

Dated: December 24, 2003.

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*Director, Office of New Animal Drug  
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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9110]

RIN 1545-BA85

#### Section 42 Carryover and Stacking Rule Amendments

**AGENCY:** Internal Revenue Service (IRS),  
Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations that amend several existing regulations concerning the low-income housing tax credit. The regulations primarily reflect changes to the law made by the Community Renewal Tax Relief Act of 2000 and affect owners of low-income housing projects who claim the credit and the State or local housing credit agencies who administer the credit.

**DATES:** *Effective Date:* These regulations are effective January 6, 2004.

*Applicability Dates:* For dates of applicability of these regulations, see §§ 1.42-12(a)(2) and (3), and 1.42-14(l)(2).

**FOR FURTHER INFORMATION CONTACT:** Lauren R. Taylor (202) 622-3040 or Christopher J. Wilson (808) 539-2874 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background

On July 7, 2003, the IRS published a notice of proposed rulemaking in the **Federal Register** (68 FR 40218) proposing amendments to the Income Tax Regulations (26 CFR part 1) under section 42 of the Internal Revenue Code. These amendments provide guidance regarding changes to section 42 made by the Community Renewal Tax Relief Act of 2000 (Public Law 106-554) (2000 Act) and make certain changes to the regulations to help facilitate the electronic filing (E-filing) of income tax returns.

One commentator submitted written comments in response to the notice of proposed rulemaking. A public hearing was scheduled for September 23, 2003, pursuant to a notice of public hearing published simultaneously with the

notice of proposed rulemaking. The IRS received one request to speak at the public hearing. This request was withdrawn before the hearing date. On September 15, 2003, the IRS published a notice (68 FR 53926) canceling the public hearing on the proposed regulations. After consideration of the comments received, the proposed regulations are adopted as revised by this Treasury decision. The revisions are discussed below.

#### Explanation of Provisions

Section 42 provides for a low-income housing tax credit that may be claimed as part of the general business credit under section 38. In general, the credit is allowable only if the owner of a qualified low-income building receives a housing credit allocation from a State or local housing credit agency (Agency) of the jurisdiction where the building is located.

In general, an allocation must be made not later than the close of the calendar year in which the building is placed in service. Under section 42(h)(1)(E), an allocation (carryover allocation) may be made to a "qualified building" that has not yet been placed in service, provided the building is placed in service not later than the close of the second calendar year following the calendar year of the allocation. Section 42(h)(1)(F) provides rules for multi-building projects receiving project-based carryover allocations. Following the changes made by the 2000 Act, section 42(h)(1)(E)(ii) defines a qualified building as any building that is part of a project if the taxpayer's basis in the project (as of the later of the date which is 6 months after the date that the allocation was made or the close of the calendar year in which the allocation is 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 of the allocation).

The commentator recommended revising § 1.42-6(a)(2) of the proposed regulations to clarify that each building in a multi-building project receiving a project-based carryover allocation under section 42(h)(1)(F) need not separately meet the 10 percent basis requirement. The commentator states that the proposed regulations appear to require that each building in a multi-building project that receives a project-based carryover allocation must meet the 10 percent basis requirement separately. The proposed regulations do not require that each building in a multi-building project satisfy the 10 percent basis requirement separately for project-based carryover allocations made under

section 42(h)(1)(F). For allocations made under section 42(h)(1)(F), the 10 percent basis requirement is only required to be met on a project basis. The final regulations clarify this issue.

#### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 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 the regulations do not impose a new collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking that preceded this Treasury decision 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 authors of these regulations are Christopher J. Wilson and Lauren R. Taylor, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. 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 continues to read in part as follows:

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

■ Par. 2. Section 1.42-6 is amended by:

■ 1. Revising paragraphs (a), (b)(4) *Example 2*, (c)(1), (c)(3), (d)(2)(viii), and (d)(4)(i).

■ 2. Removing the word "September" from paragraph (b)(4) *Example 1*. and adding the word "May" in its place; removing the year "1993" each place it appears and by adding the year "2003" in its place; and removing the year "1995" and adding the year "2005" in its place.

