

Montana Board of Housing

Housing Credit

*Compliance Manual*

**Draft**

Multifamily Program

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# Training and Reference Guide

This manual is a training and reference guide for the administration of the Housing Credit (HC) Program. It is intended to answer questions regarding the procedures, rules, and regulations that govern the HC projects. The manual should be used in conjunction with, and as a supplement to, Section 42 of the Internal Revenue Code (IRC).

Compliance monitoring by Montana Board of Housing (MBOH) will be administered through the Multifamily Program.

If a determination is made that any provision of this manual is in conflict with Section 42 of the Internal Revenue Code, the Internal Revenue Code will govern.

The laws and regulations governing the Housing Credit (HC) Program as well as the interpretation of these laws can and do change. Owners and Managers should keep abreast of all changes in the Internal Revenue Code and the Code of Federal Regulations that may affect their properties. This may require consulting qualified legal and tax professionals for advice.

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## 1. INTRODUCTION

## **A. The Purpose of the Montana Board of Housing Compliance Manual**

This manual focuses on the responsibilities of owners and managers of all Housing Credit (HC) properties from the beginning of the lease up period through the end of the compliance period. HC properties are governed by Section 42 of the Internal Revenue Code. All projects additional requirements found in the Declaration of Restrictive Covenants for HC properties.

This manual includes links to forms MBOH is committed to providing quality affordable housing for the citizens of Montana and it is our goal to assist owners and managers to better understand and fulfill their obligations under the program. Monitors dealing with organized and complete files will find far fewer compliance issues to report to the owner and investors. This manual is intended as a reference to promote a better understanding of the HC program. Owners are responsible for compliance with all applicable federal and state rules and regulations that govern their properties.

**THIS MANUAL IS SUBJECT TO CHANGES AND UPDATES AT ANY TIME.**

## **B. The Low Income Housing Credit Program (LIHTC)**

The Tax Reform Act of 1986 established and the LIHTC

## **C. The Credit Period (Initial Period) vs. The Compliance Period (Extended Use Period)**

Owners are liable to the Internal Revenue Service (IRS) for the initial 15-year compliance period as credits are subject to re-capture for non-compliance during this time. The IRS further requires compliance during an extended use period of at least 15 years. MBOH compliance period consists of the initial 15-year compliance period, plus at least an additional 15 years. The extended use period for most HC properties in Montana is 31 years or longer.

## **D. Regulations Change Over Time**

Since its creation in 1986LIHTC MBOH, Congress, and the IRS have made several changes to the rules and regulations governing the program. It is the responsibility of owners and managers to stay current with changes as they occur.

## **2. GENERAL COMPLIANCE & SITE VISITS**

The HC program is governed and regulated by the IRS. MBOH is required to monitor each property for compliance. A project may have other sources of funding with their own compliance requirements. When these requirements conflict, yield to the most restrictive (check with those funding sources if you have questions)

The IRS requires MBOH to conduct physical inspections and file audits at least every 3 years on a sliding scale calculated on the number of units in a HC property. Properties may be subject to more frequent inspections and audits based on funding sources and/or MBOH discretion.

Site visits will consist of a physical inspection and file audit at each property. The inspection is based on Uniform Physical Conditions Standards (UPCS) guidelines and will include the property site, units, mechanical rooms, common areas, and building exteriors. Additionally, crawl spaces, basements, roofs and other areas may be inspected. Files will be reviewed to ensure income and rent limits, and other rules and requirements are being adhered to. The Declaration of Restricted Covenants and the 8609 are an important part of compliance. These and other project records may be reviewed at the time of the site visit.

MBOH staff will contact properties by phone to schedule site visits. A confirmation letter will be sent by email. It is imperative that MBOH be updated on all email addresses and changes. Units will be randomly selected by the HC monitoring software. The property must provide all tenants at least 24 hour notice of the date and time period of the inspection. Staff will not enter any unit unless they are accompanied by property staff; preferably a manager or maintenance person. Units not available for inspection will be considered non-compliant. In the event of non-compliance, a second site visit may be scheduled and the cost for the additional visit may be billed to the property.

To claim the full amount of HC, the owner must maintain continuous compliance with federal and state regulations throughout the compliance period. The main components of compliance are:

- Renting to qualified households;
- For a unit to be considered HC eligible, the rent must be restricted;
- Providing decent, safe, and sanitary housing that meets the UPCS guidelines;
- Compliance with the Fair Housing Act;

It is our goal to assist owners and managers to stay in compliance. Compliance may be achieved through due diligence, strong internal controls, organized files, and documentation. Notes written documenting situations not covered in the regular process help the file to stand on its own.

