

The Housing and Economic Recovery Act of 2008 set a 9% minimum tax credit percentage rate for the 70% credit for new and substantially rehabilitated buildings placed in service after July 30, 2008 and before December 31, 2013. (No similar flat rate was set for 30% credits.) The 70% rate for August shown below was set by the IRS in Revenue Ruling 2008-43, which was published before enactment of the new law. The 70% rate for September shown below was set by the IRS in Revenue Ruling 2008-46, which does not discuss the enactment of the new law.

EXPLANATION OF THE BILL

TITLE I – BENEFITS FOR MULTI-FAMILY LOW-INCOME HOUSING

OVERVIEW

Low-income housing credit

The low-income housing credit may be claimed over a 10-year period for the cost of building rental housing occupied by tenants having incomes below specified levels. The amount of the credit for any taxable year in the credit period is the applicable percentage of the qualified basis of each qualified low-income building. The qualified basis of any qualified low-income building for any taxable year equals the applicable fraction of the eligible basis of the building.

The credit percentage for newly constructed or substantially rehabilitated housing that is not Federally subsidized is adjusted monthly by the Internal Revenue Service so that the 10 annual installments of the credit have a present value of 70 percent of the total qualified basis. The credit percentage for newly constructed or substantially rehabilitated housing that is Federally subsidized and for existing housing that is substantially rehabilitated is calculated to have a present value of 30 percent of qualified basis. These are referred to as the 70-percent credit and 30-percent credit, respectively.

Tax-exempt bonds for housing

Private activity bonds are bonds that nominally are issued by State or local governments, but the proceeds of which are used (directly or indirectly) by a private person and payment of which is derived from funds of such private person. The exclusion from income for interest paid on State and local bonds does not apply to private activity bonds, unless the bonds are issued for certain permitted purposes (“qualified private activity bonds”). The definition of a qualified private activity bond includes, but is not limited to, qualified mortgage bonds, qualified veterans’ mortgage bonds, and bonds for qualified residential rental projects.

Residential rental property may be financed with qualified private activity bonds if the financed project is a “qualified residential rental project.” A project is a qualified residential rental project if 20 percent or more of the residential units in such project are occupied by individuals whose income is 50 percent or less of area median gross income (the “20-50 test”). Alternatively, a project is a qualified residential rental project if 40 percent or more of the residential units in such project are occupied by individuals whose income is 60 percent or less of area median gross income (the “40-60 test”). The issuer must elect to apply either the 20-50 test or the 40-60 test. Operators of qualified residential rental projects must annually certify that such project meets the requirements for qualification, including meeting the 20-50 test or the 40-60 test.

Low-Income Housing Credit

Temporary increase in the low-income housing credit volume limits (sec. 3001 of the bill and sec. 42 of the Code)

Present Law

In general

The low-income housing credit may be claimed over a 10-year period by owners of certain residential rental property for the cost of rental housing occupied by tenants having incomes below specified levels (sec. 42). The amount of the credit for any taxable year in the credit period is the applicable percentage of the qualified basis of each qualified low-income building. The qualified basis of any qualified low-income building for any taxable year equals the applicable fraction of the eligible basis of the building.

Volume limits

A low-income housing credit is allowable only if the owner of a qualified building receives a housing credit allocation from the State or local housing credit agency. Generally, the aggregate credit authority provided annually to each State for calendar year 2008 is \$2.00 per resident, with a minimum annual cap of \$2,325,000 for certain small population States (Rev. Proc. 2007-66). These amounts are indexed for inflation. Projects that also receive financing with proceeds of tax-exempt bonds issued subject to the private activity bond volume limit do not require an allocation of the low-income housing credit.

Explanation of Provision

The provision increases from \$2.00 per resident to \$2.20 per resident the allocation authority provided annually to each State for calendar years 2008 and 2009. Also, the provision increases the minimum annual cap for certain small population States by ten percent of the otherwise available amounts in 2008 and 2009, respectively. In 2010, the volume limits will return to the prescribed levels had this provision not been enacted.

Effective Date

The provision is effective for low-income credit allocations made for calendar years after 2007.

Determination of credit rate (sec. 3002 of the bill and sec. 42 of the Code)

(a) Modifications to the applicable percentage

Present Law

In general

The low-income housing credit may be claimed over a 10-year credit period after each low-income building is placed-in-service. The amount of the credit for any taxable year in the credit period is the applicable percentage of the qualified basis of each qualified low-income building.

Present value credit

The calculation of the applicable percentage is designed to produce a credit equal to: (1) 70 percent of the present value of the building's qualified basis in the case of newly constructed or substantially rehabilitated housing that is not Federally subsidized (the "70-percent credit"); or (2) 30 percent of the present value of the building's qualified basis in the case of newly constructed or substantially rehabilitated housing that is Federally subsidized and existing housing that is substantially rehabilitated (the "30-percent credit"). Where existing housing is substantially rehabilitated, the existing housing is eligible for the 30-percent credit and the qualified rehabilitation expenses (if not Federally subsidized) are eligible for the 70-percent credit.

