

NEW YORK CITY HOUSING DEVELOPMENT CORPORATION LOW INCOME HOUSING TAX CREDIT MONITORING PROCEDURES

The New York City Housing Development Corporation's ("HDC") low income housing tax credit ("LIHTC") monitoring procedures implement the requirements of Section 42(m)(1)(B)(iii) of the Internal Revenue Code of 1986 ("Code"). Section 42(m)(1)(B)(iii) was added by the Revenue Reconciliation Act of 1990 and became effective on January 1, 1992. The requirements of Section 42(m)(1)(B)(iii) apply to all buildings placed in service for which the LIHTC is, or has been, allowable at any time.

In addition, the Internal Revenue Service ("IRS") published final regulations on September 2, 1992 ("IRS Regulations"), as amended effective January 14, 2000 and January 1, 2001¹ (as amended "IRS Regulations") that create procedures pursuant to which allocating agencies such as HDC are required to monitor compliance with Section 42 of the Code and report any noncompliance to the IRS. HDC's monitoring procedures are intended to implement the requirements contained in the IRS Regulations.

HDC's monitoring procedures set forth herein apply to any owner of a project that has received an allocation of LIHTC from HDC.

I. Record Keeping and Record Retention Provisions

- A. **Record Keeping**: An owner of a project that has received an allocation of LIHTC from HDC is required to keep records for each building in the project and make these records available to HDC upon request for LIHTC compliance monitoring. These records shall show for each year in the compliance period the following:
1. The total number of residential rental units in the building, identified by apartment number (and including the number of bedrooms and the size in square feet of each residential rental unit), and whether a unit has been occupied by tenants whose family income and rental charges comply with Section 42(g) of the Code so as to qualify such unit as a low income unit as defined in Section 42(i)(3) of the Code ("Low Income Unit");
 2. The percentage of Low Income Units in each building and the project;
 3. The initial rent charged on each residential rental unit in the building (including any utility allowances) and all changes thereto (including any forgiveness of rent as an incentive to initial or continued occupancy by the tenant of such unit);

¹ **All amendments are effective January 1, 2001, except that Sections II. E and the last sentence of Section IV. B are effective January 14, 2000.**

4. The number of occupants in each Low Income Unit, but only if rent is determined by the number of occupants in each unit under Section 42(g)(2) of the Code (as in effect before the amendments made by the Omnibus Budget Act of 1989). This requirement applies to any project owner that entered into a LIHTC Reservation Agreement with HDC prior to January 1, 1990, unless the project owner made an election pursuant to IRS Revenue Procedure 94-9 to determine rents by unit size;
5. The vacancies in each building and information that shows when, and to whom, such units were rented;
6. The annual income certification of each of the tenants of a Low Income Unit (“Tenant Income Certification”);
7. The documentation submitted to support each Tenant Income Certification (for example, a copy of each tenant’s federal income tax return or W-2 Forms or verification of income from third parties such as employers or state agencies paying unemployment compensation). Tenant income is to be calculated in a manner consistent with the determination of annual income under Section 8 of the United States Housing Act of 1937 as amended (“Section 8”), not in accordance with the determination of gross income for federal income tax liability. In the case of tenants of a Low Income Unit receiving housing assistance payments under Section 8, the documentation requirement is satisfied if the public housing authority provides a statement to the building owner declaring the tenant’s income does not exceed the applicable income limit under Section 42(g) of the Code;
8. The eligible basis and qualified basis of each building at the end of the first year of the credit period;
9. A description listing the character and use of the non-residential portion of each building included in such building’s eligible basis under Section 42(d) of the Code (for example, tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities, or facilities reasonably required by the project); and
10. The original local health, safety and/or building code violation reports or notices that were issued by the State or local government unit responsible for making local health, safety or building code inspections. Retention of these original violation reports or notices is not required once HDC reviews the violation reports and/or notices and completes its inspection of the building (as required by Section III. C of these monitoring procedures), unless the violation remains uncorrected.

2. Record Retention Provisions: The owner of a project that received an allocation of LIHTC from HDC shall retain the foregoing records for a minimum of six (6) years beyond the due date (with extensions) for filing the federal income tax return for the last year of each building's LIHTC compliance period; provided however the records set forth in Section I.A.10 shall be retained for the period set forth in such section.

