

Chapter 5
Category 11b
Owner Failed to Correctly Complete or
Document Tenant’s Annual Income Recertification

Definition

Under Treas. Reg. §1.42-5(b)(1)(vi), owners are required to complete an annual income certification for each low-income household. The recertification process is identical to the initial certification in terms of documenting household composition, income, and income from assets. State agencies are required to review the tenant income recertifications and the supporting documentation for the tenants in the units.¹ Therefore, the state agency should be reviewing the most recent income recertification.

**Exception for
Certain
Buildings**

Under Treas. Reg. §1.42-5(c)(4), a state agency may except buildings financed by the Rural Housing Service (RHS) under the section 515 program and buildings financed with tax-exempt bonds (50% or more of the aggregate basis of the building and land) from the annual income recertification as part of its certification and review provisions. To qualify for this exception, the state agency must enter into an agreement with the RHS or tax-exempt bond issuer. Under the agreement, RHS or the bond issuer must agree to provide information concerning the income and rent of the tenants in the building to the state agency. The state agency may assume the accuracy of the information provided without further verification.

Under this exception, owners are not required to perform annual income recertifications specific to IRC §42, and the state agencies are not required to review, tenant income recertifications, supporting documentation, and rent records. Instead, the state agency must review the information provided by RHS or the bond issuer and determine whether the owner is in compliance with the income limitations and rent restrictions in IRC §42(g)(1) and (2). If the information provided by RHS or the bond issuer is not sufficient for the state agency to make a determination, the state agency must request the necessary additional income or rent information from the owner of the buildings.

NOTE: RHS determines tenant eligibility based on its definition of “adjusted annual income,” rather than “annual income” as defined under the Section 8 program. Therefore, the state agency may be required to calculate the tenant’s income for IRC §42 purposes and may need to request additional income information from the owner.

**Noncompliance
Corrected by
Owner Prior to
Notification of
State Agency’s
Compliance
Review**

Noncompliance with the annual income recertification requirements that is identified and corrected by the owner *prior to notification* of the compliance review by the state agency need not be reported; i.e., the owner has demonstrated due diligence by addressing noncompliance issues independently. See Chapter 3.

Example 1: Noncompliance Corrected Before Notification of Compliance Review

On January 15, 2004, the owner of a LIHC building incorrectly completed a household’s income recertification. The owner identified the problem and corrected the documentation deficiency on March 30, 2004. The owner was notified on April 20, 2004, that the state agency would be

¹ See Treas. Reg. §1.42-5(c)(2)(ii)(B).

conducting a tenant file review on May 1, 2004.

The state agency selected Unit A as part of the 20% sample and reviewed the household's income certification and noted the corrections. Because the owner corrected the noncompliance before the April 20, 2004 notification date, the owner is in compliance.

100% LIHC Projects

Tax Years Ending Before July 31, 2008

An owner may have received a waiver of the annual income recertification requirements under Rev. Proc. 2004-38, 2004-2 C.B. 10 or Rev. Proc. 94-64, 1994-2 C.B. 797, which applied to owners of qualified low-income housing projects that consist entirely of 100 percent low-income buildings. If noncompliance with the tenant income certification requirements was sufficiently serious, consideration was given to revoking the waiver. Revocation was not required, but the Service would revoke the waiver at the state agency's request.

Tax Years Ending After July 30, 2008

Under IRC §142(d)(3)(A), if all the low-income buildings in the *project* are 100% low-income buildings, owners are not required to complete annual tenant income recertifications.² "Projects" are identified based on the owner's election as documented on Form 8609, line 8b.³ Previously approved Income recertification waivers are subsumed by the new law and are no longer in force.

Mixed-Use Buildings

Note: For buildings with both LIHC units and market rate units, the state agencies must also determine whether the owner appropriately applied the Available Unit Rule when a household's income exceeds 140 percent of the income limit at the time of recertification. See Chapter 14.

In Compliance

Owners of mixed-use LIHC properties are in compliance if the recertification is completed within 120 days before the anniversary of the effective date of the original tenant income certification.

Household Vacates Unit

If an owner has sent a timely notice informing the household that the annual recertification is due, but the household does not provide the certification and supporting documentation prior to vacating the unit, the vacated unit will not be considered out of compliance with the recertification requirements. Owners should document attempts to obtain the recertification and the date the tenant actually moved out.

² IRC §142(d)(3)(A) was amended by section 3010 of the Housing Assistance Tax Act of 2008 and is effective for taxable years ending after July 30, 2008. IRC §142(d)(3)(A) is made applicable to IRC §42 low-income projects in IRC §42(g)(4).

³ Each building is considered a separate building unless each building that is (or will be) part of the multiple-building project is identified by check "yes" on Form 8609, line 8b, and attaching a statement identifying the (1) name and address of the project and aggregate credit associated with the project, and (2) the address and building identification number (BIN) and credit associated with every building in the project.

Example 1: Household Gives Notice of Departure Before Recertification is Due

The owner provided timely notice to a household on July 15th, 2009, that the annual income recertification was due on October 1, 2009. The household informed the owner on September 13, 2009 that they would be vacating the unit on October 15, 2009.

Since the household gave notice in advance and will not occupy the unit in the coming year, there is no reason to complete the income recertification and the unit remains in compliance. Should the household later decide to stay in the unit, a late recertification must be completed.

Owner Takes Action to Remove Noncompliant Household

If the owner initiates an eviction proceeding and the household vacates the unit, no recertification is necessary. If, for any reason, it is determined that the household will not vacate the unit as anticipated, a recertification will be necessary within 120 days of the determination.