Calculation of the applicable percentage

The credit percentage for a low-income building is set for the earlier of: (1) the month the building is placed in service; or (2) at the election of the taxpayer, (a) the month the taxpayer and the housing credit agency enter into a binding agreement with respect to such building for a credit allocation, or (b) in the case of a tax-exempt bond-financed project for which no credit allocation is required, the month in which the tax-exempt bonds are issued.

These credit percentages (used for the 70-percent credit and 30-percent credit) are adjusted monthly by the IRS on a discounted after-tax basis (assuming a 28-percent tax rate) based on the average of the Applicable Federal Rates for mid-term and long-term obligations for the month the building is placed in service. The discounting formula assumes that each credit is received on the last day of each year and that the present value is computed on the last day of the first year. In a project consisting of two or more buildings placed in service in different months, a separate credit percentage may apply to each building.

Explanation of Provision

The provision provides a temporary applicable percentage of 9 percent for newly constructed non-Federally subsidized buildings placed in service after the date of enactment and before December 31, 2013.

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

(b) Modification to the definition of a Federally subsidized building

Present Law

If any portion of the eligible basis of a building is Federally subsidized, then the building is ineligible for the 70-percent credit. A Federal subsidy is defined as: (1) any obligation the interest of which is tax exempt from tax under section 103; (2) a direct or indirect Federal loan if the interest rate is less than the applicable Federal rate; or (3) assistance provided under the HOME Investments Partnership Act or the Native American Housing Assistance and Self Determination Act of 1996 if certain requirements are not met.

Explanation of Provision

The provision limits the definition of a Federal subsidy for these purposes to any obligation the interest on which is exempt from tax under section 103. Therefore, additional buildings may become eligible for the 70-percent credit.

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

Modifications to definition of eligible basis (sec. 3003 of the bill and sec. 42 of the Code)

(a) Modification to the enhanced credit for buildings in high-cost areas

Present Law

Generally, buildings located in two types of high-cost areas (i.e., qualified census tracts and difficult development areas) are eligible for an enhanced credit. Under the enhanced credit, the 70-percent and 30-percent credits are increased to a 91-percent and 39-percent credit, respectively. The mechanism for this increase is through an increase from 100 to 130 percent of the otherwise applicable eligible basis of a new building or the rehabilitation expenditures of an existing building. A further requirement for the enhanced credit is that the portions of each metropolitan statistical area or nonmetropolitan statistical area designated as difficult to develop areas cannot exceed an aggregate area having 20 percent of the population of such statistical area.

Explanation of Provision

The provision adds a third type of high-cost area eligible for an enhanced credit. The third type is defined as any building designated by the State housing credit agency as requiring the enhanced credit in order for such building to be financially feasible. This new type of high-cost area is not subject to the present-law limitation limiting high cost areas to 20 percent of the population of each metropolitan statistical area or nonmetropolitan statistical area.

It is expected that the State allocating agencies shall set standards for determining which areas shall be designated difficult development areas and which projects shall be allocated additional credits in such areas in the State allocating agency's allocation plan. It is also expected that the State allocating agency shall publicly express its reasons for such area designations and the basis for allocating additional credits to a project.

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

(b) Modification to the substantial rehabilitation requirement

Present Law

Rehabilitation expenditures¹ paid or incurred by a taxpayer with respect to a low-income building are treated as a separate building and may be eligible for the 70-percent credit if they satisfy the otherwise applicable credit rules.² To qualify for the credit, the rehabilitation expenditures must equal the greater of an amount that is (1) at least 10 percent of the adjusted basis of the building being rehabbed; or (2) at least \$3,000 per low-income unit in the building being rehabbed.

At the election of the taxpayer, a special rule applies allowing the 30-percent credit to both existing buildings and rehabilitation expenditures if the second prong (i.e., at least \$3,000 of rehabilitation expenditures per low-income unit) of the rehabilitation expenditures test is satisfied. This special rule applies only in the case where the taxpayer acquired the building and immediately prior to that acquisition the building was owned by or on behalf of a government unit.

Explanation of Provision

The provision increases the minimum expenditure requirements. Under the provision, the rehabilitation expenditures must equal the greater of an amount that is (1) at least 20 percent of the adjusted basis of the building being rehabbed; or (2) at least \$6,000 per low-income unit in the building being rehabbed. The provision also indexes the \$6,000 amount for inflation. The other present-law rules apply.³

The provision retains the taxpayer election allowing the 30-percent credit to both existing building and the rehabilitation expenditures if the second prong (i.e., at least \$6,000 of rehabilitation expenditures per low-income unit) of the rehabilitation expenditures test is satisfied.

Effective Date

The provision is effective for buildings which receive credit allocations after the date of enactment and substantially tax-exempt bond financed buildings (which satisfy the requirements of section 42(h) (4) and therefore do not require a credit allocation) which receive a tax-exempt bond allocation after the date of enactment.

(c) Community service facility eligibility for the credit

Present Law

In general, the qualified basis of a low-income building is limited to that portion of the building dedicated to qualified low-income use (either living space or certain common areas). However certain "community service facilities" used by non-tenants of the low-income building may be included in the qualified basis of the low-income building if certain requirements are satisfied. For this purpose, a community service facility: (1) means any facility to serve primarily individuals whose income is 60 percent or less of area median income; and (2) may not exceed 10 percent of the eligible basis of the qualified low-income housing credit project of which it is a part.

