

## Chapter 23 Category 11q Other Noncompliance Issues

### Definition

This category should be used to report noncompliance only when the noncompliance cannot be associated with any other category. The discussion presented here is not intended to be all inclusive.

### Nonreportable Compliance Issues

#### Nonperformance of Extended Use Agreements

Under IRC §42(h)(6), taxpayers receiving credits must execute an extended use agreement, which is recorded as a restrictive covenant against the property, as provided by state law. The extended use period ends on the later of the date specified in the agreement or 15 years after the close of the compliance period. At a minimum, the property must be maintained as low-income housing property for 30 years beginning with the first day of the compliance period. The required content of the extended use agreement is outlined in IRC §42(h)(6)(B).

In addition, state agencies may add additional terms or restrictions to reflect the terms of the credit allocation. Under IRC §42(m), state agencies are required to develop qualified allocation plans with criteria for determining housing needs in their location and selecting appropriate projects. These terms and conditions will be reflected in the extended use agreement; e.g., the targeting of special needs groups, income restrictions, rent skewing, housing types, etc. State agencies are expected to enforce the agreement. Nonperformance of the terms of the extended use agreement should *not* be reported to the IRS. See chapter 16 for reportable noncompliance associated with extended use agreements.

#### Example 1: Special Set-Asides Not Reported

The owner elected the 40/60 minimum set-aside on Form 8609. The state agency required 20/50 targeting, as evidenced in the extended use agreement. The maximum 50% gross rent is \$400, but the maximum 60% gross rent is \$500. The owner charges \$450 rent and a \$50 utility allowance, for a total of \$500. The rent charged is above the limit agreed upon in the extended use agreement, but equals the rent limit for the 60 percent minimum set aside election.

The owner has violated the state's requirements. However, according to the imputed income limitation applicable to the unit, the rent is in compliance within federal regulation. The state agency should *not* file a Form 8823.

#### Example 2: Elected Minimum Set-Aside Inconsistent with Extended Use Agreement

An owner, at the time of application and subsequent submission of final cost certifications when the LIHC project was completed, represented to the state agency that the 20/50 minimum set-aside would be elected. The

20/50 minimum set-aside is also identified in the extended use agreement. When making the election on Form 8609 for IRS purposes, the taxpayer selected the 40/60 set-aside.

The taxpayer is in compliance with the requirements of IRC §42. Noncompliance with the terms of the extended use agreement is *not* reportable to the IRS on Form 8823.

**\*100%  
Low-Income  
Projects: Failure  
to Complete  
Annual Income  
Recertifications\***

\*Under IRC §142(d)(3)(A) and IRC §42 (per IRC §42(g)(4)), owners of 100 percent low-income *projects* are no longer required to complete annual income recertifications. State agencies, however, have authority to impose additional requirements upon IRC §42 projects and may require income recertifications after completing the initial income certification at the time the household moves into the low-income unit. For example, a state agency may require a one-time income recertification after the first year of occupancy.

State agencies may place such restrictions on a project owner for a variety of reasons. For example, the state agency has little confidence that (1) an owner can consistently identify income-qualified households without frequent technical errors, or (2) is willing to provide sufficient due diligence. In other cases, the state agency may be providing financing and, as part of their own internal controls and due diligence, is ensuring that the state's funds are used for the purposes intended.

However, like other state-imposed requirements, failure to comply with a state agency's requirement for income recertifications is not a reportable noncompliance event.\*