### **3. HC COMPLIANCE REGULATIONS**

#### **A. Compliance by Building**

Compliance is a building by building issue. Records must be kept by building and by unit number. Every building is assigned its own Building Identification Number (BIN). Therefore, all record keeping and reporting must be sorted and submitted by BIN.

#### **B. Placed-in-Service Date (PIS)**

The PIS date for new construction is the date the certificate of occupancy (C of O) is issued by the proper authority. For rehabilitation of an existing building, the owner selects a date within a 24 month period over which rehab expenditures are aggregated. The PIS date for each building is recorded on IRS form 8609.

#### **C. Minimum Set Aside**

The minimum set aside is an IRS election and every tax credit property must make a minimum set aside election. This is usually known as the 20/50 or 40/60 election and once it is made it is irrevocable.

- **20/50** – at least 20% of the total units in the property must be rent restricted and occupied by eligible tenants
- **40/60** – at least 40% of the total units in the property must be rent restricted and occupied by eligible tenants.
- **Average income** – at least 40% of the total units in the property must have unit designations, be rent restricted and occupied by eligible tenants, and must average 60% or less (more clarification coming from the IRS)

#### **D. Record Keeping Requirements**

Federal regulations require the Owner of a LIHTC project to retain the following information for each qualified building. For each year of the compliance period, the information must show:

- The total number of residential rental units in a building (including the number of bedrooms and the square footage of each residential rental unit);
- The percentage of residential rental units in the building that are low-income units, offices, and management units;
- The rent charged on each residential rental unit in the building (including any applicable utility allowances) as well as any additional mandatory charges to the tenant;
- The low-income unit vacancies in the building and information that shows when, and to whom, the next available units were rented. If a unit is left vacant, the Owner must maintain documentation showing a diligent attempt is being made to rent the unit to a qualifying tenant.
- The annual income re-certification (if applicable) of each low-income

tenant (by unit);

- The documentation to support each Tenant's Income Certification (TIC) including application or recertification (if applicable) and verifications;
- The character and use of any non-residential portion of the building included in the eligible basis;
- Record of all utility allowances from PIS throughout the extended use period;
- Copies of Form 8609 after completion by the Owner and filed with the IRS;

## **E. Record Retention Requirements**

The Owner must retain the above described records for the first year of the credit period for at least 6 years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period, meaning the original files must be retained for at least 21 years. All other records are required to be retained for at least 6 years beyond the due date (with extensions) for filing the federal income tax return for that year. IRS has approved electronic storage of these records provided they can be accessed at any time.

## **F. Maximum Gross Rent**

Maximum rents are calculated using the current HUD MTSP income limits. These income limits and maximum rents are provided as a courtesy by MBOH. *It is the Owner's responsibility to verify accuracy.* HC income and rent limits are posted on the MBOH website for your convenience.

<https://housing.mt.gov/Multifamily-Development/Income-and-Rent-Limits>

Gross monthly rent is equal to the total tenant paid rent plus the applicable utility allowance plus any mandatory charges. Gross monthly rent must not exceed the maximum rent. Charging more than the allowable rent is non-compliance and recapture of credits may result. IRS has taken the position that once a tenant has been overcharged for rent, the unit will not be considered back in compliance until January 1st of the following year. If there is at least \$1.00 in subsidy, then the Gross Rent including subsidy may exceed the Maximum Gross Rent limit.

## **G. Utility Allowances**

Utility allowances must be used when the tenants pay any of the utilities. Utilities normally are items such as electric, heat, oil or gas and on occasion water, sewer, trash. Utility allowances used are:

- Public Housing Authority;
- Rural Development;
- Department of Commerce Section 8;
- HOME or MBOH approved allowance (must be approved by MBOH before they are implemented)

Department of Commerce Section 8 allowances can be found here:

<https://housing.mt.gov/Rental-Housing/Housing-Choice-Voucher-Program/Utility-Allowances>

- Utility allowances provided by utility providers will not be considered or accepted.

Utility allowances must be updated at least annually. Copies of utility allowance documentation must be submitted to MBOH if using anything other than Department of Commerce Section 8. Realize that any changes in utility allowances have a direct impact on the net chargeable rent to the tenant. **Any utility allowance must be implemented within 90 days of the change.**

## **4. Additional Special HC Rules**

### **A. Vacant Unit Rule**

If a low-income unit becomes vacant during the year, the unit remains HC qualified and eligible for the tax credit provided reasonable attempts are made to rent the unit. This is a "project rule" not a "building rule" and thus includes all vacant units in the project.

"Reasonable attempts" are efforts toward marketing and renting a unit. Proof of such marketing must be available for review by MBOH staff.