Explanation of Provision

The provision expands the size of the community service facility with respect to which the low-income housing credit may be claimed. Under the provision the size of the community service facility may not exceed the sum of: (1) 25 percent of so much of the eligible basis of the qualified low-income housing credit project of which it is a part as does not exceed \$15,000,000; and (2) 10 percent of any excess over \$15,000,000 of the eligible basis of the qualified low-income housing credit project of which it is a part.

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

1. Rehabilitation expenditures are amounts chargeable to a capital account and incurred for property (or additions or improvements to property) of a character subject to the allowance for depreciation in connection with the rehabilitation of a building. Such term does not include the cost of acquiring the building (or any interest therein). Other rules apply.

2. The credit period for an existing building does not begin before the credit period for the rehabilitation expenditures.

3. A present-law rule reduces the \$3,000 amount to \$2,000 for any building substantially assisted, financed, or operated under Housing and Urban Development ("HUD") section 8, section 221(d)(3), or section 236 programs, or under the USDA Rural Development section 515 program where an assignment of the mortgage secured by the property in the project to HUD or the USDA Rural Development otherwise would occur or when a claim against a Federal mortgage insurance fund would occur. A conforming change is made by the provision so that that the \$2,000 amount will be increased to two-thirds of the \$6,000 amount as indexed.

(d) Clarification of the treatment of Federal grants

Present Law

The compliance period for any low-income credit building is the period of fifteen taxable years beginning with the taxable year in which the building is placed in service, or at the election of the taxpayer the succeeding taxable year. If during any year of the compliance period, a grant is made with respect to any building or the operation thereof and any portion of the grant is funded with Federal funds, the eligible basis of the building must be reduced by the portion of the grant that is Federally-funded. This basis reduction must be made for the taxable year in which the grant is made and all succeeding taxable years.

Explanation of Provision

The provision clarifies the basis reduction rule to apply to Federally-funded grants received before the compliance period. It also provides that no basis reduction is required for Federally-funded grants to enable the property to be rented to low-income tenants received during the compliance period if those grants do not otherwise increase the taxpayer's eligible basis in the building.

The provision also directs the modification of section 1.42-16(b) of the Treasury regulations to provide that none of the following shall be considered a grant made with respect to a building or its operation for purposes of section 42(d)(5)(A) of the Internal Revenue Code of 1986: (1) rental assistance under section 521 of the Housing Act of 1949 (42 U.S.C. 1490a); (2) assistance under section 538(f)(5) of the Housing Act of 1949 (42 U.S.C. 1490p-2(f)(5)); (3) interest reduction payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1); (4) rental assistance under section 202 of the Housing Act of 1959 (12 U.S.C. 1701q); (5) rental assistance under section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013); (6) modernization, operating, and rental assistance pursuant to section 202 of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4132); (7) assistance under title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11361 et seq.); (8) tenant-based rental assistance under section 212 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12742); (9) assistance under the AIDS Housing Opportunity Act (42 U.S.C. 12901 et seq.); (10) per diem payments under section 2012 of title 38, United States Code; (11) rent supplements under section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); (12) assistance under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r); and (13) any other ongoing payment used to enable the property to be rented to low-income tenants. Further, no basis reduction is required for loans (regardless of interest rate) made to owners of qualified low-income housing projects from the proceeds of Federally-funded grants. Nothing contained in this direction to modify the regulations is intended to create any inference with respect to the consideration of any program specified under subsection (a) of a grant made with respect to a building or its operation for purposes of section 42(d)(5)(A) of the Internal Revenue Code of 1986 as in effect on the day before such date of enactment.

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

(e) Modification to the definition of related persons

Present Law

With certain exceptions,⁴ the eligible basis of an existing building is zero for low-income housing credit purposes unless: (1) the building was acquired by purchase; (2) there has been a period of at least 10 years between the acquisition by purchase and the later of the date the building was last placed in service or the date of the most recent nonqualified substantial improvement of the building (e.g., improvements equaling at least 25 percent of the adjusted basis of the building before such improvements); and (3) the building was not previously placed in-service by the taxpayer or a related person (sec. 42(d)(2)(B)). In order for a building to be acquired by purchase, it may not be acquired from a related party.

The definition of related persons for purposes of these rules is the same as the definition used in sections 267(b) and 707(b)(1) (relating to the disallowance of losses) with one modification.⁵ Under the modification, in determining whether two persons are related, "10 percent" is substituted for "50 percent" in determining the threshold level of ownership in certain partnerships and corporations. For example, under the low-income credit provision, two partnerships are related if the same persons own more than ten percent of the capital interests or profits interest in each partnership.

4. The Internal Revenue Service may waive the 10-year requirement for any building substantially assisted, financed, or operated under Housing and Urban Development ("HUD") section 8, section 221(d)(3), or section 236 programs, or under the Farmers' Home Administration section 515 program where an assignment of the mortgage secured by the property in the project to HUD or the Farmers' Home Administration otherwise would occur or when a claim against a Federal mortgage insurance fund would occur.

5. In addition, certain businesses under common control are related persons for purposes of these rules.

Explanation of Provision

The provision repeals the ten-percent attribution rule used to determine whether parties are related for purposes of determining whether an existing building qualifies for the low-income housing credit. Under the provision, two persons are related for this purpose if they bear a relationship to each other specified in sections 267(b) or 707(b)(1).

