

Part III - Administrative, Procedural, and Miscellaneous

Notice 2021-12

I. PURPOSE

Because of the Coronavirus Disease 2019 (COVID-19) pandemic, the Department of the Treasury and the Internal Revenue Service issued Notice 2020-53, 2020-30 I.R.B. 151, to provide temporary relief from certain requirements under § 42 of the Internal Revenue Code (Code) for qualified low-income housing projects and under §§ 142(d) and 147(d) of the Code for qualified residential rental projects. In response to the continuing presence of the pandemic, this notice extends that temporary relief and also provides temporary relief from additional § 42 requirements not previously addressed in Notice 2020-53. Section III of this notice describes the persons eligible for the relief granted in sections IV through VI of this notice.

II. BACKGROUND

A. Qualified low-income housing projects

In this notice, the terms “Agency,” and “Owner” have the same meanings as described in section 5 of Rev. Proc. 2014-49, 2014-37 I.R.B. 535.

Section 42(a) provides that the amount of the low-income housing credit for any taxable year in the credit period is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building.

Section 42(c)(1)(A) provides that the qualified basis of any qualified low-income building for any taxable year is an amount equal to (i) the applicable fraction (determined as of the close of the taxable year) of (ii) the eligible basis of the building (determined under § 42(d)(5)). Sections 42(c)(1)(B) defines applicable fraction and § 42(d)(1) and (2) define the eligible basis of a new building and an existing building, respectively.

Section 42(c)(2) defines a qualified low-income building as any building which is part of a qualified low-income housing project at all times during the “compliance period” (that is, the period of 15 taxable years beginning with the first taxable year of the credit period) and to which § 168(e)(2)(A) applies. To be a qualified low-income housing project, one of the § 42(g) minimum set-aside tests, as elected by the taxpayer, must be satisfied.

Under § 42(d)(4)(A) and (B), the adjusted basis for a qualified low-income building includes the adjusted basis of the property (of a character subject to the allowance of depreciation) used in common areas or provided as comparable amenities to all residential rental units in the building.

Section 42(e) provides general rules under which rehabilitation expenditures incurred by taxpayers related to a low-income building may be treated as a separate new building. Under § 42(e)(3)(A)(ii), to qualify as a separate new building, the

rehabilitation expenditures with respect to a low-income building during a 24-month period (§ 42(e) 24-month minimum rehabilitation expenditure period) must be at least the greater of two statutory criteria.

Section 42(f) sets forth the definition and special rules relating to the credit period. Under § 42(f)(3)(A), in the case of any building which was a qualified low-income building as of the close of the first year of the credit period, if as of the close of any taxable year in the compliance period (after the first year of the credit period) the qualified basis of the building exceeds the qualified basis of the building at the close of the first year of the credit period, then the applicable percentage that applies under § 42(a) for the taxable year to such excess will be the percentage equal to $\frac{2}{3}$ of the applicable percentage that would otherwise apply. For example, if the credit period begins in the year a building is placed in service, but full occupancy of the building by low-income tenants does not occur until the following (or any subsequent) year, there is an increase in qualified basis and the applicable percentage used to determine credits for this increase is equal to $\frac{2}{3}$ of the applicable percentage that would otherwise apply.

Section 42(g) sets forth three alternative minimum set-aside tests for low-income housing projects. The Owner of a project must elect one and satisfy that chosen test each taxable year. Once a taxpayer elects to use a particular set-aside test, the election is irrevocable.

Section 42(h)(1)(E) provides general rules for carryover allocations of the low-income housing credit. A carryover allocation is defined in § 1.42-6(a)(1) of the Income Tax Regulations as an allocation that meets the requirements of § 42(h)(1)(E) (relating

to carryover allocations for single buildings) or § 42(h)(1)(F) (relating to carryover allocations for multiple building projects).