### **B. Available Unit Rule/ 140 % Rule**

If the household income for residents in a qualified unit increases to more than 140% of the current applicable income limit, the unit is considered an "over-income unit" but may continue to be counted as a low-income unit as long as two conditions are met.

1. The unit must continue to be rent restricted and;
2. The next comparable size or smaller unit in the building must be rented to a qualified low-income tenant.

The Owner of a low-income building must rent to qualified residents all comparable units that are available or that subsequently become available in the same building until the applicable fraction (excluding the over-income units) is restored to the percentage on which the credit is based.

### **C. Relocating Existing Tenants/Unit Transfers**

When an existing tenant moves to another unit within the same building or within buildings in the same property, the status of the two units will swap. If a qualified tenant moves to an 'empty' (a unit never occupied by a qualified tenant) or 'vacant' (unit previously occupied by a qualified tenant) unit, the new unit ceases to be 'empty' or 'vacant' and becomes a qualified unit. The other unit will then be deemed 'empty' or 'vacant'.

The owner must have elected yes on line 8b of the completed the IRS 8609 form ("Are you treating this building as part of a multiple building project for purposes of section 42?") for transfers to be allowed between buildings.

, Therefore, you need to know how the owner answered the question on the 8609, line 8b.

#### **Transfers between buildings may also affect the available unit/140% rule.**

During the initial credit period, existing tenants cannot be relocated for purposes of qualifying more than one HC unit to count toward the minimum set aside or applicable fraction. Under no circumstances can one household be used to initially qualify more than one tax credit unit in a project.

### **D. Staff Units**

Revenue Ruling 92-61 [Section 13], effective September 9, 1997 allows a unit for a full-time staff member to be considered part of a project's "common space." Revenue Ruling 2004-82 [Section 251 further expanded staff units to include a unit occupied by a full-time security officer for the building if the building owner requires the security officer to live in the unit.]

#### **Two options apply:**

1. If the unit occupied by staff is actually a HC rental unit and is to be counted as part of the qualified basis, then the staff must be a qualified tenant.
2. If a staff unit is considered common space, the household does not need to be qualified. The IRS has stated in the 8823 Guide, "...if the owner is charging rent for a staff unit, the Service may determine the unit is not reasonably required by the project and may be considered commercial space".

The owner's HC application may have designated staff units. Staff units may be added or removed through an approval process with MBOH.

Moving staff units around the property is not allowed without MBOH approval. A written request must be submitted to MBOH which shows a bona fide need for the change.

## **E. Non-Transient Occupancy**

"HC rental units must be for use by the general public and all of the units in a project must be used on a non-transient basis.... generally, a HC unit is considered to be used on a non-transient basis if the initial lease term is six months or greater."

"In general—a unit shall not be treated as a low-income unit unless the unit is suitable for occupancy and used other than on a transient basis." [Section 42(i)(3)(B)(i)]

To be in compliance, a six-month minimum lease term is required at initial occupancy. Rehab projects with tenants in place may need to work with MBOH on the initial HC lease if other funding sources are involved.

## **F. General Public/Fair Housing**

All residential rental units in the project must be available for use by the general public. HC units may not be exclusively offered to members of a social organization or provided by an employer for its employees. "Available to the general public" applies to all residential rental units, market, and tax credit.

HC properties are subject to Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act, prohibiting discrimination in the sale, rental, and financing of dwellings based on race, color, religion, sex, national origin, familial status, and disability.

## **G. Full Time Students**

A student as defined by the IRS is "an individual, who during each of 5 calendar months during a calendar year is a full-time student". One day of attendance in a month is considered to be a full month. The determination of full or part time will be based on the criteria used by the educational organization.

- An educational organization is one that normally maintains a regular faculty and curriculum and normally has an enrolled body of students at the place where the educational activities take place. This would include K-12, colleges, universities, technical, trade and mechanical schools; but not on-the-job training. On-line colleges are considered to be an educational organization.
- Even if all tenants were not full-time students at move-in, they are not exempt from the student rule at a later date if the entire household becomes comprised of all full-time students.

The IRS has made it clear that student status is to be monitored on a calendar basis. An applicant would not be eligible if the person has been or will be a full-time student for any 5 months of the calendar year, even if they had graduated prior to applying for an HC unit.