■ 3. Removing the language "by the close of the calendar year of the allocation" from the first and last sentences of

paragraph (c)(2) and adding the language “by the close of the calendar year of the allocation (for allocations made before July 1) or by the close of the date that is 6 months after the date the allocation is made (for allocations made after June 30)” in its place.

■ 4. Removing the language “, ‘Carryover Allocation of the Low-Income Housing Credit,’ from paragraph (d)(4)(ii).

■ 5. Removing the language “before the close of the calendar year of the allocation” from the first sentence of paragraph (e)(2) and adding the language “by the close of the calendar year of the allocation (for allocations made before July 1) or by the close of the date that is 6 months after the date the allocation is made (for allocations made after June 30)” in its place.

The revisions read as follows:

**§ 1.42-6 Buildings qualifying for carryover allocations.**

(a) *Carryover allocations*—(1) *In general.* A carryover allocation is an allocation that meets the requirements of section 42(h)(1)(E) or (F). If the requirements of section § 42(h)(1)(E) or (F) that are required to be satisfied by the close of a calendar year are not satisfied, the allocation is not valid and is treated as if it had not been made for that calendar year. For example, if a carryover allocation fails to satisfy a requirement in § 1.42-6(d) for making an allocation, such as failing to be signed or dated by an authorized official of an allocating agency by the close of a calendar year, the allocation is not valid and is treated as if it had not been made for that calendar year.

(2) *10 percent basis requirement.* A carryover allocation may only be made with respect to a qualified building. A qualified building is any building which is part of a project if, by the date specified under paragraph (a)(2)(i) or (ii) of this section, a taxpayer’s basis in the project 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 the allocation is made. For purposes of meeting the 10 percent basis requirement, the determination of whether a building is part of a single-building project or multi-building project is based on whether the carryover allocation is made under section 42(h)(1)(E) (building-based allocation) or section 42(h)(1)(F) (project-based allocation). In the case of a multi-building project that receives an allocation under section 42(h)(1)(F), the 10 percent basis requirement is satisfied by reference to the entire project.

(i) *Allocation made before July 1.* If a carryover allocation is made before July 1 of a calendar year, a taxpayer must meet the 10 percent basis requirement by the close of that calendar year. If a taxpayer does not meet the 10 percent basis requirement by the close of the calendar year, the carryover allocation is not valid and is treated as if it had not been made.

(ii) *Allocation made after June 30.* If a carryover allocation is made after June 30 of a calendar year, a taxpayer must meet the 10 percent basis requirement by the close of the date that is 6 months after the date the allocation was made. If a taxpayer does not meet the 10 percent basis requirement by the close of the required date, the carryover allocation must be returned to the Agency. Unlike a carryover allocation made before July 1, if a taxpayer does not meet the 10 percent basis requirement by the close of the required date, the carryover allocation is treated as a valid allocation for the calendar year of allocation, but is included in the “returned credit component” for purposes of determining the State housing credit ceiling under section 42(h)(3)(C) for the calendar year following the calendar year of the allocation. See § 1.42-14(d)(1).

(b) \* \* \*  
(4) \* \* \*

*Example 2.* (i) *Facts.* D, an accrual-method taxpayer, received a carryover allocation from Agency, the state housing credit agency of State X, on September 12, 2003. As of that date, D has not begun construction of the low-income housing building D plans to build and D does not have basis in the land on which D plans to build the building. From September 12, 2003, to the close of March 12, 2004, D incurs some costs related to the planned building, including architects’ fees. As of the close of March 12, 2004, these costs do not exceed 10 percent of D’s reasonably expected basis in the single-building project as of the close of 2005.

(ii) *Determination of whether building is qualified.* Because D’s carryover-allocation basis as of the close of March 12, 2004, is not more than 10 percent of D’s reasonably expected basis in the single-building project, the building is not a qualified building for purposes of section 42(h)(1)(E)(ii) and paragraph (a) of this section. Accordingly, the carryover allocation to D must be returned to the Agency. The allocation is valid for purposes of determining the amount of credit allocated by Agency from State X’s 2003 State housing credit ceiling, but is included in the returned credit component of State X’s 2004 housing credit ceiling.

