Notice of Proposed Rulemaking and Notice of Public Hearing

Compliance Monitoring and Miscellaneous Issues Relating to the Low-Income Housing Credit

REG–114664–97

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed amendments to various existing final regulations concerning the low-income housing tax credit including the procedures for compliance monitoring by state and local housing agencies (Agencies), the requirements for making carryover allocations, and the rules for Agencies' correction of administrative errors or omissions. In addition, regulations are being proposed involving the independent verification of information on sources and uses of funds submitted by taxpayers to Agencies. These amendments and proposed regulations affect owners of low-income housing projects who have claimed the credit and the Agencies who administer the credit. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written and electronic comments must be received by May 6, 1999. Outlines of topics to be discussed at the public hearing scheduled for May 27, 1999, must be received by April 8, 1999.

ADDRESSES: Send submissions to: CC:DOM:CORP:R (REG–114664–97), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG–114664–97), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.ustreas.gov/prod/tax_regs/comments.html. The public hearing will be held in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Paul Handleman, (202) 622-3040; concerning submissions, the hearing, and/or to be placed on the building access list to attend the hearing, LaNita Van Dyke, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in §§1.42–5 and 1.42–13 previously have been reviewed and approved by the Office of Management and Budget for review under control numbers 1545-1291 and 1545-1357, respectively; all of these paperwork requirements will be consolidated under control number 1545-1357. The new collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

Comments on the collections of information should be sent to the **Office of Management and Budget,** Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service,** Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224. Comments on the collections of information should be received by March 9, 1999. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The requirement for the collections of information in this notice of proposed rulemaking is in §§1.42–5, 1.42–13, and 1.42–17. The information is required by the IRS to verify compliance with the requirements of section 42. The collections of information are mandatory. The likely respondents/recordkeepers are individuals, state and local governments, businesses or other for-profit institutions, nonprofit institutions, and small businesses or organizations.

Estimated total annual reporting and recordkeeping burden for §1.42–5: 102,500 hours.

For §1.42–5, the estimated annual burden per respondent varies from .5 hour to 3 hours for taxpayers and 250 to 5,000 hours for Agencies, with an estimated average of 1 hour for taxpayers and 1,500 hours for Agencies.

Estimated number of respondents for §1.42–5: 20,000 taxpayers and 55 Agencies.

Estimated total annual reporting and recordkeeping burden for §1.42–13: 289 hours.

For §1.42–13, the estimated annual burden per respondent varies from .5 hour to

10 hours for taxpayers and Agencies, with an estimated average of 3.5 hours for taxpayers and 3 hours for Agencies.

Estimated number of respondents for §1.42–13: 43 taxpayers and 43 Agencies.

Estimated total annual reporting and recordkeeping burden for §1.42–17: 2,110 hours.

For §1.42–17, the estimated annual burden per respondent varies from .5 hour to 2 hours for taxpayers and .5 hour to 5 hours for Agencies, with an estimated average of 1 hour for taxpayers and 2 hours for Agencies.

Estimated number of respondents for §1.42–17: 2,000 taxpayers and 55 Agencies.

Estimated annual frequency of responses: once a year.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On March 28, 1997, the General Accounting Office (GAO) submitted a report to Congress, "Tax Credits: Opportunities to Improve Oversight of the Low-Income Housing Program," (GAO/GGD/RCED-97–55), recommending certain revisions to existing Agency procedures for compliance with the low-income housing credit and requirements under qualified allocation plans for verifying taxpayers' sources and uses of funds for low-income housing projects. Consistent with these proposals, the proposed regulations amend existing regulation §1.42–5 to require Agencies: (i) to report annually their compliance monitoring activities to the IRS; (ii) to conduct on-site habitability inspections of low-income housing projects; and (iii) to review local government reports on building code violations. In addition, the proposed regulations provide that qualified allocation plans require taxpayers to submit independent verification on sources and uses of funds for low-income projects.

The proposed regulations also contain amendments to the Income Tax Regulations (26 CFR part 1) including §1.42–6 (carryover allocations), §1.42–11 (provision of services), §1.42–12 (effective dates and transitional rules), and §1.42–13 (correction of administrative errors and omissions) that are issued under the authority granted by section 42(n).

Explanation of Provisions

Compliance Monitoring

Section 42(m)(1)(B)(iii) provides that an allocation plan is not qualified unless it contains a procedure that the Agency (or an agent of, or private contractor hired by, the Agency) will follow in monitoring compliance with the provisions of section 42. The Agency is to notify the IRS of any noncompliance of which the Agency becomes aware.