Households comprised solely of full-time students are not HC eligible, unless they meet one of the exceptions stated below:

1. A student and receiving assistance under title IV of the Social Security Act, or;
2. A student who was previously under the care and placement responsibility of the State agency responsible for administering a plan under part B or part E of title IV of the Social Security Act (foster care). (Montana has no age restriction), or;
3. A student enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar federal, state, or local laws, or;
4. Single parents and their children and such parents are not dependents (as defined in section 152) and the children are not dependents of another individual other than the parents, or;
5. Married and eligible to file a joint tax return

Verification documenting the exception must be included in the tenant file and must be verified on an annual basis.

## **H. Section 8 Voucher Holders**

Section 42 states that HC properties may not refuse Section 8 certificate or voucher holders simply based on their Section 8 status. However, this does not assure tenant qualification.

## **I. Tenant Data Collection**

As mandated by Congress via the Housing and Economic Recovery Act (HERA) of 2008, HUD now requires that every state collect and submit specific demographic and economic information to them regarding households that reside in HC units. Some of this information is tenant specific and some is property specific. A household is not required to supply this information. Never guess the answer to any of this requested information.

## **J. Suitable for Occupancy Requirement**

A unit must be suitable for occupancy or habitable in accordance with the UPCS guidelines. If a unit is destroyed due to casualty loss (i.e., fire, flood, or any other disaster) credits cannot be claimed while the unit is being replaced. If the unit is restored within a reasonable time and on or before December 31<sup>st</sup> of the current year, credits can again be claimed. HC units that are vacated must be made ready to rent within 30 days. Otherwise, they would not be considered suitable for occupancy and would not be eligible for credit.

## **L. Recertification Requirements**

IRS guidance does not require projects to re-certify every household annually if the project is 100% HC.

MBOH requires annual student status verification on or before the anniversary of the initial move-in date.

MBOH does require annual recertifications for properties that have chosen the Average Income minimum set a side.

If the property is required by the owner or investor to continue to do recertification's or is a mixed property, the re-certifications are due on or before the anniversary of the initial HC move-in date for the household

## **M. Extended Use Requirements**

Compliance and monitoring requirements will not change in the extended use period.

# **5. HC Common Regulations**

## **A. Income Qualifying Households**

Income qualifying households is of the utmost importance to keep a project in compliance with federal regulations. Not only must you income qualify households, you must be able to produce the acceptable certifications and verifications necessary to prove they are qualified. The IRS (Section 42) mandates that income is calculated using the Income and Asset qualification requirements can be found in the HUD 4350.3 Chapter 5:

[https://www.hud.gov/program\\_offices/administration/hudclips/handbooks/hsqh/4350.3](https://www.hud.gov/program_offices/administration/hudclips/handbooks/hsqh/4350.3) It is the owner and manager responsibility to be aware of any updates and changes.

## **B. Calculating Child Support and Alimony**

Because child support and/or alimony are often a source of income, MBOH follows the requirements of the HUD Handbook 4350.3 Chapter 5, Section 1, Subsection 5-6, F.

Child support and alimony are issues that should be addressed at each annual re-certification as situations can change. This only applies to properties that are required to do full re-certifications.

### **C. Changes in Household Size**

Changes in the size of an existing household after initial certification must also be addressed. Tenants who reasonably believe (or know) that they will be adding members to their household are required to disclose this information at the initial certification so that all relevant income sources can be considered.

For additions to the household, the property must complete a new household member TIC and have it signed by the new household member (or their guardian) and the manager. This along with all income verifications will be placed in households file. The new household member and their income will be added into Certification on Line (COL) but a new TIC does not need to be printed and signed. The unit continues to remain qualified as long as one original member is still living in the unit.

### **D. Restricted Rents**

One of the key components of affordable housing is restricted rents. Over charging of rents in a HC project may cause loss of credits This loss of credit may happen even if it was an inadvertent mistake. For example, if there is a utility allowance increase and it puts the tenant portion of the rent over the maximum, you may lose credits. Housing Credit rent restrictions and calculations are discussed in this manual at Section 3. HC Compliance, I. Maximum Gross Rent.

### **E. Application for Tenancy Procedure**

Your application may be your most valuable tool in the qualification process. It will be the first document that a monitor will want to see in a file as it is the starting point that all other documentation must support. Because the HC program uses special definitions for income, assets, and household composition, standard property management application forms may not collect sufficient information to determine eligibility. A comprehensive housing application is critical to the accurate identification of all necessary information required to effectively determine household eligibility for the HC program. MBOH does not require a specific application form be used. A face-to-face interview with all adult household members can be very beneficial to review the application and historical documents and clarify any discrepancies or missing information.

### **F. Leases**

All tenants occupying an HC unit must be qualified and under a lease no later than the date the tenant takes possession of the unit. Leases must be a minimum of 6 months.