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

(f) Exception to 10-year period rule related to prior placement in service of certain buildings

Present Law

In general the low income housing credit is not allowed with respect to existing buildings unless there was a period of at least ten years between the date of its acquisition by the taxpayer and the later of the date the building was last placed-in-service or the date of the most recent nonqualified substantial improvement of the buildings (the "ten-year" rule").

Under one exception from this general rule, the Secretary of the Treasury (after consultation with the appropriate Federal official) may waive the ten-year rule with respect to any Federally-assisted building if such waiver is necessary: (1) to avert an assignment of the mortgage secured by property in the project (of which the building is a part) to the Department of Housing and Urban Development or the Farmers Home Administration, or (2) to avert a claim against a Federal mortgage insurance fund (or such department or Administration) with respect to a mortgage which is so secured. For these purposes a Federally-assisted building is any building which is substantially assisted, financed, or operated under: (1) section 8 of the United States Housing Act of 1937; (2) section 221(d)(3) or 236 of the National Housing Act; or (3) section 515 of the Housing Act of 1949, as such Acts are in effect on the date of the enactment of the Tax Reform Act of 1986.

Also, a waiver may be granted with respect to certain Federally-assisted building if: (1) the mortgage on such building is eligible for prepayment under subtitle B of the Emergency Low Income Housing Preservation Act of 1987 or under section 502(c) of the Housing Act of 1949 at any time within one year after the date of the application for such waiver; (2) the appropriate Federal official certifies to the Secretary of the Treasury that it is reasonable to expect that, if the waiver is not granted, such building will cease complying with its low-income occupancy requirements; and (3) the eligibility to prepay such mortgage without the approval of the appropriate Federal official is waived by all persons who are so eligible and such waiver is binding on all successors of such persons. For purposes of this rule a Federally-assisted building is a building which is substantially assisted, financed, or operated under: (1) section 221(d)(3) or 236 of the National Housing Act; or (2) section 515 of the Housing Act of 1949, as such Acts are in effect on the date of the enactment of the Tax Reform Act of 1986). An appropriate Federal official means, for these purposes, the Secretary of Housing and Urban Development (in certain instances) and the Secretary of Agriculture (in certain instances).

Finally, a waiver may be granted with respect to any building acquired from an insured depository institution in default (as defined in section 3 of the Federal Deposit Insurance Act) or from a receiver or conservator of such an institution.

Explanation of Provision

The provision replaces the first two exceptions to the ten-year rule under present law with one new exception. The new exception waives the ten-year rule in the case of any Federally- or State-assisted building. For these purposes, the definition of Federally-assisted building is expanded to include any building which is substantially assisted, financed, or operated under section 8 of the United States Housing Act of 1937, section 221(d)(3), 221(d)(4) or 236 of the National Housing Act, section 515 of the Housing Act of 1949, or any other housing program administered by the Department of Housing and Urban Development or the Rural Housing Service of the Department of Agriculture. The term State-assisted building means any building which is substantially assisted, financed, or operated under any State law similar in purposes to those of the Federal laws used in the definition of a Federally-assisted building. The present-law exception related to certain depository institutions in default is retained.

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

Other simplification and reform of low-income housing tax incentives (sec. 3004 of the bill and sec. 42 of the Code)

(a) Repeal prohibition of the credit for buildings receiving HUD moderate rehabilitation assistance

Present Law

Generally, the low-income housing credit is available to otherwise qualifying buildings which also receive direct assistance under HUD Section 8 programs. No credit is allowed to any building with respect to which moderate rehabilitation assistance is provided at any time during the compliance period, under section 8(e)(2) of the United States Housing Act of 1937 (other than assistance under the Stewart B. McKinney Homeless Assistance Act).

Explanation of Provision

The provision eliminates the present-law prohibition against providing the low-income housing credit to buildings receiving moderate rehabilitation assistance under section 8(e)(2) of the United States Housing Act of 1937.

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

(b) Carryover allocation rule

Present Law

In general, the allocation of the low-income housing credit must be made not later than the close of the calendar year in which the building is placed in service. One exception to this rule is a carryover allocation. In a carryover allocation, an allocation may be made to a building that has not yet been placed in service, provided that: (1) more than 10 percent of the taxpayer's reasonably expected basis in the project (as of the close of the second calendar year following the calendar year of the allocation) is incurred as of the later of six months after the allocation is made or the end of the calendar year in which the allocation is made; and (2) the building is placed in service not later than the close of the second calendar year following the calendar year of the allocation.

Explanation of Provision

The provision modifies the first prong of the carryover allocation rule. Under this modification such an allocation will satisfy the first prong provided that more than 10 percent of the taxpayer's reasonably expected basis in the project (as of the close of the second calendar year following the calendar year of the allocation) is incurred as of 12 months after the allocation is made. The second prong of the carryover allocation rules is unchanged.

Effective Date

The provision is effective for buildings placed in service after the date of enactment.

(c) Repeal of bond posting requirement

Present Law

The compliance period for any building is the period beginning on the first day of the first taxable year of the credit period of such building and ending 15 years from such date.