Section 42(m)(1)(B)(iii) is effective on January 1, 1992, and applies to all buildings for which the low-income housing credit determined under section 42 is, or has been, allowable at any time. Allocation plans must have complied with the requirements of §1.42–5 by June 30, 1993. Section 42(m)(1)(B)(iii) and §1.42–5 do not require monitoring for whether a low-income housing project is in compliance with the requirements of section 42 prior to January 1, 1992. However, if an Agency becomes aware of noncompliance that occurred prior to January 1, 1992, the Agency is required to notify the IRS of that noncompliance.

The current compliance monitoring regulations require an Agency, at a minimum, to review tenant income certifications and rent charges of projects using one of the following three monitoring options: (1) review the owners' annual income certifications, including the documentation supporting the certifications for at least 50 percent of the Agency's low-income projects, and tenant rent records in at least 20 percent of the low-income units in these projects; (2) make annual on-site inspections of at least 20 percent of the projects, and review the low-income certification, the documentation supporting the certification, and rent record for each tenant in at least 20 percent of the low-income units in those projects; or (3) obtain from all project owners tenant income and rent records for each low-income unit and, for at least 20 percent of the projects, review the annual tenant income certification, backup income documentation, and rent record for each low-income tenant in at least 20 percent of the low-income units in those projects.

The GAO report recommended that an Agency conduct regular on-site inspections of projects and obtain building code inspection reports performed by the local government unit. The GAO found that desk audits (monitoring options 1 and 3 above) failed to detect violations involving the physical condition of buildings. In addition, site visits allow an Agency to directly assess the compliance status of projects and the physical condition of buildings. Consistent with these proposals, the proposed regulations remove the three monitoring options and require, at least once every three (3) years, that each Agency conduct on-site inspections of all buildings in each low-income housing project and, for each tenant in at least 20 percent of the project's low-income units selected by the Agency, review the low-income certification, the documentation supporting such certification, and the rent record. The proposed regulations also require, at a minimum, by the end of the calendar year following the year the last building in a project is placed in service, that the Agency conduct on-site inspections of the projects and review the low-income certification, the documentation supporting such certification, and the rent record for each tenant in the project. As part of the inspection requirements, the proposed regulations also require the Agency to determine whether the project is suitable for occupancy, taking into account local health, safety, and building codes. Agencies may delegate this determination only to a state or local government unit responsible for making building code inspections. The three-year inspection requirement is proposed to be effective on the date the final regulations are published in the **Federal Register**. The placed-in-service year inspection requirement is proposed to be effective for buildings placed in service on or after the date

the final regulations are published in the **Federal Register**.

The current compliance monitoring regulations require the owner of a project, at a minimum, to certify annually that for the preceding 12-month period each building in the project was suitable for occupancy, taking into account local health, safety, and building codes. Based on the GAO recommendation, the proposed regulations revise this certification by also requiring the owner of the project to certify that for the preceding 12-month period the state or local government unit responsible for making building code inspections did not issue a report of a violation for the project. If the governmental unit issued a report of a violation, the owner will be required to attach a copy of the report of the violation to the annual certification submitted to the Agency.

The proposed regulations also adopt the GAO recommendation that Agencies report annually to the IRS on compliance monitoring activities. It is anticipated Form 8610, "Annual Low-Income Housing Credit Agencies Report," will be revised to require an Agency to confirm annually that it has satisfied the new compliance monitoring requirements involving: (1) the once every three-year on-site inspections and review of the low-income certification, the documentation supporting such certification, and the rent record for each tenant in at least 20 percent of the low-income units selected by the Agency; and (2) the on-site inspections relating to the placed-in-service year and review of the low-income certification, the documentation supporting such certification, and the rent record for each low-income tenant in the project.

The current compliance monitoring regulations require Agencies to report a correction of noncompliance or failure to certify if the correction occurs within the correction period defined in §1.42–5(e)(4). The proposed regulations clarify that the Agency is required to file Form 8823, "Low-Income Housing Credit Agencies Report of Noncompliance," with the IRS reporting the correction of the noncompliance or failure to certify regardless of when the correction occurs during the compliance period. This requirement is proposed to be effective on the date the final regulations are published in the **Federal Register**.

