

integrity tests, the manufacturer may label the product with an expiration date of up to 5 years from the date of product packaging. If the extrapolated expiration date under paragraphs (d)(1) and (d)(2) of this section is used, the labeled expiration date must be confirmed by physical and mechanical integrity tests performed at the end of the stated expiration period as described in paragraph (d)(3) of this section. If the data from tests following real time storage described in paragraph (d)(3) of this section fails to confirm the extrapolated expiration date, the manufacturer must, at that time, relabel the product to reflect the actual shelf life.

(f) Products that already have established shelf life data based upon real time storage and testing and have such storage and testing data available for inspection are not required to confirm such data using accelerated and intermediate aging data described in paragraphs (d)(1) and (d)(2) of this section. If, however, such real time expiration dates were based upon testing of products that were not first left unpackaged for the maximum amount of time as described in paragraph (d)(3) of this section, the real time testing must be confirmed by testing products consistent with the requirements of paragraph (d)(3) of this section. This testing shall be initiated no later than the effective date of this regulation. Until the confirmation testing in accordance with paragraph (d)(3) of this section is completed, the product may remain on the market labeled with the expiration date based upon previous real time testing.

(g) If a manufacturer uses testing data from one product to support expiration dating on any variation of that product, the manufacturer must document and provide, upon request, an appropriate justification for the application of the testing data to the variation of the tested product.

(h) If a latex condom contains a spermicide, and the expiration date based on spermicidal stability testing is different from the expiration date based upon latex integrity testing, the product shall bear only the earlier expiration date.

(i) The time period upon which the expiration date is based shall start with the date of packaging.

(j) As provided in part 820 of this chapter, all testing data must be retained in each company's files, and shall be made available upon request for inspection by the Food and Drug Administration.

(k) Any latex condom not labeled with an expiration date as required by

paragraph (c) of this section, and initially delivered for introduction into interstate commerce after the effective date of this regulation is misbranded under sections 201(n) and 502(a) and (f) of Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(n) and 352(a) and (f)).

Dated: August 20, 1997.

William B. Schultz,

Deputy Commissioner for Policy.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8731]

RIN 1545-AU92

Section 42(d)(5) Federal Grants

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final regulations with respect to the low-income housing tax credit relating to the application of section 42(d)(5) to certain rental assistance programs under section 42(g)(2)(B)(i). The regulations clarify that certain types of federal rental assistance payments do not result in a reduction in the eligible basis of a low-income housing building.

DATES: These regulations are effective September 26, 1997.

FOR FURTHER INFORMATION CONTACT: Christopher J. Wilson, (202) 622-3040 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations (TD 8713) and a notice of proposed rulemaking cross-referencing the temporary regulations were published in the **Federal Register** for January 27, 1997 (62 FR 3792, 3848). Those regulations provide that certain federal rental assistance payments made to the owner of a building on behalf of low-income tenants are not federal grants with respect to a building or its operation that require a reduction in the building's eligible basis under section 42(d)(5) of the Internal Revenue Code (Code). These payments include rental assistance payments made under section 8 of the United States Housing Act of 1937 (Act) (42 U.S.C. 1437f), certain payments made under section 9 of the Act (42 U.S.C. 1437g), and payments made under such other programs or

methods of rental assistance as may be designated in the **Federal Register** or the Internal Revenue Bulletin. The notice of proposed rulemaking indicated that comments would be considered on those areas addressed in the temporary regulations. Written comments responding to the notice of proposed rulemaking were received. There was no request for a public hearing, and no public hearing was held. After consideration of all the written comments, the proposed regulations have been adopted, without change, by this Treasury decision.

Summary of Comments

One commenter suggested that the final regulations provide additional guidance for state agencies to use in determining whether similar programs beyond those described in the regulations should be considered grants that cause a reduction in a building's eligible basis under section 42(d)(5) of the Code. The final regulations do not adopt this suggestion. The scope of this regulation is limited to specified rental assistance payments that are not grants requiring a reduction in a building's eligible basis and any additional payments the Secretary may designate in the future.

Another commenter suggested that § 1.42-16(c)(3) should be deleted if it is intended to impose conditions beyond the restrictions under section 9 of the Act, because the Service is improperly infringing upon the Department of Housing and Urban Development's (HUD) authority to provide subsidies under section 9. The final regulations do not adopt this suggestion. Section 1.42-16 does not interpret HUD's authority for paying subsidies under section 9; it describes the extent to which section 9 payments may be made without a reduction in a building's eligible basis under section 42(d)(5) of the Code. The conditions imposed on section 9 payments in § 1.42-16(c)(3) serve to differentiate section 9 assistance for operating expenses that function in a manner similar to rental assistance payments under section 8 of the Act from section 9 assistance that is applied to uses more closely associated with operational expenses requiring a reduction in a building's eligible basis under section 42(d)(5).