Under § 42(h)(1)(E)(i), if a qualified building is placed in service not later than a statutorily specified date, the building is relieved of a requirement concerning the timing of the allocation. Section 42(h)(1)(E)(ii) provides in part, for purposes of § 42(h)(1)(E)(i), that the term “qualified building” means any building which is part of a project if the taxpayer’s basis in the project (as of the date that is 1 year after the date that the allocation was made) is 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 in which an allocation is made) (10-percent test).

In general, under § 42(j)(1), if (1) a building is beyond the first year of the credit period, and (2) at the end of the taxable year, the building’s qualified basis with respect to the taxpayer is less than the qualified basis with respect to the taxpayer at the end of the preceding taxable year, then the credits, if any, for the year of the reduction are determined using the reduced qualified basis, and the taxpayer’s Federal income tax liability for the year of the reduction is increased by the credit recapture amount prescribed in § 42(j)(2).

Section 42(j)(4)(E) provides generally that a building is not subject to recapture by reason of a casualty loss to the extent the loss is restored by reconstruction or replacement within a reasonable period established by the Secretary of the Treasury or his delegate (Secretary).

Section 42(m)(1) requires an Agency to allocate housing credit dollar amounts among candidate proposed housing projects. The allocation must be pursuant to a qualified allocation plan (QAP) that has been approved by the governmental unit of which the Agency is a part. A QAP not only sets forth selection criteria by which an Agency makes these allocations but also provides a procedure that the Agency must follow in monitoring for noncompliance with the provisions of § 42, including monitoring for noncompliance with habitability standards through regular site visits.

Section 1.42-5 of the Income Tax Regulations provides the general requirements of Agencies' compliance-monitoring responsibilities under their monitoring procedures that must be part of all QAPs. Among the requirements, an Agency must perform physical inspections and low-income certification review.

Section 1.42-5(c)(1)(iii) requires, generally, that the Owner of a low-income housing project certify at least annually to the Agency that, for the preceding 12-month period, the Owner has received an annual income certification from each low-income tenant, and the documentation to support that certification.

Section 1.42-5(e)(4) defines the correction period for noncompliance as the period specified in an Agency's compliance-monitoring procedure during which an Owner must supply any missing certifications and bring the project into compliance with the provisions in § 42. The correction period is not to exceed 90 days from the date of the notice to the Owner. An Agency may extend the correction period for up to 6 months, but only if the Agency determines there is good cause for granting the extension.

Under § 1.42-13(a) of the Income Tax Regulations, the Secretary may provide guidance to carry out the purposes of § 42 through various publications in the Internal Revenue Bulletin.

B. Qualified residential rental projects financed by bonds

In this notice, the terms “Issuer” and “Operator” have the same meanings as described in section 4 of Rev. Proc. 2014-50, 2014-37 I.R.B. 540.

Generally, under § 103 of the Code, if private activity bonds are not qualified bonds within the meaning of § 141 of the Code, then those private activity bonds are not tax-exempt. Section 141(e) provides in part that the term “qualified bond” means any private activity bond if such bond is an exempt facility bond, and § 142(a) provides in part that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide qualified residential rental projects. To be a qualified residential rental project, a residential rental housing project must meet the requirements in § 142(d).

Section 142(d)(1) provides that the term “qualified residential rental project” means any project for residential rental property if, at all times during the qualified project period, such project meets the requirements under § 142(d)(1)(A) or (B) (§ 142(d) set-aside requirements), whichever is elected by the Issuer at the time of the issuance of the issue with respect to such project.

Section 142(d)(2)(A) provides that the term “qualified project period” means the period beginning on the first day on which 10 percent of the residential units in the project are occupied and ending on the latest of (i) the date that is 15 years after the

date on which 50 percent of the residential units in the project are occupied, (ii) the first day on which no tax-exempt private activity bond issued with respect to the project is outstanding, or (iii) the date on which any assistance provided with respect to the project under section 8 of the United States Housing Act of 1937 terminates.

Rev. Proc. 2004-39, 2004-2 C.B. 49, sets forth procedures for determining whether a residential rental project complies with the applicable § 142(d) set-aside requirements. Under section 5.02 of that revenue procedure, if bonds are issued to acquire an existing residential rental project, then for a period of up to 12 months beginning on the issue date of the bonds (12-month transition period), a failure to satisfy the § 142(d) set-aside requirements does not cause the acquired project to fail to be a qualified residential rental project.