Example 1: Court Failed to Sustain Request for Eviction

Income recertification was due on July 1, 2009. The owner initiated the recertification process on April 15, 2009, and documented attempts to obtain recertification information. The household did not complete the recertification and the owner initiated eviction proceedings on July 29, 2009. The court did not sustain the owner's filing for eviction on September 15, 2009. The owner must secure the tenant income recertification.

Households Determined to be Over the Income Limit at Recertification

In the event that a household's income exceeds the income limit at the time of recertification, state agencies must determine whether the household was income qualified at the time of move in. The initial tenant income certification should be reviewed.

Example 1: Household Qualified at Move In

An income qualified household moved into a rent restricted unit on June 23, 2004 and timely completed their tenant income recertifications each year. In 2009, for the first time, the recertification indicates that that same household's income exceeds the income limit.

The state agency must review the initial tenant income certification. If the household qualified at move in, no further action is necessary and the unit is in compliance with the annual income recertification requirements. If the household's income is 140% or more of the income limit, compliance with the Available Unit Rule must also be evaluated. See Chapter 14.

If the state agency identifies an issue of noncompliance on the initial tenant income certification, the state agency must review the intervening tenant income recertifications to determine whether the noncompliance was corrected at some intervening point.

Out of Compliance

A unit will be considered out of compliance if the annual recertification was not performed, or the annual recertification was performed late *and after notification* of a state agency compliance review.

Example 1: Annual Recertification Was Not Performed

Household was initially qualified and properly certified at move-in. However, it has been more than 12 months from the previous recertification and there is no recertification on file. This unit is out of compliance as of the date the recertification is due.

Example 2: Insufficient Documentation of Eligibility at Recertification

Household was initially qualified and properly certified at move-in; however, recertification was not properly documented and the state agency cannot reasonably determine the household's continuing eligibility. The following are possible documentation noncompliance issues:

- a. Application/questionnaire is not sufficiently detailed to disclose all sources of income and/or assets;
- b. Not all sources of income are verified;
- c. Not all sources of assets are verified;
- d. Verifications are insufficient;
- e. Not all adult household members' incomes and/or assets are disclosed and/or included;
- f. Tenant income certification form is not prepared, signed and/or dated; and
- g. Other state-required forms designed to document compliance with IRC §42 are not in file.

Back in Compliance

Owners may use the following methods to self-correct noncompliance. Evidence of corrected noncompliance may include a copy of the full recertification, including application, verifications, and/or tenant income recertification. Owners must submit copies of the documents required by the monitoring agency.

1. A recertification can be performed using current income and asset sources and current income limits. If there is no resulting noncompliance (e.g., violation of the Available Unit Rule), the unit would be out of compliance on the date the recertification was due and back in compliance on the date the tenant signs the recertification.
2. A retroactive recertification can be performed which completely and clearly documents the sources of income and assets *that were in place at the time the recertification should have been completed* and applies income limits that were in effect on that date. If there is no resulting noncompliance (e.g., violation of the Available Unit Rule), the unit would be out of compliance on the date the recertification was due, and back in compliance on the date the tenant signs the recertification.

While the recertification has been performed retroactively, the recertification documents should be dated with the current date. All the adult members of the household should sign the recertification using the current date. In other words, the recertification documents should not be backdated.

The advantage of the retroactive recertification is that the owner may avoid violating the Available Unit Rule.

In either case, the effective date for recertification continues to be the anniversary of the actual date of move in.

Example 1: New Recertification is Performed After Notification

An owner failed to complete a tenant's annual income recertification, which was due February 10, 2009. The mistake was identified during a state agency compliance review conducted November 1, 2009. The management company completed the recertification on November 12, 2009 using the income limits available on that date. The recertification was completed based on the tenant's anticipated future income for the period November 12, 2009 through November 12, 2010.

The unit is out of compliance from February 10th to November 12th, 2009. Since the late income recertification was completed within 120 days of the annual income recertification due February 10, 2010, and is based on current income limits and the tenant's anticipated income for the next year, the income recertification satisfies the annual income recertification requirement for 2010. Since the noncompliance was corrected after notification of a state agency review, the noncompliance must be reported on Form 8823.

Example 2: Household Determined to be Over-Income

An owner failed to complete a tenant's annual income recertification, which was due February 10, 2009. The mistake was identified during a state agency compliance review conducted November 1, 2009. The management company completed the recertification on November 12, 2009 using the income limits available on that date. The recertification was completed based on the tenant's anticipated future income for the period November 12, 2009 through November 12, 2010. The household's income was determined to be more than 140% of the income limit.

Since the recertification was corrected after notification of a state agency review, the noncompliance must be reported on Form 8823. The unit is out of compliance with the recertification requirements from February 10th to November 12th, 2009. Since the late income recertification was completed within 120 days of the annual income recertification due February 10, 2010, and is based on current income limits and the tenant's anticipated income for the next year, the income recertification satisfies the annual income recertification requirement for 2010. Further, the Available Unit Rule may have been violated if any comparable (or smaller) unit was rented to a nonqualified household or as a market rate unit after February 10, 2009, and before November 12, 2009.

References

1. Notice 88-80, 1988-2 CB 396
2. HUD Handbook 4350.3
3. Under IRC §6001, taxpayers are required to keep records and comply with regulations as prescribed. To claim the low-income housing credit, taxpayers must substantiate that the tenants were income qualified.
4. Rev. Proc. 94-65, 1994-2 C.B. 798
5. Rev. Proc. 2004-38, 2004-2 C.B. 10, which supersedes Rev. Proc. 94-64, 1994-2 C.B. 797