Sources and Uses of Funds

The GAO report recommended that IRS regulations be amended to establish clear requirements to ensure independent verification of taxpayer's key information on sources and uses of funds submitted to an Agency. Without assurance of reliable and complete cost and financing information, Agencies are vulnerable to providing more (or fewer) tax credits to projects than are actually needed. Under section 42(m)(2)(A), the housing credit dollar amount allocated to a project should not exceed the amount the Agency determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period. In making this determination, section 42(m)(2)(B) requires that the Agency must consider: (i) the sources and uses of funds and the total financing planned for the project, (ii) any proceeds or receipts expected to be generated by reason of tax benefits, (iii) the percentage of the housing credit dollar amount used for project costs other than the costs of intermediaries, and (iv) the reasonableness of the developmental and operational costs of the project. The requirement in section 42(m)(2)(B)(iii) is not to be applied so as to impede the development of projects in hard-to-develop areas.

In its report, the GAO determined that an Agency must make three critical judgments in awarding credits: (1) the reasonableness of developer costs because the Agency is to award no more credits to a project than a specified percentage of certain Agency-approved project development costs; (2) the reasonableness of the financing arrangements for the project because the Agency is required to base an award of credit on the financial need of a project subject to the limit computed on Agency-approved development costs; and (3) criteria for pricing the credit (for example, use of an appropriate rate to convert credits into an equity investment amount).

So that an Agency may more accurately determine the amount of credits to be awarded, the GAO proposed three alternative recommendations: (1) an examination or audit, which would provide a reasonable basis for an independent public accountant to issue an opinion on the overall reliability of a project's financial information taken as a whole; (2) a review, which would consist of inquiries and application of analytical procedures that might bring to the accountant's attention significant matters affecting a project's financial information but would not provide assurance that the accountant would become aware of all significant matters that would be disclosed in an audit; or (3) agreed-upon procedures, which would provide an accountant with a basis to issue a report of findings based on the specified procedures but not a basis to issue an opinion on the reliability of the financial information.

Because the first alternative provides the most reliable independent verification on sources and uses of funds, the proposed regulations require that a taxpayer must obtain an opinion by a certified public accountant, based upon the accountant's audit or examination, on the financial determinations and certifications provided by the taxpayer to the Agency, including the costs that may qualify for inclusion in eligible basis under section 42(d) and the amount of the credit under section 42. This opinion must be submitted to the Agency before the Agency issues the Form 8609, "Low-Income Housing Credit Allocation Certification." This requirement is proposed to be effective on the date the final regulations are published in the **Federal Register**.

Buildings Qualifying for Carryover Allocations

The proposed regulations amend the carryover allocation regulations by requiring the Agency to file a form (to be prescribed by the IRS) that summarizes the carryover allocation document described in §1.42–6(d)(2) with the Agency's Form 8610 for the year the allocation is made. The new form will be filed with the Form 8610 in lieu of the original carryover allocation document. Taxpayers must continue to file a copy of the carryover allocation document with the Form 8609 for the building for the first year the credit is claimed.

Correction of Administrative Errors and Omissions

Housing credit agencies may correct administrative errors and omissions with respect to allocations and recordkeeping

if the correction occurs within a reasonable period of time after discovery of the error or omission. The current administrative error and omission regulations define an administrative error or omission as a mistake that results in a document that inaccurately reflects the intent of the Agency at the time the document is originally completed or, if the mistake affects a taxpayer, a document that inaccurately reflects the intent of the Agency and the affected taxpayer at the time the document is originally completed. However, an administrative error or omission does not include a misinterpretation of the applicable rules and regulations under section 42. Agencies must obtain prior approval from the Secretary to correct an administrative error or omission if the correction is not made before the close of the calendar year of the error or omission and the correction: (1) is a numerical change to the housing credit dollar amount allocated for the building or project; (2) affects the determination of any component of the state's housing credit ceiling under section 42(h)(3)(C); or (3) affects the state's unused housing credit carryover that is assigned to the Secretary under section 42(h)(3)(D).

The proposed regulations would provide automatic approval for correcting an administrative error or omission in an allocation document (a Form 8609, or a carryover allocation document under the requirements of section 42(h)(1)(E) or (F) and §1.42–6(d)(2)) that either did not accurately reflect the number of buildings constructed by the affected taxpayer, or transposed the information for one or more buildings with other buildings in a project.

