

TAX CREDIT AND HOME COMPLIANCE: Common Noncompliance Issues A Guide for Property Owners and Managers

The Tax Credit and HOME Compliance Unit (“TCHM Unit”) of the NYC Department of Housing Preservation and Development (“HPD”) monitors properties that have received financial assistance through Low Income Housing Tax Credits (“TC”) and/or the federal HOME Investment Partnership Program (“HOME”) to confirm adherence to the applicable household income, maximum rent and housing quality standards (“HQS”) requirements.

In the course of overseeing TC/HOME-assisted properties, the TCHM Unit’s staff have observed a number of recurring issues that result in delays in our review and approval of document submissions and/or result in the property owner being cited for noncompliance with the TC Regulatory Agreement and/or the HOME Written Agreement that governs the property’s operations. This Guide is intended to remind owners and managers of these common pitfalls, so that they may more easily be avoided. Obviously, this Guide is far from comprehensive and does not substitute for the more thorough direction furnished elsewhere by HPD, the Internal Revenue Service (“IRS”) and the U.S. Department of Housing and Urban Development (“HUD”). Such additional guidance may be found on the TCHM Unit’s webpage: <https://www1.nyc.gov/site/hpd/services-and-information/tax-credit-and-home-compliance.page>

COMMON ANNUAL OWNER CERTIFICATION (“AOC”) AND/OR FILE REVIEW ISSUES:

- Rent Roll Issues:
 - eRent Roll: Rent rolls should be submitted via HPD’s e-Rent Roll application (link: <https://a806-err.nyc.gov/eRentRoll/RentRoll.html>). Additional information and instructions for how to use eRent Roll can be found [online](#).
 - Incomplete Information: It’s critical that rent rolls include all requested information. An owner’s failure to complete all rent roll fields is a frequent source of delays in our completing our review of a submission and/or may lead to the owner being cited for noncompliance with TC and/or HOME restrictions. Examples of required information often omitted from submitted rent rolls include: (i) unit designations as “Low Income” or “Very Low Income”; (ii) tenant household income; (iii) date income certified (if for some reason not certified for the compliance year in question, “N/C” or the

date of the most recent income certification should be indicated); (iv) full time student; (v) market unit information on TC properties; and (vi) super's unit information (super's name, move-in date, #BRs). Also, please ensure that the "Unit Breakdown" at the top of the rent roll corresponds to the unit details provided.

- Section 8 (Housing Choice Voucher) Assistance:
 - TC Unit vs. HOME Unit: Under TC rules, if project-based or tenant-based Section 8 rental assistance applies to a TC-assisted unit, then the applicable rent restriction is the Section 8 rent limit. For HOME-assisted units, however, the Section 8 rent limit applies only with respect to project-based Section 8; if tenant-based rental assistance applies to a HOME unit, the HOME rent limit still governs. Please note that, with respect to both project-based and tenant-based rental assistance, the tenant's share of the rent may not exceed the applicable TC or HOME limit.
 - Project-Based Section 8 and HOME: The Project-based Section 8 exception that allows owners to exceed the maximum HOME rents applies only to "Very Low Income" tenants. If a tenant's income exceeds the VLI limit, then the rent charged must be within the HOME limits.
 - Rent **COLLECTED**: Where a Section 8 application is pending, the rent indicated on the rent roll should be the rent actually charged/collected by the landlord, not the rent that the owner expects to charge, assuming the Section 8 subsidy is approved.
- Tenant Income Qualification/Recertification Issues:
 - Tenant Income Certification ("TIC"): It's important to use the HPD-approved TIC form (available on our webpage), provide all requested information on the TIC and make sure the form is signed and dated by both the tenant and the landlord. The top of the TIC should be marked to indicate whether it's an "Initial Certification" or a "Recertification."
 - Calculating Income:
 - Self-employment Income: As a rule, income calculations are based on a tenant or applicant's gross income; however, for self-employed

individuals, owners should use net income, plus any salaries paid to household members from the tenant's or applicant's business.