II. Owner Certifications

An owner of a project that received an allocation of LIHTC from HDC shall submit certifications ("Owner Certification") annually to HDC for the period during which the project is required to comply with Section 42 of the Code. Such Owner Certification shall be made under penalty of perjury and on a form approved by HDC. The project owner shall certify that for the preceding twelve (12) month period (and in addition thereto any lesser or greater period of time as HDC may determine in its sole discretion):

- A. The project meets the requirements of either (i) the "20-50 test" under Section 42(g)(1)(A) of the Code or (ii) the "25-60 test" under Sections 42(g)(4) and 142(d)(6) of the Code. If the owner has elected for the project to be "deep rent skewed" then the owner must also certify that the project meets the requirements of the "15-40 test" under Sections 42(g)(4) and 142(d)(4)(B) of the Code;
- B. There has been no change in the applicable fraction (as defined in Section 42(c)(1)(B) of the Code) of any building in the project; provided, however, if there has been such a change the owner shall certify as to the nature of the change on a building by building basis (pursuant to Section 252(f)(2) of the Tax Reform Act of 1986, this requirement does not apply to any project that received an allocation of LIHTC from HDC pursuant to a Credit Reservation Agreement entered into by HDC prior to January 1, 1990);
- C. The owner has received a Tenant Income Certification for each Low Income Unit and documentation to support such certification and the owner has examined such documentation and verified such Tenant Income Certification, or in the case of tenants receiving Section 8 housing assistance payments, the owner has received a statement from a public housing authority as described in Section I.A.7 of these monitoring procedures;
- D. Each Low Income Unit was rent restricted under Section 42(g)(2) of the Code;
- E. All units in the project were: (i) for use by the general public (as defined in Section 1.42(9) of the IRS Regulations), including the requirement that no finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, occurred for the project (a finding of discrimination includes an adverse final decision by the Secretary of the Department of Housing and Urban Development ("HUD"), 24 CFR 180.680, an adverse final decision by a substantially equivalent State or local fair housing agency, 42 U.S.C. 3616(a)(1), or an adverse judgment from a federal court); and (ii) used on a nontransient basis (except for transitional housing for the homeless provided under Section 42(i)(3)(B)(iii) of the Code or single room-occupancy units rented on a month-by-month basis under Section 42(i)(3)(B)(iv) of the Code);

- F. The buildings and Low Income Units in the project were suitable for occupancy, taking into account local health, safety, and building codes (or other habitability standards), and the State or local government unit responsible for making local health, safety, or building code inspections did not issue a violation report for any building or Low Income Unit in the project. If a violation report or notice was issued by the governmental unit, the owner must attach a statement summarizing the violation report or notice, or attach a copy of the violation report or notice, to its Owner Certification. In addition, the owner must certify whether the violation has been corrected;
- G. There was no change in any building's eligible basis (as defined in Section 42(d) of the Code); provided, however, if there has been such a change the owner shall certify as to the nature of the change on a building by building basis (for example, a common area has become commercial space, or a fee is now charged for a tenant facility formerly provided without charge);
- H. All tenant facilities included in the eligible basis (as defined in Section 42(d) of the Code) of any building in the project (such as swimming pools, other recreational facilities, and parking areas) were provided on a comparable basis without a charge to all tenants in such building;
- I. When and if a Low Income Unit in the project became vacant during the year, and such vacancy caused the percentage of Low Income Units to fail the 20-50 test or the 25-60 test, whichever is applicable to the project, reasonable attempts were or are being made to rent such unit or the next available unit of comparable or smaller size to tenants having a qualifying income for a Low Income Unit before any other units in the project were or will be rented to tenants not having a qualifying income for a Low Income Unit; provided, however, if the project is "deep rent skewed" reasonable attempts were or are being made to rent the next available Low Income Unit that had been rented to a tenant satisfying either the 20-50 test or the 25-60 test, whichever is applicable to the project, to tenants having a qualifying income for a Low Income Unit under the 20-50 test or the 25-60 test whichever is applicable to the project, unless the vacancy occurred in a unit being used to satisfy the 15-40 test, in which event reasonable attempts were or are being made to rent the next available Low Income Unit to tenants having a qualifying income under the 15-40 test;
- J. If the income of the tenants of a Low Income Unit in a Building that is not "deep rent skewed" increased above the limit allowed in Section 42(2)(D)(ii) of the Code (i.e. 140% of the project's applicable income eligibility limit - 50% or 60% of area gross median income, whichever is applicable), and such increase caused the percentage of Low Income Units to fail the 20-50 test or the 25-60 test, whichever is applicable to the building, the next available unit of comparable or smaller size in the building was or will be rented to tenants having a qualifying income for a Low Income Unit. For a building in a project that elected to be "deep rent skewed", if the income of the tenants of a Low Income Unit increased above the limit allowed in Section 42(g)(2)(D)(ii) of the Code (i.e. 170% of the project's applicable income eligibility limit - 50% or 60% of area gross median income whichever is applicable), and such increase caused the percentage of Low Income Units to fail the 20-50 test or the 25-60 test, whichever is applicable to the building, or the 15-40 test, the next available Low Income Unit in the building was or will be rented to tenants having a

qualifying income for a Low Income Unit (i.e. 40% of area gross median income and at a gross rent equal to 30% of 40% of area gross median income as adjusted by either the imputed income limitation or actual family size, whichever is applicable) until the 20-50 test or the 25-60 test, whichever is applicable to the project, is satisfied, and until the 15-40 test is satisfied (if applicable)(provided however if a project received an allocation of LIHTC from HDC pursuant to Section 252(f)(2) of the Tax Reform Act of 1986, then the foregoing “deep rent skewed” test may be met on a project-wide basis as opposed to a building by building basis);