If the automatic approval provision applies to the administrative error or omission, the proposed regulations require the Agency to amend the allocation document. If correcting the administrative error or omission requires adding a Building Identification Number (B.I.N.) to the amended allocation document, the proposed regulations require that the Agency must include any B.I.N.(s) already existing for the buildings in the document and, if possible, number the additional B.I.N.(s) sequentially from the existing B.I.N.(s). In addition, the Agency must file the amended allocation document with an amended Form 8610. This provision is proposed to be effective on the date the final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collections of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that any burden on taxpayers is minimal. Furthermore, an Agency is not a "small entity" for purposes of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury specifically request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Thursday, May 27, 1999, at 10 a.m. in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit written and electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by April 8, 1999.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Paul F. Handleman, Office of the Assistant Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.42–17 also issued under 26 U.S.C. 42(n); * * *

Par. 2. Section 1.42-5 is amended by:

1. Revising paragraphs (c)(1)(v), (c)(1)(vi) and (c)(2)(ii).

2. Removing the language "If a monitoring procedure includes the review provision described in paragraph (c)(2)(ii)(B) of this section, the" from the second sentence in paragraph (c)(2)(iii) and adding "The" in its place.

3. Removing the language "paragraph (c)(2)(ii)(A), (B), and (C) of this section" from the first sentence in paragraph (c)(4)(i) and adding "paragraph (c)(2)(ii) of this section" in its place.

4. Removing the language "An Agency chooses the review requirement of paragraph (c)(2)(ii)(A) of this section and some of the buildings selected for review are" from the first sentence in the example in paragraph (c)(4)(iii) and adding "An Agency selects for review" in its place.

5. Adding paragraph (c)(5).

6. Revising the last sentence in paragraph (d).

7. Removing the language "(c)(2)-(ii)(A), (B), or (C) of this section (whichever is applicable)" from paragraph (e)(2) and adding the language "(c)(2)(ii) of this section" in its place.

8. Adding a sentence at the end of paragraph (e)(3)(i).

9. Removing the language "paragraph (e)(3) of this section" in the third sentence in paragraph (f)(1)(i) and adding "paragraphs (c)(5) and (e)(3) of this section" in its place.

10. Adding two sentences at the end of paragraph (h).

The revisions and additions read as follows:

§1.42–5 Monitoring compliance with low-income housing credit requirements.

* * * * *

(c) * * *

(1) * * *

(v) All units in the project were for use by the general public (as defined in §1.42–9) and used on a nontransient basis (except for transitional housing for the homeless provided under section 42(i)-(3)(B)(iii) or single-room-occupancy units rented on a month-by-month basis under section 42(i)(3)(B)(iv));

(vi) Each building in the project was suitable for occupancy, taking into account local health, safety, and building codes, and the State or local government unit responsible for making building code inspections did not issue a report of a violation for any building in the project. If a report of a violation was issued by the governmental unit, the owner must attach a copy of the report of the violation to the annual certification submitted to the Agency under paragraph (c)(1) of this section;

(2) * * *

(ii) Require that with respect to each low-income housing project—

(A) The Agency conduct on-site inspections of all buildings in the project by the end of the calendar year following the year the last building in the project is placed in service and review the low-income certification, the documentation supporting such certification, and the rent record for each low-income tenant; and

(B) At least once every three (3) years, the Agency conduct on-site inspections of all buildings in the project, and, for each tenant in at least 20 percent of the project's low-income units selected by the Agency, review the low-income certification, the documentation supporting such certification, and the rent record; and

* * * * *

(5) *Agency reports of compliance monitoring activities.* The Agency must report its compliance monitoring activities annually on Form 8610, "Annual Low-Income Housing Credit Agencies Report."

(d) * * * In addition, in connection with the on-site inspections required by paragraph (c)(2)(ii) of this section, the Agency must determine whether the project is suitable for occupancy, taking into account local health, safety, and building codes. Notwithstanding paragraph (f) of this section, this determination may be delegated only to a State or local government unit responsible for making building code inspections.

(e) * * *

(3) * * *

(i) * * * For noncompliance or failure to certify that is corrected after the end of the correction period, the Agency is required to file Form 8823 with the Service reporting the correction of the noncompliance or failure to certify regardless of when the correction occurs during the 15-year compliance period under section 42(i)(1).