## **G. Uniform Physical Condition Standards (UPCS)**

MBOH staff will inspect to UPCS guidelines. MBOH is responsible for monitoring the physical condition of projects and marketability. Owners are required to abide by all local and state codes.

MBOH will also inspect for health and safety concerns and all life-threatening incidents will be reported to the IRS on form 8823. Non-life-threatening concerns may also be reported depending on the severity and frequency.

## **H. Evictions**

Pursuant to Revenue Ruling 2004-82, the owner may only evict residents for "Good Cause" as defined by the state or local jurisdiction. Non-renewal of a lease without good cause is also prohibited.

## **I. Compliance On-Line (COL)**

All project owners and management companies are required to use the MBOH's Certification On Line (COL) system. COL is a web-based reporting system that enables project owners and management companies to generate the owners annual certification of continuing program compliance, Tenant Income Certifications (TIC) and re-certifications submitted to the MBOH.

The COL system automates the reports for the annual reporting requirements for owners & tenants. Also required is an annual compliance packet for the assigned reporting period as described in 7B below.

Project owners and management companies using the COL system (or any other software) to generate a TIC must still complete all the required backup documentation for determining tenant eligibility and verifying tenant income referenced in Chapter 5 of this manual and as required by the HUD Handbook 4350.3, Chapter 5.

- *COL data input:*
  - Project owners and management companies are required to input into COL occupancy and tenant information for each Housing Credit unit. Project owners and management are responsible for ensuring the information is current and correct.
  
- *COL data submission:*
  - COL unit and tenant data and the owner's certification of continuing program compliance must be electronically submitted to MBOH on or before the 25<sup>th</sup> of the month following the assigned annual period.
  
  - COL also enables project owners and management companies to track tenant incomes and assets, set and manage gross rents, track

unit move-ins and transfers, and generate TIC's for use in resident qualifications and re-certifications.

Instructions for using the COL system can be found on the COL site itself. If you need further assistance, please contact a staff member listed on page 4 of this manual.

## **J. Compliance Training Requirements**

All persons gathering applicant information, giving applicants information, or responsible for qualifying tenants and verifying compliance (involved in tenant qualification and compliance) must be certified in LIHTC compliance by a nationally recognized LIHTC compliance training company. New personnel must complete a nationally recognized certification course and pass the test. To maintain certification, the person must attend a class with a nationally recognized compliance company at least once every four years.

The manager for a HC property must be trained and certified before the property is placed in service. New managers hired for existing HC properties must be certified according to QAP requirements.

## **K. Transfer of Property Ownership**

An Owner must contact MBOH for information and the process to sell or transfer any portion of ownership (change or purchase of partners, etc.) of a Housing Credit property.

## **6. Non-Compliance**

Non-compliance may be when the development, specific building, or unit has failed to adhere to required regulations and procedures. These procedures may be IRS Section 42 requirements, or MBOH requirements. Non-compliance may lead to the issuance of an 8823 and may cause recapture or loss of credits.

## **7. Forms, File and Reporting Requirements**

If you need a form, please contact one of the staff listed on page 4 of this manual.

Make certain that every form is filled out in its entirety. This includes forms that you have asked a third party to complete. Unanswered questions must be followed up by phone, email, or fax clarification.

## **A. Tenant Files**

At a minimum, the following documentation must be present in a tenant file:

- Application for Housing;
- Income & Asset Calculation Worksheets;
- 3rd Party Source Verifications;
- Tenant Income Certification (TIC);
- Certification of Zero Income (if applicable);
- Under \$5,000 Asset Certification (if applicable);
- Lease (including any addendums);
- Utility Allowance documentation;(if applicable)
- Re-certification documentation (if applicable)

## **B. Annual Compliance Reporting**

The following are required to be submitted to MBOH on or before the property's assigned report date:

- MBOH Owner's Certification of Continuing Program Compliance
- Current Property Information Form
- Income & Expenses summary for last fiscal year
- Reserves statement
- HC and Fair Housing Certifications for all staff
- Tenant data submitted via COL
- Annual compliance fee for each non-market unit

# **8. Late Fees**

## **A. Annual Compliance Package**

If the Annual Compliance Package is not received by the deadline, a late fee of \$100.00 or 25% of the compliance monitoring fee, whichever is greater, will be charged.

## **B. Correction of Non-Compliance**

Failure to provide those corrections by the deadline will result in an initial late fee and an additional per-week fee until all required documentation is received. A one-time extension may be granted if a written request is submitted to MBOH no later than 10 days prior to the deadline. If an extension is granted and the extension deadline passes, a per-week fee will be imposed until all required documentation is received by MBOH.

Please contact MBOH staff listed earlier on page 4 with any questions.