- K. For a project that elected to be “deep rent skewed”: with respect to units of comparable size, that the highest annual gross rent for each Low Income Unit type (e.g. studios, one bedrooms, two bedrooms) in the project does not exceed one half of the average annual gross rent for the respective unit types which are not Low Income Units; **provided, however, that for a project that elected to be “deep rent skewed” prior to January 1, 1990, with respect to units of comparable size, that the ratio of the highest annual gross rent with respect to each Low Income Unit type in the project does not exceed one third of the average annual gross rent for the respective unit types which are not Low Income Units (unless the project owner made an election pursuant to IRS Revenue Procedures 94-10 to use a 2:1 “deep rent skewed” ratio);** and
- L. An extended low income housing commitment as described in Section 42(h)(6) of the Code was in effect (for buildings subject to Section 7108(c)(1) of the Omnibus Budget Reconciliation Act of 1989), including the requirement under Section 42(h)(6)(B)(iv) of the Code that an owner cannot refuse to lease a unit in the project to an applicant who holds a voucher or a certificate of eligibility under Section 8. This requirement does not apply to any project that received an allocation of LIHTC from HDC pursuant to a Credit Reservation Agreement entered into by HDC prior to January 1, 1990.

III. HDC Compliance Review

- A. Certification Review: HDC shall review the certifications submitted under Section II of these monitoring procedures for compliance with Section 42 of the Code;
- B. On-Site Review: HDC shall, by the end of the second calendar year following the year the last building in the project is placed in service, and at least once every three years thereafter, review the records of at least twenty (20%) percent of projects monitored by HDC which received an allocation of LIHTC and for which HDC has not delegated LIHTC compliance monitoring responsibility pursuant to Section VI.B(ii) of these monitoring procedures. Project reviews shall be conducted in a manner that will not give owners advance notice that their records for a particular year will or will not be reviewed; provided, however, HDC may give the project owner reasonable notice that a review will occur so that the project owner may assemble records (for example, thirty (30) days is reasonable notice). Project owners shall provide HDC with access to and, upon request of HDC, copies of all records set forth in Section I of these monitoring procedures. The

review shall include (but not be limited to) an on-site examination of the following information for at least twenty percent (20%) of the Low Income Units in a project:

1. The Tenant Income Certification for a particular year;
 2. The documentation the project owner has received to support such Tenant Income Certification; and
 3. The rent record for such Low Income Unit.
3. **Inspection Provision:** During the LIHTC compliance period, HDC has the right to perform an on-site inspection of any building in a project monitored by HDC that received an allocation of LIHTC . The inspection provision in this Section III. C is a separate requirement from any tenant file review under Section III. B of these monitoring procedures. HDC must conduct on-site inspections of all buildings in a project by the end of the second calendar year following the year the last building in the project is placed in service and at least once every three (3) years thereafter. Additionally, HDC must inspect at least twenty percent (20%) of the project's Low Income Units by the end of the second calendar year following the year the last building in the project is placed in service, and at least once every three (3) years thereafter.

As part of its on-site inspection of the buildings in the project and the Low Income Units HDC or its authorized delegate must review any local health, safety or building code violations reports or notices retained by the project owner pursuant to these monitoring procedures and must determine whether the buildings and Low Income Units either (i) are suitable for occupancy, taking into account local, health safety and building codes (or other habitability standards); or (ii) satisfy the uniform physical condition standards for public housing established by HUD pursuant to 24 CFR 5.703. If HDC determines by inspection that the HUD physical condition standards are met, HDC is not required to determine by inspection whether the project meets local health, safety and building codes. The HUD physical condition standards do not supersede or preempt local health, safety and building codes and the project, under Section 42 of the Code, must continue to satisfy these codes. If HDC becomes aware of any violation of the above codes, HDC must report the violation to the IRS.