Section 147(d)(1) provides, with certain exceptions, that a private activity bond shall not be a qualified bond if issued as part of an issue and any portion of the net proceeds of such issue is to be used for the acquisition of any property (or an interest therein) unless the first use of such property is pursuant to such acquisition. The private activity bonds to which § 147(d) applies include bonds to finance qualified residential rental projects.

Section 147(d)(2) provides that § 147(d)(1) shall not apply with respect to any building (and the equipment therefor) if the rehabilitation expenditures with respect to such building, equal or exceed 15 percent of the portion of the cost of acquiring such building (and equipment) financed with the net proceeds of the issue.

Section 147(d)(3)(C) provides that the term “rehabilitation expenditures” shall not include any amount which is incurred after the date 2 years after the later of (i) the date on which the building was acquired, or (ii) the date on which the bond was issued (§ 147(d) 2-year rehabilitation expenditure period).

C. Postponement of certain deadlines by reason of Presidentially declared disasters

On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5121 et seq., in response to the ongoing COVID-19 pandemic (Emergency Declaration).¹ The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).” Subsequent to the Emergency Declaration, the President issued major disaster declarations under the authority of the Stafford Act with respect to all 50 States, the District of Columbia, and 5 territories (Major Disaster Declarations).² In addition, under § 1.42-13(a), the Secretary has the general authority to issue guidance and provide relief to carry out the purposes of § 42.

In the context of a Presidentially-declared Major Disaster, Rev. Proc. 2014-49 provides temporary relief from certain requirements of § 42 for Agencies and Owners of low-income housing projects. Under section 8 of Rev. Proc. 2014-49, in the case of a

¹ See <https://www.whitehouse.gov/wp-content/uploads/2020/03/LetterFromThePresident.pdf>.

² See <https://www.fema.gov/coronavirus/disaster-declarations>.

casualty loss suffered due to a Major Disaster that has reduced a low-income building's qualified basis, the Agency that has jurisdiction over the building must determine what constitutes a reasonable restoration period. The reasonable restoration period established by the Agency must not extend beyond the end of the 25th month following the close of the month of the Major Disaster declaration (25-month reasonable restoration period). Subject to completing the restoration, to determine the credit amount allowable during the reasonable restoration period for a building described in section 8 of Rev. Proc. 2014-49, an Owner must use the building's qualified basis at the end of the taxable year immediately preceding the first day of the incident period for the Major Disaster.

Rev. Proc. 2014-49 also provides emergency housing relief for individuals who are displaced by a Major Disaster from their principal residences in certain Major Disaster Areas. See Rev. Proc. 2014-49, sections 12–14. In the context of a Presidentially-declared Major Disaster, Rev. Proc. 2014-50 provides temporary relief from certain requirements under § 142(d) for qualified residential rental projects financed with exempt facility bonds issued by State and local governments under § 142. Rev. Proc. 2014-50 also provides emergency housing relief for individuals who are displaced by a Major Disaster from their principal residences in certain Major Disaster Areas. See Rev. Proc. 2014-50, sections 5–7.

Notice 2020-23, 2020-18 I.R.B. 742, issued April 9, 2020, provided certain relief to affected taxpayers and postponed due dates until July 15, 2020, with respect to certain tax filings and payments, certain time-sensitive government actions, and all time-

sensitive actions listed in Rev. Proc. 2018-58, 2018-50 I.R.B. 990 (Dec. 10, 2018), that were due to be performed on or after April 1, 2020, and before July 15, 2020, including certain actions under § 42 for qualified low-income housing projects.

Notice 2020-53, issued on July 1, 2020, extended until December 31, 2020, the relief provided in Notice 2020-23 for § 42 qualified low-income housing projects, as well as providing until December 31, 2020, additional relief under § 42 and under §§ 142(d) and 147(d) for qualified residential rental projects.

