

Objective:

To develop recommended borrower/investee certifications that may be obtained and loan covenants that may be included in the loan agreement with the borrower/investee.

Background:

A CDE may find it useful to utilize the recommended borrower/investee certifications and loan covenants to assist it in its overall compliance monitoring program to ensure that it is in compliance with the various requirements of the New Markets Tax Credit program.

Recommended Practices

1. Obtain a representation letter from the management of the proposed QALICB representing that all documents provided contain information that is complete, accurate, and represents the entire business of the borrower/investee.
2. Obtain certification from the proposed QALICB that it is not involved in the conduct of any of the excluded businesses listed below, either as a principal or an ancillary business:
 - Massage parlor
 - Hot tub facility
 - Suntan facility
 - Country club
 - Racetrack or other facility used for gambling
 - Sale of alcoholic beverages for consumption off premises
 - Development or holding of intangibles for sale
 - Private or commercial golf course
 - Farming

3. Obtain certification from the proposed QALICB that it is not a bank, credit union or other financial institution.
4. Obtain certification from the proposed QALICB that if it operates a mixed-use property, more than 20% of its rental revenue is derived from commercial rental of the property.
5. Obtain certification from the proposed QALICB that nonqualified property as defined in Internal Revenue Code Section 1397C(e) constitutes less than 5 percent of the aggregate unadjusted cost bases of the assets of the borrower/investee.
6. Obtain certification from the proposed QALICB that collectibles as defined in Internal Revenue Code Section 408(m)(2) not held primarily for sale to customers in the ordinary course of business constitute less than 5 percent of the aggregate unadjusted cost bases of the assets of the borrower/investee.
7. Obtain certification from the proposed QALICB that at least 50 percent of the gross income will be derived from the active conduct of a qualified business within any low-income community.
8. Obtain certification from the proposed QALICB that at least 40 percent of the services performed for such entity by its employees are performed in any low-income community.
9. Obtain certification from the proposed QALICB that at least 40 percent of the use of the tangible property of such borrower/investee whether owned or leased is within any low-income community.
10. Obtain certification from the proposed QALICB that it has no information or knowledge that it does not satisfy the definition of a qualified active low-income community business as defined in Section 1.45D-1T(d)(4)(i) of the Internal Revenue Code.
11. Obtain certification from the proposed QALICB that at the time of making the loan/investment it has no plans to
 - a. move/expand existing operations to a new address.
 - b. change the percent of gross income derived from the active conduct of a qualified business within any low-income community.

- c. change the percent of employee services performed in any low-income communities.
 - d. change the percent of use of tangible property in any low-income community.
 - e. maintain collectibles not held primarily for sale in the ordinary course of business at more than 5% of the aggregate unadjusted cost bases of its assets.
 - f. maintain nonqualified financial property at more than 5% of the aggregate unadjusted cost bases of its assets.
12. Obtain certification from the proposed QALICB that it does not use low-income housing tax credits.
13. Obtain certification from the proposed QALICB that there has been no communication from the Community Development Financial Institutions Fund concerning noncompliance with, or deficiencies in, reporting practices.
14. If the proposed Qualified Low-Income Community Investment is an investment in or a loan to a Community Development Entity (“CDE”), obtain the following additional certifications that:
- a. at least 60 percent of the CDEs activities have been directed to low-income communities or low-income persons.
 - b. it is maintaining accountability to the low-income communities.
 - c. it is making investments/loans or providing financial counseling to qualified active low-income community businesses.
 - d. it believes the statements of the qualified low-income community business to be accurate.
15. If there is a purchase of loans from another CDE, obtain a representation that the loan is a Qualified Low-Income Community Investment at the time of purchase or at the time it was made.

Loan covenants: Recommended Practices

Loan documents of proposed QALICB may include the following covenants:

1. It derives at least 50% of the gross income from the active conduct of a qualified business within any low-income community.
2. Its employees perform at least 40% of their services within any low-income community
3. At least 40% of the use of its tangible property are within any low-income community.
4. Collectibles as defined in Internal Revenue Code Section 408(m)(2) not held primarily for sale to customers constitute less than 5% of its aggregate unadjusted cost bases of its assets.
5. Nonqualified financial property as defined in Internal Revenue Code Section 1397(C)(e) will constitute less than 5% of its aggregate unadjusted cost bases of its assets.
6. Best efforts will be made in the event of expansion of the business to maintain:
 - a. the percent of gross income derived from the active conduct of a qualified business within a low-income census tract at 50%.
 - b. the percent of employee services performed in the low-income communities at 40%.
 - c. the use of tangible property in the low-income census tracts at 40%.
 - d. collectibles not held primarily for sale in the ordinary course of business at less than 5% of the aggregate unadjusted cost bases of its assets.
 - e. nonqualified financial property at less than 5% of the aggregate unadjusted cost bases of its assets.

7. Where an amortizing loan is made to the proposed QALICB, loan documents should include covenants restricting any unscheduled principal pay-downs on the loan other than payments in accordance with the loan agreement. In the event of non-amortizable loans, loan documents to include covenants restricting any principal pay-downs within the 7 year compliance period unless failure to do so would cause a financial detriment to the borrower/investee.

8. Where the proposed QALICB is a CDE, additional covenants may be included in the loan agreement, requiring the CDE
 - a. to meet its accountability requirements by setting up an advisory board with at least 20 percent of the advisory board members being representatives of the low-income community or being low-income persons.

 - b. to direct at least 60 percent of its activities to low-income communities or to low-income persons.

 - c. it will use loan/investment to make loans/investments in a QALICB or to provide financial consulting services to QALICBs.