IV. Notification

- A. If HDC (i) does not receive the Owner Certification required by Section II of these monitoring procedures, or (ii) is not permitted to conduct its compliance monitoring review as set forth in these monitoring procedures and/or as may be required by the IRS Regulations including, without limitation, if HDC does not receive or is not permitted to review a project owner's records as set forth in Section I of these monitoring procedures (including without limitation Tenant Income Certifications and supporting documentation or rent records), or is not permitted to conduct an inspection of a project, all as more fully described in Sections III(B) and (C) of these monitoring procedures, or (iii) discovers by inspection, review, or in some other manner, that the project is not

in compliance with Section 42 of the Code, then HDC shall promptly notify the project owner. The project owner shall be afforded a period of time to be determined by HDC in its sole discretion (the “Correction Period”) to supply any missing certifications, permit HDC to conduct its compliance monitoring review and/or bring the project into compliance with the provisions of Section 42 of the Code; provided, however, that the Correction Period shall not exceed ninety (90) days from the date of HDC’s notice to Owner. HDC may extend the Correction Period permitted hereunder for up to 180 days if HDC determines, in its sole discretion, that there is good cause for granting such extension.

2. HDC shall notify the IRS of a project owner’s noncompliance, failure to permit HDC to conduct its compliance monitoring review, or failure to submit the Owner Certification, no later than forty-five (45) days after the end of the Correction Period including extensions, if any, and no earlier than the end of the Correction Period including extensions, if any, whether or not the noncompliance, failure to permit HDC to conduct its compliance monitoring review, or failure to submit the Owner Certification is corrected, by filing IRS Form 8823 “Low-Income Housing Credit Agencies Report of Noncompliance” with the IRS and/or providing such other notification as may be required by Section 42 of the Code or the IRS Regulations. HDC shall provide on IRS Form 8823 (i) an explanation of the nature of the noncompliance, failure to permit HDC to conduct its compliance monitoring review, or failure to submit the Owner Certification, as the case may be, and (ii) an indication as to whether the project owner has corrected the noncompliance, failure to permit HDC to conduct its compliance monitoring review, or failure to submit the Owner Certification as the case may be. Any reported or discovered change in either the applicable fraction or eligible basis under Sections II(B) and (G) of these monitoring procedures respectively, that results in a decrease in the qualified basis of the project under Section 42(c)(1)(A) of the Code is noncompliance that shall be reported to the IRS. If HDC reports on IRS Form 8823 that a building is entirely out of compliance and will not be in compliance at any time in the future, then HDC need not file IRS Form 8823 in subsequent years to report that building’s noncompliance. If the noncompliance or failure to certify is corrected within three (3) years after the end of the Correction Period, HDC is required to file a Form 8823 with the IRS reporting the correction of the noncompliance or failure to certify.

V. Delegation of Authority

- A. HDC, at its discretion, may retain an agent or other private contractor to perform compliance monitoring to the extent that such delegation of HDC’s compliance monitoring activities is permitted by and performed in accordance with the IRS Regulations.
- B(i) HDC, at its discretion, may delegate all or some of its compliance monitoring responsibilities for one or more projects to another agency located within New York State including the responsibility of notifying the IRS of a project owner’s noncompliance or failure to submit the Owner Certification pursuant to the IRS Regulations, provided that the entity delegated to perform compliance monitoring activities informs HDC of its monitoring results.

- (ii) In the event that HDC makes a delegation of its compliance monitoring responsibilities for one or more projects as set forth in (i) above to another agency located in New York State that has also allocated LIHTC to the projects so delegated, then, with regard to HDC, such projects so delegated shall be, in HDC's discretion, exempt from the provisions of Sections II and III of these monitoring procedures during the period of time that such delegation remains in effect.

VI. HDC Retention of Records

HDC shall retain records of noncompliance, failure to permit HDC to conduct its compliance monitoring review, or failure to submit the Owner Certification for 6 years beyond HDC's filing of the respective IRS Form 8823. In all other cases, HDC shall retain the Owner Certifications and records described in Sections II and III of these monitoring procedures for 3 years from the end of the calendar year in which HDC receives such Owner Certifications and records.

VII. Liability

Compliance with the requirements of Section 42 of the Code is the responsibility of the project owner of the building for which the LIHTC is allowable. HDC's obligation to monitor for compliance with the requirements of Section 42 of the Code does not make HDC liable for a project owner's noncompliance.

VIII. Fees

HDC reserves the right to charge a fee to owners of projects that received an allocation of LIHTC, such fee to be determined by HDC in its sole discretion, to cover HDC's expenses in monitoring compliance under these monitoring procedures. HDC may refuse to accept a project owner's certification required under Section II of these monitoring procedures unless and until such fee is paid to and received by HDC.

9. Reporting Requirements

HDC must report its compliance monitoring activities annually on Form 8610, "Annual Low Income Housing Credit Agencies Report."

X. Effective Date

These LIHTC monitoring procedures are effective as of January 1, 1992 as amended, effective January 14, 2000 and January 1, 2001 (see footnote on page 1) and supersede any procedures previously adopted by HDC for monitoring compliance with Section 42 of the Code by project owners that received an allocation of LIHTC from HDC.