The penalty for any building subject to the 15-year compliance period failing to remain part of a qualified low-income project (due, for example, to noncompliance with the minimum set aside requirement, or the gross rent requirement, or other requirements with respect to the units comprising the set aside) is recapture of the accelerated portion of the credit, with interest, for all prior years.

Generally, any change in ownership by a taxpayer of a building subject to the compliance period is also a recapture event. An exception is provided if the seller satisfies certain bond posting requirements (in an amount and manner prescribed by Treasury), and if it can reasonably be expected that such building will continue to be operated as a qualified low-income building for the remainder of the compliance period.

Explanation of Provision

The provision eliminates the bond posting requirement. In its place the provision extends the otherwise applicable statute of limitation until three years after the Secretary of the Treasury is notified of noncompliance with the low-income housing credit rules.

Also, at the election of the taxpayer, the provision applies with respect to dispositions of interests in a building on or before the date of enactment if it is reasonably expected that such building will continue to be a qualified low-income building for the remaining compliance period.

Effective Date

The provision applies with respect to dispositions of interests in buildings after the date of enactment.

(d) Additions of energy efficiency and historic native criteria to housing credit agency allocation plan criteria

Present Law

Each State must develop a plan for allocating credits, and such plan must include certain allocation criteria including: (1) project location; (2) housing needs characteristics; (3) project characteristics (including whether the project uses existing housing as part of a community revitalization plan; (4) sponsor characteristics; (5) tenant populations with special needs; (6) tenant populations of individuals with children; and (7) projects intended for eventual tenant ownership.

The State allocation plan must also give preference to housing projects: (1) that serve the lowest-income tenants; (2) that are obligated to serve qualified tenants for the longest periods; and (3) that are located in qualified census tracts and the development of which contributes to a concerted community revitalization plan. For this purpose, a qualified census tract is defined as a census tract: (1) designated by the Secretary of HUD; and (2) for the most recent year for which census data is available for such tract, either 50 percent or more of the households have a income that is less than 60 percent of the area median income for that year or which has a poverty rate of at least 25 percent.

Present law also requires that housing credit agencies perform a comprehensive market study of the housing needs of the low-income individuals in the area to be served by the project and a written explanation, available to the general public, for any allocation not made in accordance with the established priorities and selection criteria of the housing credit agency. It also requires that the housing credit agency conduct site visits to monitor for compliance with habitability standards.

Explanation of Provision

The provision adds two additional criteria which States must use in its allocation of credits among potential low-income housing projects. The additional criteria are: (1) the energy efficiency of the project; (2) the historic nature of the project (e.g., encouraging rehabilitation of certified historic structures (sec. 47(c)(3))).

Effective Date

The provision is effective for allocations made after December 31, 2008.

(e) Treatment of individuals who previously received foster care assistance

Present Law

In general, student housing does not qualify for the low-income housing credit. Two exceptions are provided from this general rule.⁶ There two exceptions are units occupied by an individual: (1) who is a student and receiving assistance under title IV of the Social Security Act (Temporary Assistance for Needy Families); or (2) enrolled in a job training program receiving assistance under the Job Training Partnership Act or under other similar Federal, State, or local laws.

Explanation of Provision

The provision adds a third exception to the general rule that student housing is not eligible for the low-income housing credit. This new exception applies in the case of a student who was previously under the care and placement responsibility of a foster care program (under part B or E of title IV of the Social Security Act).

Effective Date

The provision is effective for determinations made after the date of enactment.

(f) Measurement of area median gross income for certain projects located in certain nonmetropolitan areas

Present Law

In order to be eligible for the low-income housing credit, a qualified low-income building must be part of a qualified low-income housing project. In general, a qualified low-income housing project is defined as a project which satisfies one of two tests at the election of the taxpayer. The first test is met if 20 percent or more of the residential units in the project are both rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income (the "20-50 test"). The second test is met if 40 percent or more of the residential units in such project are both rent-restricted and occupied by individuals whose income is 60 percent or less of area median gross income (the "40-60 test").

6. See also the discussion of the full-time student rule in item I.A.7., below.

In the case of property placed in service during 2006, 2007, and 2008 in a nonmetropolitan area within the Gulf Opportunity Zone, the income targeting rules of the low-income housing credit are applied by replacing the area median gross income standard with a national nonmetropolitan median gross income standard. These new income targeting rules apply to all such buildings in the Gulf Opportunity Zone regardless of whether the building receives its credit allocation under the otherwise applicable low-income housing credit cap or the additional credit cap (described above). The income targeting rules are not changed for buildings in metropolitan areas in the Gulf Opportunity Zone.

Explanation of Provision

The measurement of area median gross income applied for residential rental property located in certain rural areas is modified in the case of projects subject to the low-income housing credit volume limits. In the case of such properties located in rural areas (as defined in section 520 of the Housing Act of 1949), the income targeting rules of the low-income housing credit are applied by reference to the greater of the otherwise applicable area median gross income standard, or the national nonmetropolitan median gross income. This new income targeting rule applies to all such buildings if the building receives a low-income housing credit allocation under the otherwise applicable low-income housing credit volume limit. It does not apply in the case of buildings which do not require a low-income housing credit allocation because they are substantially bond-financed. The area median gross income rules are not changed for buildings in metropolitan areas.