(c) *Verification of basis by Agency*—(1) *Verification requirement.* An Agency that makes a carryover allocation to a taxpayer must verify that the taxpayer has met the 10 percent basis

requirement of paragraph (a)(2) of this section.

(2) \* \* \*

(3) *Time of verification*—(i) *Allocations made before July 1.* For a carryover allocation made before July 1, an Agency may require that the basis certification be submitted to or received by the Agency prior to the close of the calendar year of allocation or within a reasonable time following the close of the calendar year of allocation. The Agency will need to verify basis as provided in paragraph (c)(2) of this section to accurately complete the Form 8610, “Annual Low-Income Housing Credit Agencies Report,” and the Schedule A (Form 8610), “Carryover Allocation of Low-Income Housing Credit,” for the calendar year of the allocation. If the basis certification is not timely made, or supporting documentation is lacking, inadequate, or does not actually support the certification, the Agency should notify the taxpayer and try to get adequate documentation. If the Agency cannot verify before the Form 8610 is filed that the taxpayer has satisfied the 10 percent basis requirement for a carryover allocation made before July 1, the allocation is not valid and is treated as if it had not been made and the carryover allocation should not be reported on the Schedule A (Form 8610).

(ii) *Allocations made after June 30.* An Agency may require that the basis certification be submitted to or received by the Agency prior to the close of the date that is 6 months after the date the allocation was made or within a reasonable period of time following the close of the date that is 6 months after the date the allocation was made. The Agency will need to verify basis as provided in paragraph (c)(2) of this section. If the basis certification is not timely made, or supporting documentation is lacking, inadequate, or does not actually support the certification, the Agency should notify the taxpayer and try to get adequate documentation. If the Agency cannot verify that the taxpayer has satisfied the 10 percent basis requirement for a carryover allocation made after June 30, the allocation must be returned to the Agency. The carryover allocation is a valid allocation for the calendar year of the allocation, but is included in the returned credit component of the State housing credit ceiling for the calendar year following the calendar year of the allocation.

(d) \* \* \*  
(2) \* \* \*

(viii) For carryover allocations made before July 1, the taxpayer’s basis in the

project (land and depreciable basis) as of the close of the calendar year of the allocation and the percentage that basis bears to the reasonably expected basis in the project (land and depreciable basis) as of the close of the second calendar year following the calendar year of allocation;

\* \* \* \* \*

(4) *Recordkeeping requirements*—(i) *Taxpayer*. When an allocation is made pursuant to section 42(h)(1)(E) or (F), the taxpayer must retain a copy of the allocation document. The Form 8609 that reflects the allocation must be filed for the first taxable year that the credit is claimed and for each taxable year thereafter throughout the compliance period, whether or not a credit is claimed for the taxable year.

\* \* \* \* \*

■ Par. 3. Section 1.42–8 is amended by:

■ 1. Revising the second sentence of paragraph (a)(6)(i), paragraph (a)(6)(ii), the sixth sentence of paragraph (a)(7) *Example 1*, (ii), (a)(7) *Example 1*, (iv), (a)(7) *Example 2* (iv), and (b)(4)(ii).

■ 2. Removing the year “1993” each place it appears in paragraph (a)(7), *Example 1* and *Example 2* and adding the year “2003” in its place; removing the year “1994” each place it appears in paragraph (a)(7) and adding the year “2004” in its place.

■ 3. Removing the second sentence of paragraph (a)(7) *Example 1*, (iii), the third sentence of paragraph (a)(7) *Example 2* (iii), and third sentence of paragraph (b)(4)(i).

The revisions read as follows:

**§ 1.42–8 Election of appropriate percentage month.**

(a) \* \* \*

(6) *Procedures*—(i) *Taxpayer*. \* \* \* The taxpayer must retain a copy of the binding agreement and the election statement.