This commenter also suggested that if § 1.42-16(c)(3) were to be retained, it should be clarified to provide that actual operating costs be determined by HUD and/or the appropriate public housing agency. The commenter reasons that HUD is already making this determination in the context of deciding the proper amount of assistance to make

under section 9 of the Act, and that precedent already exists for allowing HUD to make certain interpretations relating to the section 42 program. The final regulations do not adopt this suggestion. The IRS and Treasury believe they should retain the ability to determine what costs are appropriately characterized as operating costs that require a reduction in a building's eligible basis under section 42(d)(5) of the Code.

Special Analyses

It has been determined that this Treasury decision 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 and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information: The principal author of these regulations is Christopher J. Wilson, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for Section 1.42–16T and adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.42–16 also issued under 26 U.S.C. 42(n); * * *

Par. 2. Section 1.42–16 is added to read as follows:

§ 1.42–16 Eligible basis reduced by federal grants.

(a) *In general.* If, during any taxable year of the compliance period (described in section 42(i)(1)), a grant is made with respect to any building or the operation thereof and any portion of the grant is funded with federal funds (whether or not includible in gross income), the eligible basis of the building for the taxable year and all succeeding taxable years is reduced by the portion of the grant that is so funded.

(b) *Grants do not include certain rental assistance payments.* A federal rental assistance payment made to a building owner on behalf or in respect of a tenant is not a grant made with respect to a building or its operation if the payment is made pursuant to—

- (1) Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f)
- (2) A qualifying program of rental assistance administered under section 9 of the United States Housing Act of 1937 (42 U.S.C. 1437g); or
- (3) A program or method of rental assistance as the Secretary may designate by publication in the **Federal Register** or in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter).

(c) *Qualifying rental assistance program.* For purposes of paragraph (b)(2) of this section, payments are made pursuant to a qualifying rental assistance program administered under section 9 of the United States Housing Act of 1937 to the extent that the payments—

- (1) Are made to a building owner pursuant to a contract with a public housing authority with respect to units the owner has agreed to maintain as public housing units (PH-units) in the building;
 - (2) Are made with respect to units occupied by public housing tenants, provided that, for this purpose, units may be considered occupied during periods of short term vacancy (not to exceed 60 days); and
 - (3) Do not exceed the difference between the rents received from a building's PH-unit tenants and a pro rata portion of the building's actual operating costs that are reasonably allocable to the PH-units (based on square footage, number of bedrooms, or similar objective criteria), and provided that, for this purpose, operating costs do not include any development costs of a building (including developer's fees) or the principal or interest of any debt incurred with respect to any part of the building.
- (d) *Effective date.* This section is effective September 26, 1997.

§ 1.42–16T [Removed]

Par. 3. Section 1.42–16T is removed.

Michael P. Dolan,

Acting Commissioner of Internal Revenue.

Approved: August 26, 1997.

Donald C. Lubick,

Acting Assistant Secretary of the Treasury.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8732]

RIN 1545–AT60

Available Unit Rule

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations concerning the treatment of low-income housing units in a building that is occupied by individuals whose incomes increase above 140 percent of the income limitation applicable under section 42(g)(1). These regulations affect owners of those buildings who claim the low-income housing tax credit.

DATES: These regulations are effective September 26, 1997.

For dates of applicability of these regulations, see § 1.42–15(i).

FOR FURTHER INFORMATION CONTACT: David Selig, (202) 622–3040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On May 30, 1996, the IRS published a notice of proposed rulemaking in the **Federal Register** (PS–29–95 at 61 FR 27036) proposing amendments to the Income Tax Regulations (26 CFR part 1) under section 42(g)(2)(D) of the Internal Revenue Code. A public hearing was scheduled for September 17, 1996, pursuant to a notice of public hearing published simultaneously with the notice of proposed rulemaking. However, the IRS received no requests to speak at the public hearing, and no public hearing was held. Written comments responding to the notice were received. After consideration of all the comments, the proposed regulations are adopted as revised by this Treasury decision.

Explanation of Revisions and Summary of Comments

The general rule in section 42(g)(2)(D)(i) provides that if the income