Effective Date

The provision is effective for determinations after the date of enactment.

(g) Clarification of general public use rule

Present Law

In order to be eligible for the low-income housing credit, the residential units in a qualified low-income housing project must be available for use by the general public. A project is available for general public use if: (1) the project complies with housing discrimination policies set forth in the Fair Housing Act (42 U.S.C. 3601), and (2) the project does not restrict occupancy based on membership in a social organization or employment by specific employers. In addition, any residential unit that is part of a hospital, nursing home, sanitarium, lifecare facility, trailer park, or intermediate care facility for the mentally or physically handicapped is not available for use by the general public.

Explanation of Provision

The provision clarifies that a project which otherwise meets the general public requirements above shall not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants: (1) with special needs; or (2) who are members of specified group under a Federal program or State program or policy that supports housing for such a specified group; or (3) who are involved in artistic and literary activities.

Effective Date

The provision applies to buildings placed in service before, on, or after the date of enactment.

(h) GAO study

Present Law

There are no current GAO studies planned of the low-income credit.

Explanation of Provision

The Comptroller General of the United States is directed to analyze the changes to the low-income credit made by this Act. The report shall be submitted to Congress not later than December 31, 2012.

Effective Date

The provision is effective on the date of enactment.

Treatment of Basic Housing Allowances for purposes of income eligibility rules (sec. 3005 of the bill and sec. 42 of the Code)

Present Law

In order to be eligible for the low-income housing credit, a qualified low-income building must be part of a qualified low-income housing project. In general, a qualified low-income housing project is defined as a project that satisfies one of two tests at the election of the taxpayer. The first test is met if 20 percent or more of the residential units in the project are both rent-restricted, and occupied by individuals whose income is 50 percent or less of area median gross income (the "20-50 test"). The second test is met if 40 percent or more of the residential units in such project are both rent-restricted, and occupied by individuals whose income is 60 percent or less of area median gross income (the "40-60 test"). These income figures are adjusted for family size.

The military provides the basic housing allowance. The recipients of the military basic housing allowance must include these amounts for purposes of low-income credit eligibility.

Explanation of Provision

Under the provision the basic housing allowance (i.e., payments under 37 U.S.C. sec. 403) is not included in income for the low-income credit income eligibility rule. The provision is limited in application to qualified buildings. A qualified building is defined as any building located:

(1) any county which contains a qualified military installation to which the number of members of the Armed Forces assigned to units based out of such qualified military installation has increased by 20 percent or more as of June 1, 2008 over the personnel level on December 31, 2005; and

(2) any counties adjacent to county described in (1), above.

For these purposes, a qualified military installation is any military installation or facility with at least 1000 members of the Armed Forces assigned to it.

Effective Date

The proposal is effective for income determinations after the date of enactment and before January 1, 2012.

Refunding treatment for certain multi-family housing bonds (sec. 3007 of the bill and sec. 146 of the Code)

Present Law

In general

Private activity bonds are bonds that nominally are issued by State or local governments, but the proceeds of which are used (directly or indirectly) by a private person and payment of which is derived from funds of such private person. The exclusion from income for interest paid on State and local bonds does not apply to private activity bonds, unless the bonds are issued for certain permitted purposes ("qualified private activity bonds"). The definition of a qualified private activity bond includes, but is not limited to, qualified mortgage bonds, qualified veterans' mortgage bonds, and bonds for qualified residential rental projects.

Qualified residential rental projects

Residential rental property may be financed with qualified private activity bonds if the financed project is a "qualified residential rental project." A project is a qualified residential rental project if 20 percent or more of the residential units in such project are occupied by individuals whose income is 50 percent or less of area median gross income (the "20-50 test"). Alternatively, a project is a qualified residential rental project if 40 percent or more of the residential units in such project are occupied by individuals whose income is 60 percent or less of area median gross income (the "40-60 test"). The issuer must elect to apply either the 20-50 test or the 40-60 test. Operators of qualified residential rental projects must annually certify that such project meets the requirements for qualification, including meeting the 20-50 test or the 40-60 test.

As with most qualified private activity bonds, bonds for qualified residential rental projects are subject to annual State volume limitations (the "State volume cap"). For calendar year 2008, the State volume cap, which is indexed for inflation, equals \$85 per resident of the State, or \$262.09 million, if greater.

Bonds issued to finance qualified residential rental projects are subject to a term to maturity rule which limits the period of time such bonds may remain outstanding. Generally, this rule provides that the average maturity of a qualified private activity bond cannot exceed 120 percent of the economic life of the property being financed.⁷

7. Sec. 147(b).

Explanation of Provision

Under the provision, if within six months after receipt of a repayment of a conduit loan used to finance a qualified residential rental project, such repayment is used to finance a second qualified residential rental project, any bond issued to refinance the first issue of bonds (i.e., the bond financing the original conduit loan) shall be treated as a refunding issue. A loan to a person other than the governmental entity from the proceeds of a bond issue to carry out the defined qualified purpose of the issue is a conduit loan. Thus, under the provision, the refinancing bond is treated as a refunding notwithstanding a change in obligors under the first and second conduit loans. The provision only applies to the first refunding of the refunded bond and only if such refunding bond is issued within four years of the date of issue of the refunded bond. In addition, the final maturity date for the refunding bonds cannot be later than 34 years after the date of issuance of the refunded bond.