- Alimony and Child Support: These payments must be included in income calculations unless the recipient certifies that payments are not being made and all reasonable actions to collect have been taken. As indicated below, a tenant or applicant generally may not self-certify the amount of support payments; documentation from the payment source is required. A limited exception may be applied where a tenant's income includes child support from a former spouse or partner, but there's no court order for the child support and the estranged spouse/partner refuses to cooperate in providing a certification. (see HUD Occupancy Handbook (4350.3, pg. 5-12))
- Social Security or Supplemental Security Income Payments: The gross amount of such payments to any household member (including minors) must be included in income calculations.
- Student Income and Income of Minors:
 - ❖ Adult Full-Time Students: Household income should include earned income of up to \$480 per year for full-time students 18 or older. (The \$480 limit doesn't apply if the student is the head-of-household or the spouse of the head-of-household.)
 - ❖ Minors: Household income does not include employment income from children under the age of 18. However, unearned income of minors generally must be included in household income (exceptions apply for foster care payments and adoption assistance payments in excess of \$480).
- General Income Documentation Issues:
 - Insufficient Paystubs: If paystubs are collected to evidence a tenant's employment/wage income, then they must cover two months of pay (see CFR, title 24, sec. 92.203(1)(i)), regardless of pay frequency. Accordingly, if a tenant is paid every two weeks, you should collect four consecutive recent paystubs; if a tenant is paid weekly, then eight consecutive recent paystubs should be obtained.
 - Stale Income Documents for Initial Certification: Income documentation for new tenant qualifications should be dated within 90 days of the TIC's effective date for HOME compliance and within 120 days of the TIC's effective date for LIHTC compliance.
 - Stale Income Documents for Recertification: Generally, income documents for recertifications may be dated up to one year prior to

the tenant's and owner's signature date on the TIC. However, if obtaining a recertification for a prior year, the income documents should relate to the compliance year in question. (For example, if recertifying a tenant's income for Compliance Year 2015, obtain 2015 income documents.)

- Missing Affidavit of No Income: An Affidavit of No Income must be completed for any household member 18 or older for whom no income is reported. (An "Unemployment Affidavit" is not the equivalent of (and will not substitute for) an Affidavit of No Income.)
- Self-Certification of Income: A "Self-Employment Affidavit" and/or any other self-certification of income (ex., certification of child support received) generally is not acceptable. All income sources must be supported by third-party documentation. (However, as indicated above, a limited exception may be applied where a tenant's income includes child support from a former spouse or partner, but there's no court order for the child support and the estranged spouse/partner refuses to cooperate in providing a certification.)
- Tax Return Issues:
 - Stale Tax Returns: Tax returns for a given calendar year are acceptable as evidence of income only through the end of the immediately following year. For example, a TIC dated September 15, 2018 may be accompanied by the tenant's tax return for 2017; however, a 2017 tax return would not be acceptable with a TIC dated January 15, 2019.
 - Self-employed Tenants: A tax return submitted by a self-employed tenant must be professionally-prepared and include all schedules.
- Lack of Source Documents on Recertification: Owners are required to obtain annual income recertifications from tenants of TC/HOME-assisted units.
 - For a Unit Receiving Both TC and HOME Assistance: In addition to obtaining an income recertification from the tenant, the owner is required to collect documents evidencing the tenant's household income every year.
 - For a TC-only Unit: Again, in addition to obtaining an income recertification from the tenant, the owner is required to collect documents evidencing the tenant's household income every year.

- For a HOME-only Unit:
 - ❖ Six-year Source Documents Collection Requirement: Income source documents must be collected for HOME unit tenants in the first year of the compliance period and every six years thereafter. For example, for a HOME-assisted project with a 20-year compliance term, income source documents must be collected from HOME tenants in year 1, year 7, year 13 and year 19. (Note: If a project has a long lease-up period, an owner may need to collect income source documents in consecutive years from tenants who were qualified and moved in prior to year 1 of the compliance term.)
 - ❖ Annual Source Documents Collection Recommended: Missing income source documentation is a recurring noncompliance issue with respect to HOME unit tenants. Owners frequently indicate that HOME tenants resist delivering the requested documents and question whether it's required, given that they weren't asked to provide them in prior years. To avoid tenant confusion arising from inconsistent annual income recertification requirements, we recommend that owners require tenants of both TC units and HOME units to furnish income source documents every year.
- Exception for 100% TC Projects: Notwithstanding the foregoing, owners are not required to obtain income recertifications (or income source documents) on TC-only units at a project where all units are TC-assisted (given that all re-rentals will be required to comply with TC limits on incomes and rents).
 - Missing HOME Recertifications at 100% TC Projects: While owners of 100% TC projects are not required to obtain annual income recertification from tenants of TC-assisted units, if any of the units is also HOME-assisted, then the recertification requirement applies for those units.
- Missing Recertifications – Uncooperative Tenants: While it's critical to avoiding noncompliance that owners diligently obtain required income recertifications, it's common to encounter tenants who refuse to respond to recertification requests. When this occurs, an owner may avoid being cited for noncompliance through eviction proceedings that result in the tenant moving out.