(ii) *Agency*. The Agency must retain the original of the binding agreement and election statement and, to the extent required by Schedule A (Form 8610), “Carryover Allocation of Low-Income Housing Credit,” account for the binding agreement and election statement on that schedule.

(7) \* \* \*

*Example 1*. \* \* \*

(ii) \* \* \* Because allocations were made for the building in two separate calendar years, Agency must issue two Forms 8609, “Low-Income Housing Credit Allocation Certification,” to X. \* \* \*

\* \* \* \* \*

(iv) Agency retains the original of the binding agreement, election statement, and 2003 carryover allocation document. Agency accounts for the binding agreement, election statement, and 2003 carryover allocation on

the Schedule A (Form 8610) that it files for the 2003 calendar year. After the building is placed in service in 2004, and assuming other necessary requirements for issuing a Form 8609 are met (for example, taxpayer has certified all sources and uses of funds and development costs for the building under § 1.42–17), Agency issues to X a copy of the Form 8609 reflecting the 2003 carryover allocation of \$100,000. Agency files the original of this Form 8609 with the Form 8610, “Annual Low-Income Housing Credit Agencies Report,” that it files for the 2004 calendar year. Agency also issues to X a copy of the Form 8609 reflecting the 2004 allocation of \$50,000 and files the original of this Form 8609 with the Form 8610 that it files for the 2004 calendar year. Agency retains copies of the Forms 8609 that are issued to X.

*Example 2*. \* \* \*

\* \* \* \* \*

(iv) Agency retains the original of the binding agreements, election statements, and carryover allocation documents. Agency accounts for the binding agreement, election statement, and 2003 carryover allocation on the Schedule A (Form 8610) that it files for the 2003 calendar year. Agency also accounts for the binding agreement, election statement, and 2004 carryover allocation on the Schedule A (Form 8610) that it files for the 2004 calendar year. After each separate new building is placed in service, and assuming other necessary requirements for issuing a Form 8609 are met (for example, taxpayer has certified all sources and uses of funds and development costs for the building under § 1.42–17), the Agency will issue to X a copy of the Form 8609 reflecting the 2003 carryover allocation of \$70,000 and a copy of the Form 8609 reflecting the 2004 carryover allocation of \$50,000, respectively. Agency files the original of each Form 8609 with the Form 8610 that reflects the calendar year each Form 8609 is issued. Agency retains copies of the Forms 8609 that are issued to X.

(b) \* \* \*

(4) \* \* \*

(ii) *Agency*. The Agency must retain the original of the election statement and a copy of the Form 8609 that reflects the election statement. The Agency must file an additional copy of the Form 8609 with the Agency’s Form 8610 that reflects the calendar year the Form 8609 is issued.

■ Par. 4. Section 1.42–12 is amended by revising paragraph (a) to read as follows:

**§ 1.42–12 Effective dates and transitional rules.**

(a) *Effective dates*—(1) *In general*. Except as provided in paragraphs (a)(2) and (a)(3) of this section, the rules set forth in §§ 1.42–6 and 1.42–8 through 1.42–12 are applicable on May 2, 1994. However, binding agreements, election statements, and carryover allocation documents entered into before May 2, 1994, that follow the guidance set forth in Notice 89–1, 1989–1 C.B. 620 (see

§ 601.601(d)(2)(ii)(b) of this chapter) need not be changed to conform to the rules set forth in §§ 1.42–6 and 1.42–8 through 1.42–12.

(2) *Community Renewal Tax Relief Act of 2000*—(i) *In general*. Section 1.42–6 (a), (b)(4)(iii) *Example 1* and *Example 2*, (c), (d)(2)(viii), and (e)(2) are applicable for housing credit dollar amounts allocated after January 6, 2004. However, the rules in § 1.42–6 (a), (b)(4)(iii) *Example 1* and *Example 2*, (c), (d)(2)(viii), and (e)(2) may be applied by Agencies and taxpayers for housing credit dollar amounts allocated after December 31, 2000, and on or before January 6, 2004. Otherwise, subject to the applicable effective dates of the corresponding statutory provisions, the rules that apply for housing credit dollar amounts allocated on or before January 6, 2004 are contained in § 1.42–6 in effect on and before January 6, 2004 (see 26 CFR part 1 revised as of April 1, 2003).