Effective Date

The provision applies to repayments of loans received after the date of enactment.

Coordination of certain rules applicable to the low-income housing credit and qualified residential rental project exempt facility bonds (sec. 3008 of the bill and sec. 142 of the Code)

Next available unit rule

Present Law

In order to be eligible for the low-income housing credit, each of the residential units with respect to which the credit is claimed must be: (1) occupied by low-income tenants; and (2) rent-restricted. If the incomes of any such tenants rise above certain levels, then the credit with respect to that unit is denied unless the next available unit in the low-income building (of a size comparable or smaller than such unit) is rented to a new tenant who satisfies the income and rent-restriction requirements (the "next-available-unit rule").⁸

Subject to certain requirements, tax-exempt bonds may be issued to finance qualified residential rental projects. The tax-exempt bond rules for qualified residential projects have similar tenant income limitations as the low-income credit, but apply the next available unit rule on a project basis rather than a building-by-building basis.⁹ Therefore, to avoid noncompliance when the income of a tenant rises above certain levels, the next available unit (of a size comparable or smaller than such unit) in the entire project (rather than just the same building) must be rented to a new tenant who satisfies the income and rent-restriction requirements.

Explanation of Provision

In the case of a low-income building which is tax-exempt bond financed and eligible for the low-income housing credit, the provision provides that both the bond and credit restrictions will be satisfied if the next available unit in the building is rented to a new tenant who satisfies the income and rent-restriction requirements. It therefore conforms the tax-exempt bond rule to the low-income housing credit rule.

Effective Date

The provision applies to determinations of the status of qualified residential rental projects for periods beginning after the date of enactment with respect to bonds issued before, on, or after such date.

Students

Present Law

In general

The low-income housing credit is not available for any residential unit unless it is available for use by the general public. For these purposes, a residential unit generally is available for use by the general public if the unit is rented in a manner consistent with housing policy governing nondiscrimination as evidenced by the rules and regulations of the Department of Housing and Urban Development ("HUD"). Notwithstanding compliance with the HUD rules and regulations, a residential rental unit is not available for use by the general public if such unit is: (1) provided only for a member of a social organization; or (2) provided by an employer for its employees. Other rules may apply.

8. Sec. 42(g)(2)(D)(ii).

9. Sec. 142(d)(3)(B).

Rules for full-time students

For purposes of the low-income housing credit, no credit is allowed with respect to a otherwise eligible unit occupied entirely by full-time students unless those students are comprised entirely of single parents and their children. Further, the single parents may not be dependents of another individual and the children may not be dependents of another individual other than of their parents. For purposes of the tax-exempt bond rules, a slightly different full-time student rule applies. The tax-exempt bond rule provides that a residential unit will not satisfy the income tests if all the occupants are students (as defined in section 152(f)(2)) and are not entitled to file a joint tax return.

Explanation of Provision

The provision conforms the tax-exempt bond rule with respect to students to the low-income housing credit rule.

Effective Date

The full-time student provision applies to determinations of the status of qualified residential rental projects for periods beginning after the date of enactment with respect to bonds issued before, on, or after such date.

Single-room occupancy units

Present Law

Unlike the requirements for projects financed with tax-exempt bonds, certain single-room occupancy housing used on a nontransient basis may qualify for the low-income credit, even though such housing may provide eating, cooking, and sanitation facilities on a shared basis. An example of housing that may qualify for the credit is a residential hotel used on a nontransient basis that is available to all members of the public.

Among other requirements, qualified residential rental projects financed with tax-exempt bonds generally cannot be used on a transient basis. Treasury regulations clarify that a residential unit will not be treated as used on a transient basis if the unit contains complete facilities for living, including living, sleeping, eating, cooking, and sanitation.¹⁰

Explanation of Provision

The provision conforms the tax-exempt bond rule to the low-income housing credit rule.

Effective Date

The provision applies to determinations of the status of qualified residential rental projects for periods beginning after the date of enactment with respect to bonds issued before, on, or after such date.

Hold harmless for reductions in area median gross income (sec. 3009 of the bill and sec. 42 of the Code)

Present Law

Tax rules

Tax-exempt bonds

Residential rental property may be financed with exempt facility bonds if the financed project is a “qualified residential rental project.” A project is a qualified residential rental project if 20 percent or more of the residential units in such project are occupied by individuals whose income is 50 percent or less of area median gross income (the “20-50 test”). Alternatively, a project is a qualified residential rental project if 40 percent or more of the residential units in such project are occupied by individuals whose income is 60 percent or less of area median gross income (the “40-60 test”). The issuer must elect to apply either the 20-50 test or the 40-60 test (sec. 142).

Low-income housing tax credit

In order to be eligible for the low-income housing credit, a qualified low-income building must be part of a qualified low-income housing project. In general, a qualified low-income housing project is defined as a project that satisfies one of two tests at the election of the taxpayer (sec. 42(g)). The first test is met if 20 percent or more of the residential units in the project are both rent-restricted, and occupied by individuals whose income is 50 percent or less of area median gross income (the “20-50 test”). The second test is met if 40 percent or more of the residential units in such project are both rent-restricted, and occupied by individuals whose income is 60 percent or less of area median gross income (the “40-60 test”). These income figures are adjusted for family size.