- Employees in TC/HOME Units:
 - TC Units: Generally, it is not permissible for an employee of the property owner or manager (or the parent, subsidiary or affiliate of the property owner or manager) to occupy a TC unit. Pursuant to IRS Regulation 1.42-9, TC units must be for use by the general public, and it's considered noncompliance for an employee to live in a TC unit. Per IRS guidance, that's true "even if the employee is an income-qualified tenant, because a residential rental unit provided by an employer for its employees is not for use by the general public and is not eligible for credit under IRC §42." To satisfy the IRS requirement that units be for use by the general public, where HPD determines a TC unit is occupied by an employee, we require the following:
 - That the tenant/employee in question was in residence prior to becoming an employee and was at the time of move-in deemed an eligible tenant. To demonstrate this, the owner is required to provide a copy of the initial TIC accompanied by the supporting third-party documentation used in that income determination.
 - The employee's most recent W2.
 - A certified rent roll for the last calendar year showing the rent being charged for the unit is at least the TC-prescribed maximum for a unit of that size. In the event the rent being charged is below the referenced maximum, the difference must be treated as a taxable fringe benefit for the purposes of income calculation and IRS reporting.
 - A copy of the current lease.
 - HOME Units: Similar to TC units, it generally is not permissible for an employee of the property owner or manager (or the parent, subsidiary or affiliate of the property owner or manager) to occupy a HOME unit and the same documentation listed above that is required when it's determined that an employee occupies a TC unit would also be needed with respect to an employee residing in a HOME unit.
 - HOME Exception for Property Manager or Maintenance Worker: Notwithstanding the above, HOME rules allow an existing employee of the property owner to move into a HOME unit, provided that the employee: (i) is income-qualified; and (ii) works full-time as a property manager or maintenance worker on the project where she/he resides. (Notes: This HOME exception does not apply if the unit in question was also subsidized with TC funds. Also, the exception wouldn't apply unless the employee/tenant has a lease and pays rent (so would almost never apply for a super).)

- Insufficient Lease Documentation:
 - Cover Entire Calendar Year: The lease(s) and lease renewal(s) on file for a tenant must cover the entire Compliance Year being reviewed (unless the lease was newly executed during the Compliance Year).
 - Fully Executed: Leases and lease renewals must be signed and dated by both the tenant and the landlord.
- Tenant Files Issues: Owners must maintain a tenant file on each household occupying a TC-assisted and/or HOME-assisted unit. To make file reviews easier for both HPD staff and owners, the files should be organized in a consistent order. At a minimum, the tenant file should contain:
 - On the Left Side:
 - Initial TIC and supporting income documentation (a worksheet indicating the calculation of income eligibility should be included); and
 - Lease(s) and lease renewal(s) signed and dated by both Landlord and Tenant, in reverse chronological order.
 - On the Right Side:
 - Annual recertifications, including supporting documentation, as required (exception applies for 100% TC properties with no HOME units); and
 - Annual Student Status Verification.

COMMON HQS ISSUES:

- HQS Corrections: To clear an HQS noncompliance issue, it's important to follow the Certification instructions available on our webpage. Please note that corrective actions taken must be indicated in the past tense to signify that the action has been completed and is not merely planned.
- No Access to Unit: Owners are responsible to ensure that HPD's property inspector can gain entry to the units selected for HQS inspections. The tenant's lease should clearly indicate that a tenant's refusal to grant access is a lease default, and the owner should coordinate with tenants to confirm that an adult will be available to open the apartment for inspection. If the tenant cannot be home on the day of inspection, then she/he may authorize the owner/manager or a representative aged 18 or older (ex., neighbor, friend, family member) to provide access to the unit.

CORRECTING NONCOMPLIANCE ISSUES: Noncompliance often relates to missing documentation, and such noncompliance generally may be corrected simply by furnishing us with the required documents. In some instances, though, a bit more is required to clear noncompliance; for example:

- Noncompliance – Failure to recertify a tenant’s income: When submitting a TIC for a prior compliance year to correct noncompliance, the current date should be indicated in the “Household Certification & Signatures” and “Signature of Owner/Representative” sections, and the “Effective Date” at the top of the TIC should indicate the compliance year in question.
- Noncompliance - Rent Exceeds the Applicable Rent Limit: You may correct this noncompliance by lowering the rent, amending the tenant’s lease, refunding the overcharge and providing the proof of credit (to the tenant or the rent subsidy program, as applicable) with a revised rent roll.
- Noncompliance - New HOME Tenant Not Income-Eligible: You may correct this noncompliance by relocating the over-income tenant to non-HOME unit, re-renting the fixed HOME unit to a qualified tenant and providing us with the new tenant’s initial income certification and income documents.
- Eviction: Generally, the completed eviction of a tenant will allow us to clear any noncompliance relating to that tenant, but note:
 - Rent Overcharges: Eviction does not correct noncompliance relating to rent overcharges unless the owner establishes that the tenant did not pay any overcharged rent.
 - Commencement of Eviction Proceedings Not Sufficient: Only a completed eviction will serve to clear noncompliance; commencement of a hold-over proceeding does not suffice.