* * * * *

(h) * * * In addition, the requirement in paragraph (c)(2)(ii)(A) of this section (involving on-site inspections relating to the placed-in-service year and review of the low-income certifications, the documentation supporting such certifications, and the rent records) is effective for buildings placed in service on or after the date the final regulations are published in the **Federal Register**. The requirements in paragraph (c)(1)(vi) of this section (involving whether a State or local government unit responsible for making building code inspections issued a report or a violation for the project), paragraph (c)(2)(ii)(B) of this section (the low-income certifications, the documentation supporting such certifications, and the rent records), paragraph (c)(5) of this section (involving the requirement to report the Agency's compliance monitoring activities to the Service), paragraph (d) of this section (involving habitability requirements), and paragraph (e)(3) of this section (involving the requirement to report corrected noncompliance or failure to certify after the end of the correction period) are effective on the date the final regulations are published in the **Federal Register**.

Par. 3. Section 1.42-6 is amended by removing the first sentence in paragraph (d)(4)(ii) and adding two sentences in its place to read as follows:

§1.42–6 Buildings qualifying for carryover allocations.

* * * * *

(d) * * *

(4) * * *

(ii) *Agency.* The Agency must retain the original carryover allocation document made under paragraph (d)(2) of this section and file the form (to be prescribed by the IRS) that summarizes the carryover allocation document. This form is filed with the Agency's Form 8610 that accounts for the year the allocation is made. * * *

* * * * *

Par. 4. Section 1.42– 11 is amended by revising the last sentence in paragraph (b)(3)(ii)(A) to read as follows:

§1.42–11 Provision of services.

* * * * *

(b) * * *

(3) * * *

(ii) * * * (A) * * * For a building described in section 42(i)(3)(B)(iii) (relating to transitional housing for the homeless) or section 42(i)(3)(B)(iv) (relating to single room occupancy), a supportive service includes any service provided to assist tenants in locating and retaining permanent housing.

* * * * *

Par. 5. Section 1.42–12 is amended by adding paragraph (c) to read as follows:

§1.42–12 Effective dates and transitional rules.

* * * * *

(c) The rule set forth in §1.42–6(d)(4)(ii) relating to the requirement that state and local housing agencies file the form to be prescribed by the Internal Revenue Service that summarizes the carryover allocation document is effective for forms the due date of which are on or after March 8, 1999.

Par. 6. Section 1.42–13 is amended by:

1. Revising the introductory text of paragraph (b)(3)(iii).

2. Adding paragraphs (b)(3)(vi), (b)(3)(vii), and (b)(3)(viii).

3. Adding a sentence at the end of paragraph (d).

The revisions and additions read as follows:

§1.42–13 Rules necessary and appropriate; housing credit agencies' correction of administrative errors and omissions.

* * * * *

(b) * * *

(3) * * *

(iii) *Secretary's prior approval required.* Except as provided in paragraph (b)(3)(vi) of this section, an Agency must obtain the Secretary's prior approval to correct an administrative error or omission, as described in paragraph (b)(2) of this section, if the correction is not made before the close of the calendar year of the error or omission and the correction—

* * * * *

(vi) *Secretary's automatic approval.* The Secretary grants automatic approval to correct an administrative error or omission described in paragraph (b)(2) of this section if—

(A) The correction is not made before the close of the calendar year of the error or omission and the correction is a numerical change to the housing credit dollar amount allocated for the building or multiple-building project;

(B) The administrative error or omission resulted in an allocation document (the Form 8609, "Low-Income Housing Credit Allocation Certification," or the allocation document under the requirements of section 42(h)(1)(E) or (F) and §1.42–6(d)(2)) that either did not accurately reflect the number of buildings constructed by the affected taxpayer (for example, the affected taxpayer built 10 buildings instead of 8 buildings having the same total number of units), or transposed the information for one or more buildings with other buildings in the multiple-building project;

(C) The administrative error or omission does not affect the Agency's ranking of the building(s) or project and the total amount of credit the Agency allocated to the building(s) or project;

(D) The Agency corrects the administrative error or omission no later than one year after the building(s) were placed in service by the affected taxpayer; and

(E) The Agency corrects the administrative error or omission by following the procedures described in paragraph (b)(3)(vii) of this section.