10. Treas. Reg. sec. 1.103-8(b)(10)(ii).

Determination of income and area median gross income

The income of individuals and area median gross income are determined by the Secretary of the Treasury in a manner consistent with determinations of lower-income families and area median gross income under section 8 of the Housing Act of 1937 (sec. 142(d)). These determinations under section 8 are made by HUD. These determinations also include adjustments for family size.

Therefore such determinations (individual and area median gross income) are applicable for purposes of tax-exempt bonds and the low-income housing credit.

HUD hold harmless policy

Generally HUD releases its calculation of area median gross income for a calendar year early in that year. Historically HUD has used the most recent decennial census data and updated it with other data on income, employment and earnings. Recently HUD modified its methodology to include additional data in its calculation of area median gross income. In some instances this change in methodology resulted in significantly lower numbers for area median gross income in some areas. In response to this result, HUD provided that such areas are not treated as having a lower area median gross income for purposes of HUD housing programs.

Explanation of Provision

In general

The provision makes two modifications to the determination of area median gross income for purposes of tax-exempt bonds and the low-income housing credit.

Determination of income and area median gross income

The provision provides that any determination of area median gross income with respect to a project may not be less than the determination of area median gross income with respect to that project for the preceding calendar year. This modification applies to all projects and is not limited to projects benefiting from the HUD hold harmless policy.

HUD hold harmless policy

In the case of a HUD hold harmless impacted project, the determination of area median gross income for the project is the greater of (i) the amount determined without regard to the special rule for HUD hold harmless impacted projects or (ii) the sum of the area median gross income determined under the HUD hold harmless policy with respect to the project for 2008 plus any increase in area median gross income after 2008.

Effective Date

The provision applies to determinations of area median gross income for calendar years after 2008.

Exception from the annual recertification requirement for projects which are entirely low-income use (sec. 3010 of the bill and sec. 142 of the Code)

Present Law

Tax rules

In general

Tax-exempt bonds

Residential rental property may be financed with exempt facility bonds if the financed project is a "qualified residential rental project." A project is a qualified residential rental project if 20 percent or more of the residential units in such project are occupied by individuals whose income is 50 percent or less of area median gross income (the "20-50 test"). Alternatively, a project is a qualified residential rental project if 40 percent or more of the residential units in such project are occupied by individuals whose income is 60 percent or less of area median gross income (the "40-60 test"). The issuer must elect to apply either the 20-50 test or the 40-60 test (sec. 142).

Low-income housing tax credits

In order to be eligible for the low-income housing credit, a qualified low-income building must be part of a qualified low-income housing project. In general, a qualified low-income housing project is defined as a project that satisfies one of two tests at the election of the taxpayer (sec. 42(g)). The first test is met if 20 percent or more of the residential units in the project are both rent-restricted, and occupied by individuals whose income is 50 percent or less of area median gross income (the "20-50 test"). The second test is met if 40 percent or more of the residential units in such project are both rent-restricted, and occupied by individuals whose income is 60 percent or less of area median gross income (the "40-60 test"). These income figures are adjusted for family size.

Determination of income and area median gross income

The income of individuals and area median gross income are determined by the Secretary of the Treasury in a manner consistent with determinations of lower-income families and area median gross income under section 8 of the Housing Act of 1937 (sec. 142(d)). These determinations also include adjustments for family size.

Certification

The Code provides that the operator of any qualified residential rental project must submit to the Secretary of the Treasury (at such time and in such manner as the Secretary prescribes) an annual certification that the project continues to satisfy the requirements of a qualified residential rental project. Any failure to comply with the annual certification to the Secretary of the Treasury will subject the operator to penalties but will not affect the tax-exempt status of the underlying bonds (sec. 142(d)(7)).

Similar rules apply for the low-income housing credit regarding tenant incomes (sec. 42(g)(4)). IRS Revenue Procedure 1994-64 allows a taxpayer to request a waiver of this certification under certain circumstances with the consent of the State agency responsible for monitoring the low-income credit project.

Treatment of tenants whose incomes rise above the income limits

Generally a low-income unit will continue to be treated as such even when the tenant's income rises above the income limits provided that the next available unit (of a size comparable to or smaller than such unit) in the project is occupied by a new resident who satisfies the income limits.

HUD rules

A family's eligibility for various types of HUD housing assistance is based on its income and family composition. The HUD Handbook 4350.3 contains the certification and annual recertification rules to be followed by project operators. Under the HUD program requirements tenants have the responsibility to provide timely information to the project operators. Operators have the responsibility to review and verify the tenant information and to make changes to assistance payment and tenant rent to satisfy program requirements.

Explanation of Provision

The provision waives the annual recertification requirements under the low-income credit (sec. 42) and tax-exempt bonds (sec. 142) for any project as long as no residential unit in the project is occupied by tenants who fail to satisfy the otherwise applicable income limits. The provision does not modify the HUD rules; therefore some projects must continue annual certification notwithstanding this provision.

Effective Date

The provision is effective for years ending after the date of enactment.