requests.

Serious and/or ongoing federal or state noncompliance may compel the Commission to pursue other remedies as allowed under the terms of the Regulatory Agreement, such as requiring the Owner to use a Commission-approved property management company, imposition of rent garnishment or other legal action.

From the date Asset Management & Compliance Division staff issue a correction or deficiency letter (via email or postal mail) to the Owner/Property Manager, the Commission will generally provide up to 30 days to correct noncompliance.

The issuance of the correction or deficiency letter is the Commission's official notification to the Owner that noncompliance has been found and that it could lead to an issuance of Form 8823 to the IRS or to issuance of a State Noncompliance notice. The date noted on the correction or deficiency letter or in the email (if no letter is attached) starts the clock on the correction period.

The total correction period is not to exceed 90 days from the date of the notice to the Owner/Property Manager.

At the end of the correction period, the Commission will issue Form 8823 or Notice of State Noncompliance in an uncorrected state if the Owner has not fully corrected the noncompliance by that date.

Common Reasons for Noncompliance

1. Deficiencies found at inspections/failure to correct inspection deficiencies.
2. Failure to properly income-qualify a Resident at the time of initial move-in.
3. Failure to charge correct rent.
4. Failure to keep units suitable for occupancy at all times (i.e., units being offline for more than 90 days).
5. Failure to properly implement changes in utility allowances.
6. Failure to satisfy Special-Needs Commitments or additional affordable housing set-asides.
7. Failure to annually recertify Residents or annually certify Student Status for every Resident.

Recertifications at 100% Low Income Properties

If the Commission discovers that Residents at a 100% low-income property are not being properly initially qualified, the Commission may require, at its sole discretion, that the Owner re-instate third-party recertifications for all Residents, every year, until the Owner can prove that all Residents are income-qualified. The Commission also has the right to require re-instatement of third-party recertifications for any property that fails to abide by any and all program requirements, including but not limited to:

- Preventing adult members from being added to Residents within the first six months of the initial lease without re-qualifying the entire household
- Following the Next Available Unit Rule
- Abiding by other Commission requirements

Properties Approved for Post-Year 15 Monitoring Procedures or Recertification Waivers

Properties approved for Post-Year 15 Monitoring Procedures or a Recertification Waiver must be certain that every new Resident is properly income-qualified. If an improper initial certification is discovered, the income of **all** units in the building must be re-certified and revocation of the Procedures or Waiver may be required. For more information about revocation of Post-Year 15 Monitoring Procedures or the Recertification Waiver, please see **Chapter 11** or **Chapter 12** of this Manual.

Delays in Making a Unit Suitable for Occupancy

The IRS expects that vacant units are always in a state of rent-readiness and are available to the public for leasing. Having said that, the Commission understands that Owners need some time to turn a unit in between tenancies. As such, the Commission considers it reasonable for a vacated unit to take up to 30 days to be made rent-ready for the next tenant.

Owners may avoid 8823s for units unsuitable for occupancy for more than 30 and less than 90 days if the Owner can **clearly demonstrate** that the unit required a higher degree of turn work than normal, and that they continually worked to make the unit rent-ready. To satisfy the criteria for avoiding an 8823 issuance, the Owner must do all of the following:

1. Respond promptly to the Commission's request for additional documentation of the problem. Failure to respond to Commission requests for information by the Commission's deadlines are considered part of the noncompliance event.
2. Provide explanation and a timeline indicating consistent rehabilitation was ongoing if routine maintenance work (e.g., fixing tile, installing a refrigerator, painting a unit, replacing a closet door) takes longer than 30 days. The owner must clearly establish why routine work would take longer than 30 days to complete. Failure to establish a credible reason for the delay of routine work is considered part of the noncompliance event.
3. Prove the unit is suitable for occupancy within 90 days – this means providing copies of completed work orders and/or paid invoices to clearly demonstrate the work was done to make the unit suitable for occupancy. Failure to provide proof of the work done and proof that it is complete are considered part of the noncompliance event.