(3) *Electronic filing simplification changes*. Sections 1.42–6(d)(4) and 1.42–8(a)(6)(i), (a)(6)(ii), (a)(7) *Example 1* and *Example 2*, (b)(4)(i), and (b)(4)(ii) are applicable for forms filed after January 6, 2004.

The rules that apply for forms filed on or before January 6, 2004 are contained in § 1.42–6 and § 1.42–8 in effect on and before January 6, 2004 (see 26 CFR part 1 revised as of April 1, 2003).

\* \* \* \* \*

■ Par. 5. Section 1.42–14 is amended by:

■ 1. Revising the section heading and paragraphs (a), (g), (i)(2), (k) and (l).

■ 2. Removing paragraph (c) and the second to last sentence of paragraph (e).

■ 3. Redesignating paragraph (b) as paragraph (c).

■ 4. Adding a new paragraph (b).

■ 5. Adding a new sentence at the end of paragraph (d)(2)(iv)(A).

The revisions and additions read as follows:

**§ 1.42–14 Allocation rules for post-2000 State housing credit ceiling amount.**

(a) *State housing credit ceiling*—(1) *In general*. The State housing credit ceiling for a State for any calendar year after 2000 is comprised of four components. The four components are—

(i) The unused State housing credit ceiling, if any, of the State for the preceding calendar year (the unused carryforward component);

(ii) The greater of—  
(A) \$1.75 (\$1.50 for calendar year 2001) multiplied by the State population; or (B) \$2,000,000 (the population component);

(iii) The amount of State housing credit ceiling returned in the calendar

year (the returned credit component); plus

(iv) The amount, if any, allocated to the State by the Secretary under section 42(h)(3)(D) from a national pool of unused credit (the national pool component).

(2) *Cost of Living Adjustment*—(i) *General rule.* For any calendar year after 2002, the \$2,000,000 and \$1.75 amounts in paragraph (a)(1)(ii) of this section are each increased by an amount equal to—

(A) The dollar amount; multiplied by  
(B) The cost-of-living adjustment determined under section 1(f)(3) for the calendar year by substituting “calendar year 2001” for “calendar year 1992” in section 1(f)(3)(B).

(ii) *Rounding.* Any increase resulting from the application of paragraph (a)(2)(i) of this section which, in the case of the \$2,000,000 amount, is not a multiple of \$5,000, is rounded to the next lowest multiple of \$5,000, and which, in the case of the \$1.75 amount, is not a multiple of 5 cents, is rounded to the next lowest multiple of 5 cents.

(b) *The unused carryforward component.* The unused carryforward component of the State housing credit ceiling for any calendar year is the unused State housing credit ceiling, if any, of the State for the preceding calendar year. The unused State housing credit ceiling for any calendar year is the excess, if any, of—

(1) The sum of the population, returned credit, and national pool components for the calendar year; over

(2) The aggregate housing credit dollar amount allocated for the calendar year reduced by the housing credit dollar amounts allocated from the unused carryforward component for the calendar year.

(d) \* \* \*  
(2) \* \* \*  
(iv) \* \* \*

(A) *Building not qualified within required time period.* \* \* \* Also, a building that has received a post-June 30 carryover allocation is not qualified within the required time period if the taxpayer does not meet the 10 percent basis requirement by the date that is 6 months after the date the allocation was made (as described in § 1.42–6(a)(2)(ii)).

(g) *Stacking Order.* Credit is treated as allocated from the various components of the State housing credit ceiling in the following order. The first credit allocated for any calendar year is treated as credit from the unused carryforward component of the State housing credit ceiling for the calendar year. After all of the credit in the unused carryforward component has been allocated, any

credit allocated is treated as allocated from the sum of the population, returned credit, and national pool components of the State housing credit ceiling.