III. SCOPE OF THE RELIEF GRANTED IN THIS NOTICE

Sections IV.A through F of this notice apply to certain deadlines related to low-income housing projects under § 42. Sections V.A through D apply to relief involving operational waivers for low-income housing projects, and Section V.E applies to relief involving operational waivers both for those projects and for qualified rental projects under § 142(d). Sections VI.A and B apply to private activity bonds that are issued for the acquisition of buildings intended to be qualified residential rental projects and that would be qualified bonds (as defined in § 141(e)) if the applicable requirements of §§ 142(d) and 147(d)(2) are satisfied. All of the provisions in Sections IV through VI also apply to Agencies, Owners, Issuers, and Operators that have responsibilities with respect to those projects and bonds.

IV. GRANT OF RELIEF FOR DEADLINES RELATED TO THE LOW-INCOME HOUSING CREDIT

A. THE 10-PERCENT TEST FOR CARRYOVER ALLOCATIONS

For purposes of § 42(h)(1)(E)(ii), if the last day for an Owner of a building with a carryover allocation to meet the 10-percent test is on or after April 1, 2020, and before September 30, 2021, the last day for the Owner to meet the 10-percent test is postponed to the earlier of one year from the original due date or September 30, 2021.

B. THE § 42(e) 24-MONTH MINIMUM REHABILITATION EXPENDITURE PERIOD

For purposes of § 42(e)(3)(A)(ii), if the 24-month minimum rehabilitation expenditure period for a building originally ends on or after April 1, 2020, and before September 30, 2021, the last day for the Owner to incur the minimum rehabilitation expenditures with respect to the building is postponed to the earlier of one year from the original end date or September 30, 2021.

C. PLACED IN SERVICE DEADLINE

For purposes of § 42(h)(1)(E)(i), if the deadline for a low-income building to be placed in service is the close of calendar year 2020, the last day for the Owner of the building to place the building in service is postponed to December 31, 2021.

D. REASONABLE PERIOD FOR RESTORATION OR REPLACEMENT IN THE EVENT OF CASUALTY LOSS

For purposes of § 42(j)(4)(E) in the case of a casualty loss not due to a pre-COVID-19-pandemic Major Disaster, and of section 8.02 of Rev. Proc. 2014-49 in the case of a casualty loss due to a pre-COVID-19-pandemic Major Disaster, if a low-

income building's qualified basis is reduced by reason of the casualty loss and the reasonable period to restore the loss by reconstruction or replacement (Reasonable Restoration Period) ends on or after April 1, 2020, then the last day of the Reasonable Restoration Period is postponed by a period of one year from the original end date but not beyond December 31, 2021. Notwithstanding the preceding sentence, the Agency may require a shorter extension, or no extension at all.

For purposes of determining the credit amount allowable under § 42(a) in the case of a credit year that ends on or after April 1, 2020, and not later than the end of the Reasonable Restoration Period (taking into account any extension under the preceding paragraph), if the Owner restores the building by the end of that extended Reasonable Restoration Period, then the Owner must use the building's qualified basis at the end of the taxable year immediately preceding the first day of the casualty as the building's qualified basis for that credit year.

E. EXTENSION TO SATISFY OCCUPANCY OBLIGATIONS

For purposes of § 42(f), if the close of the first year of the credit period with respect to a building is on or after April 1, 2020, and on or before June 30, 2021, then the qualified basis for the building for the first year of the credit period is calculated by taking into account any increase in the number of low-income units by the close of the 6-month period following the close of that first year.

F. CORRECTION PERIOD

For purposes of § 1.42-5, if a correction period that was set by the Agency ends on or after April 1, 2020, and before September 30, 2021, then the correction period is

extended by a year, but not beyond December 31, 2021. Notwithstanding the preceding sentence, the Agency may require a shorter extension, or no extension at all.

V. GRANT OF RELIEF FOR OPERATIONAL PROVISIONS

A. INCOME RECERTIFICATIONS

An Owner of a low-income building is not required to perform income recertifications under § 1.42-5(c)(1)(iii) in the period beginning on April 1, 2020, and ending on September 30, 2021. The Owner must resume the income recertifications as due under § 1.42-5(c)(1)(iii) not later than October 1, 2021.

