KPMG

TaxNewsFlash

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Final, temporary, and proposed regulations: Low-income housing credit average income test (text of regulations)

The U.S. Treasury Department and IRS today released for publication in the Federal Register final and temporary regulations (T.D. 9967) setting forth guidance on the “average income test” under section 42(g)(1)(C) for purposes of the low-income housing credit.

The **final and temporary regulations** [PDF 396 KB] (18 pages as published in the Federal Register on October 12, 2022) finalize regulations that were proposed in October 2020. Read ***TaxNewsFlash***

According to the preamble, the Treasury Department and the IRS received 98 comments on the proposed regulations and 15 taxpayers provided testimony at a public hearing held on March 24, 2021. Today’s final regulations adopt the proposed regulations as modified after consideration of the comments received and the testimony provided.

The revisions in final regulations attempt to provide more flexibility for meeting the average income test than had been available under the proposed regulations and generally attempt to limit the impact of one unit’s noncompliance on the ability of a project to satisfy the average income test.

T.D. 9967 also includes temporary regulations containing recordkeeping and reporting requirements that are needed to facilitate administrability of, and compliance with, changes made in the final regulations.

The final and temporary regulations will be published in the Federal Register on October 12, 2022.

The text of the temporary regulations also serves as the text of a **notice of proposed rulemaking** [PDF 206 KB] (REG–113068-22) also issued today.

The proposed regulations will be published in the Federal Register on October 12, 2022, and comments are due 60 days after publication of the proposed regulations in the Federal Register.

Background

Before the Consolidated Appropriations Act of 2018 (Pub. L. No. 115-141), section 42(g) set forth two minimum set-aside tests that a taxpayer may elect with respect to a low-income housing project. These are known as the 20-50 test and the 40-60 test.

- Under the 20-50 test, at least 20% of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 50% or less of the area median gross income (AMGI).
- Under the 40-60 test, at least 40% of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 60% or less of AMGI.

The 2018 Act added section 42(g)(1)(C) to provide a third minimum set-aside test that a taxpayer may elect with respect to a low-income housing project—the average income test.

Under the average income test, a project meets the minimum requirements of the average income test if 40% or more (25% or more in the case of a project described in section 142(d)(6)) of the residential units in the project are both rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the taxpayer with respect to that unit.

The taxpayer must designate the imputed income limitation for each unit and the designated imputed income limitation of any unit must be 20%, 30%, 40%, 50%, 60%, 70% or 80% of AMGI. The average of the imputed income limitations designated by the taxpayer for each unit must not exceed 60% of AMGI.

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