The Commission considers any unit which is unsuitable for occupancy for **more than 90 days** to be material noncompliance **and automatically reportable to the IRS. Form 8823 will always be issued for these units, regardless of reason.**

If the unit has been made rent-ready by the time the Commission reviews the file, then the Commission will issue Form 8823 as corrected. If the unit is not rent-ready at the time of review, the Commission may be able to give additional time for the Owner to make the unit rent-ready before issuing the 8823. If the unit is still not rent-ready at the end of the correction period, the Commission will issue an uncorrected 8823.

Regardless of the correction status of the 8823 being issued, the Owner may forward to the Commission any additional documentation they deem appropriate to accompany Form 8823 to the IRS.

Overcharging Rent

If a Resident's gross rent (utilities + fees + rent) exceeds the federal (i.e., 50% or 60%) tax credit maximum rent limit for any month during the reporting year, the Commission is obligated to issue Form 8823 to the IRS for Owner noncompliance. This is still true even if the Owner has promptly notified the Commission of the problem and corrected the issue.

The IRS takes overcharging of rent very seriously. In fact, once a unit is determined to be out of compliance with the rent limits, the unit ceases to be

**Residents
Found to be
Over-income at
Time of Move-
in**

a low-income unit for the remainder of the year. This means that the potential financial repercussions for the Owner could be significant.

The unit is not back in compliance until the first day of the next year, even if the Owner has already lowered the resident's rent and refunded them any overpayments made.

If the Owner has overcharged rent on a unit meeting a State income set-aside the Commission will issue a letter of State Non-Compliance and will require the Owner to reimburse the resident all overpaid monies. Failure to timely adjust the rent and reimburse the resident could hinder the Owner's future applications for credit or lead to further action on the part of the Commission.

If the Owner finds a Resident to be **over the income limit at move-in**, the Owner must correct the noncompliance and immediately notify the monitoring Portfolio Analyst to inform them what was found, and how and when it was corrected. This applies to an initial move-in over-income situation caused by either Resident error/fraud or Owner/Manager error.

For the above situation, the Commission is required to issue Form 8823 to the IRS. Assuming the Owner has properly corrected the noncompliance, the Commission will issue the Form 8823 as corrected and with an explanation that the Owner identified, fixed and reported the noncompliance. Additionally, the Owner must note this incident in the *Owner's Annual Certification* prior to submitting the form in January.

If the over-income situation **did not** occur at initial lease-up, and it is discovered and fixed at any time prior to receipt of the Commission's Annual Report notification in December, the Owner must immediately notify the monitoring Portfolio Analyst to inform them what was found, and how and when it was corrected. Additionally, this incident would be noted on the *Owner's Annual Certification*.

If the Owner finds, fixes and reports the noncompliance, the Commission does not have to notify the IRS. If the Owner does not identify the noncompliance, fix it, and notify the Portfolio Analyst prior to the Commission sending an Annual Report notification, the noncompliance must be reported to the IRS. It does not matter if the noncompliance was due to management error or the resident failing to disclose all income sources.

Resident Fraud

Owners should demonstrate due diligence to prevent Resident fraud when determining eligibility. Deliberate misrepresentation on the part of a Resident can result in the Owner renting a unit to an ineligible tenant. If an Owner has demonstrable proof that a Resident has deliberately misrepresented one or more eligibility factors, the Owner should consult applicable landlord-tenant law to determine if the Resident can be compelled to move.

To prevent any recapture issues, Owners are also encouraged to immediately report Resident fraud directly to the IRS by completing the IRS Form 211, which can be downloaded from the IRS' website.

Authority:

Federal compliance monitoring requirements - **IRS Regulation 1.42-5**. State compliance requirements are set out in the property's recorded Regulatory Agreement (Extended Use Agreement) as well as the Commission's Tax Credit *Policies*, including guidance provided by the *Tax Credit Compliance Manual* and *Tax Credit Compliance Frequently Asked Questions*.