B. COMPLIANCE-MONITORING

For purposes of § 1.42-5, an Agency is not required to conduct compliance-monitoring inspections or reviews in the period beginning on April 1, 2020, and ending on September 30, 2021. The Agency must resume compliance-monitoring inspections or reviews as due under § 1.42-5 not later than October 1, 2021.

C. COMMON AREAS AND AMENITIES

If an amenity or common area in a low-income building or project is temporarily unavailable or closed during some or all of the period from April 1, 2020, to September 30, 2021, and if the unavailability or closure is in response to the COVID-19 pandemic and not because of other noncompliance for § 42 purposes, then this temporary unavailability or closure does not result in a reduction of the eligible basis of the building.

D. GUIDANCE PERMITTING AGENCIES TO CONDUCT TELEPHONIC HEARINGS

For the purposes of an Agency's QAP meeting the requirements of § 42(m)(1)(A), if a hearing on or after April 1, 2020, and before September 30, 2021, is held by teleconference that is accessible to the residents of the locality where the Agency has jurisdiction by calling a toll-free telephone number, then the hearing does not fail to satisfy § 42(m)(1)(A) solely on the grounds that it was not held in-person.

E. EMERGENCY HOUSING FOR MEDICAL PERSONNEL AND OTHER ESSENTIAL WORKERS

If individuals are medical personnel or other essential workers (as defined by State or local governments) that provide services during the COVID-19 pandemic, then, for purposes of providing emergency housing from April 1, 2020, to September 30, 2021, under Rev. Proc. 2014-49 or under Rev. Proc. 2014-50, Agencies, Issuers, Owners, and Operators of low-income housing projects may treat these individuals as if they were Displaced Individuals (defined under section 5.02 of Rev. Proc. 2014-49 or Section 4.04 of Rev. Proc. 2014-50, as applicable). That is, Agencies, Issuers, Owners, and Operators may provide emergency housing for these individuals pursuant to the provisions of the applicable revenue procedure. See sections 12, 13, and 14 of Rev. Proc. 2014-49 and sections 5, 6, and 7 of Rev. Proc. 2014-50.

VI. GRANT OF RELIEF FOR DEADLINES ASSOCIATED WITH QUALIFIED RESIDENTIAL RENTAL PROJECTS

A. THE 12-MONTH TRANSITION PERIOD TO MEET SET-ASIDES FOR QUALIFIED RESIDENTIAL RENTAL PROJECTS

For purposes of section 5.02 of Rev. Proc. 2004-39, the last day of a 12-month transition period for a qualified residential rental project that ends on or after April 1, 2020, and before September 30, 2021, is postponed to September 30, 2021.

B. THE § 147(d) 2-YEAR REHABILITATION EXPENDITURE PERIOD FOR BONDS USED TO PROVIDE QUALIFIED RESIDENTIAL RENTAL PROJECTS

If a bond is used to provide a qualified residential rental project and if the § 147(d) 2-year rehabilitation expenditure period for the bond ends on or after April 1, 2020, and before September 30, 2021, then the last day of that period is postponed to the earlier of one year from the original due date or September 30, 2021.

VII. EFFECT ON OTHER DOCUMENTS

Notice 2020-23, Notice 2020-53, Rev. Proc. 2004-39, Rev. Proc. 2014-49, and Rev. Proc. 2014-50 are amplified.

VIII. DRAFTING INFORMATION

The principal authors of this notice are Dillon Taylor and Michael Torruella Costa, Office of Associate Chief Counsel (Passthroughs & Special Industries) and David White, Office of the Associate Chief Counsel (Financial Institutions and Products). For further information regarding this notice relating to the low-income housing credit, please contact Dillon Taylor or Michael Torruella Costa on (202) 317-4137 (not a toll-free call);

for further information regarding this notice relating to qualified residential rental projects, please contact David White on (202) 317-4562 (not a toll-free call).