(vii) *How Agency corrects errors or omissions subject to automatic approval.* An Agency corrects an administrative error or omission described in paragraph (b)(3)(vi) of this section by—

(A) Amending the allocation document described in paragraph (b)(3)(vi)(B) of this section to correct the administrative error or omission. The Agency will indicate on the amended allocation document that it is making the "correction under §1.42–13(b)(3)(vii)". If correcting the allocation document requires including any additional B.I.N.(s) in the document, the document must include any B.I.N.(s) already existing for the buildings. If possible, the additional B.I.N.(s) should be sequentially numbered from the existing B.I.N.(s);

(B) Amending, if applicable, the form to be prescribed by the Service that summarizes the allocation document (see §1.42–6 (d)(4)(ii)) and attaching a copy of this form to an amended Form 8610, "Annual Low-Income Housing Credit Agencies Report," for the year the allocation was made. The Agency will indicate on the forms that it is making the "correction under §1.42–13(b)(3)(vii)";

(C) Amending, if applicable, the Form 8609 and attaching the original of this amended form to an amended Form 8610 for either the year the allocation was made or the year the building was placed in service by the affected taxpayer. The Agency will indicate on the forms that it is making the "correction under §1.42–13(b)(3)(vii)";

(D) Filing the amended Form 8610 with the Service. When completing the amended Form 8610, the Agency should follow the specific instructions for the Form 8610 under the heading "Amended Report"; and

(E) Mailing a copy of any amended allocation document and any amended Form 8609 to the affected taxpayer.

(viii) *Other approval procedures.* The Secretary may grant automatic approval to correct other administrative errors or omissions as designated in one or more documents published either in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

* * * * *

(d) * * * Paragraphs (b)(3)(vi), (vii), and (viii) of this section are effective on the date the final regulations are published in the **Federal Register**.

Par. 7. Section 1.42–17 is added to read as follows:

§1.42–17 Qualified Allocation Plan.

(a) *Requirements*—(1) *In general.* [Reserved]

(2) *Selection criteria.* [Reserved]

(3) *Agency evaluation.* Section 42(m)(2)(A) requires that the housing credit dollar amount allocated to a project should not exceed the amount the Agency determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period. In making this determination, the Agency must consider—

(i) The sources and uses of funds and the total financing planned for the project. The taxpayer must certify to the Agency the full extent of all federal, state, and local subsidies that apply (or which the taxpayer expects to apply) to the project. The taxpayer must also certify to the Agency all other sources of funds and all development costs for the project. The taxpayer's certification should be sufficiently detailed to enable the Agency to ascertain the nature of the costs that will

comprise the total financing package, including subsidies and the anticipated syndication or placement proceeds to be raised. Development cost information, whether or not includible in eligible basis under section 42(d), that should be provided to the Agency includes, but is not limited to, site acquisition costs, construction contingency, general contractor's overhead and profit, architect and engineer's fees, permit and survey fees, insurance premiums, real estate taxes during construction, title and recording fees, construction period interest, financing fees, organizational costs, rent-up and marketing costs, accounting and auditing costs, working capital and operating deficit reserves, syndication and legal fees, developer fees, and other costs;

(ii) Any proceeds or receipts expected to be generated by reason of tax benefits;

(iii) The percentage of the housing credit dollar amount used for project costs other than the costs of intermediaries. This requirement should not be applied so as to impede the development of projects in hard-to-develop areas under section 42(d)(5)(C); and

(iv) The reasonableness of the developmental and operational costs of the project.

(4) *Timing of Agency evaluation.* The financial determinations and certifications required under paragraph (a)(3) of this section must be made at each of the following times:

(i) The time of the application for the housing credit dollar amount.

(ii) The time of the allocation of the housing credit dollar amount.

(iii) The date the building is placed in service.

(iv) After the building is placed in service, and before the Agency issues the Form 8609, "Low-Income Housing Credit Allocation Certification."

(5) *Special rule for final determinations and certifications.* For the Agency's evaluation under paragraph (a)(4)(iv) of this section, the taxpayer must obtain an opinion by a certified public accountant, based upon the accountant's audit or examination, on the financial determinations and certifications in paragraphs (a)(3)(i) through (iii) of this section, including the costs that may qualify for inclusion in eligible basis under section 42(d) and amount of the credit under section 42.

(6) *Bond financed projects.* A project qualifying under section 42(h)(4) is not entitled to any credit unless the governmental unit that issued the bonds (or on behalf of which the bonds were issued), or the Agency responsible for issuing the Form(s) 8609 to the project, makes determinations under rules similar to the rules in paragraphs (a)(3), (4), and (5) of this section.

(b) *Effective date.* This section is effective on the date final regulations are published in the **Federal Register**.

Robert E. Wenzel,
Deputy Commissioner of Internal Revenue.

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