\* \* \* \* \*  
(i) \* \* \*

(2) *Unused housing credit carryover.* The unused housing credit carryover of a State for any calendar year is the excess, if any, of—

(i) The unused carryforward component of the State housing credit ceiling for the calendar year; over  
(ii) The total housing credit dollar amount allocated for the calendar year.

\* \* \* \* \*

(k) *Example.* (1) The operation of the rules of this section is illustrated by the following examples. Unless otherwise stated in an example, Agency A is the sole Agency authorized to make allocations of housing credit dollar amounts in State M, all of Agency A’s allocations are valid, and for calendar year 2003, Agency A has available for allocation a State housing credit ceiling consisting of the following housing credit dollar amounts:

A. unused carryforward component .....	\$50
B. population component .....	110
C. returned credit component .....	10
D. national pool component .....	0
	170
Total .....	170

(2) In addition, the \$10 of returned credit component was returned before October 1, 2003.

*Example 1—(i) Additional facts.* By the close of 2003, Agency A had allocated \$80 of the State M housing credit ceiling. Of the \$80 allocated, \$17 was allocated to projects involving qualified nonprofit organizations.

(ii) *Application of stacking rules.* The \$80 of allocated credit is first treated as allocated from the unused carryforward component of the State housing credit ceiling. The \$80 of allocated credit exceeds the \$50 attributable to the unused carryforward component by \$30. Because the unused carryforward component is fully utilized no credit will be forfeited by State M to the 2004 National Pool. The remaining \$30 of allocated credit will next be treated as allocated from the \$120 in credit determined by aggregating the population, returned credit, and national pool components (\$110 + 10 + 0 = \$120). The \$90 of unallocated credit remaining in State M’s 2003 State housing credit ceiling (\$120 – 30 = \$90) represents the unused carryforward component of State M’s 2004 State housing credit ceiling. Under paragraph (i)(3) of this section, State M does not qualify for credit from the 2004 National Pool.

(iii) *Nonprofit set-aside.* Agency A allocated exactly the amount of credit to projects involving qualified nonprofit organizations as necessary to meet the nonprofit set-aside requirement (\$17, 10% of the \$170 ceiling).

*Example 2—(i) Additional facts.* By the close of 2003, Agency A had allocated \$40 of the State M housing credit ceiling. Of the \$40 allocated, \$20 was allocated to projects involving qualified nonprofit organizations.

(ii) *Application of stacking rules.* The \$40 of allocated credit is first treated as allocated from the unused carryforward component of the State housing credit ceiling. Because the \$40 of allocated credit does not exceed the \$50 attributable to the unused carryforward component, the remaining components of the State housing credit ceiling are unaffected. The \$10 remaining in the unused carryforward component is assigned to the Secretary for inclusion in the 2004 National Pool. The \$120 in credit determined by aggregating the population, returned credit, and national pool components becomes the unused carryforward component of State M’s 2004 State housing credit ceiling. Under paragraph (i)(3) of this section, State M does not qualify for credit from the 2004 National Pool.

(iii) *Nonprofit set-aside.* Agency A allocated \$3 more credit to projects involving qualified nonprofit organizations than necessary to meet the nonprofit set-aside requirement. This does not reduce the application of the 10% nonprofit set-aside requirement to the State M housing credit ceiling for calendar year 2004.

*Example 3—(i) Additional fact.* None of the applications for credit that Agency A received for 2003 are for projects involving qualified nonprofit organizations.

(ii) *Nonprofit set-aside.* Because at least 10% of the State housing credit ceiling must be set aside for projects involving a qualified nonprofit organization, Agency A can allocate only \$153 of the \$170 State housing credit ceiling for calendar year 2003 (\$170 – 17 = \$153). If Agency A allocates \$153 of credit, the credit is treated as allocated \$50 from the unused carryforward component and \$103 from the sum of the population, returned credit, and national pool components. The \$17 of unallocated credit that is set aside for projects involving qualified nonprofit organizations becomes the unused carryforward component of State M’s 2004 State housing credit ceiling. Under paragraph (i)(3) of this section, State M does not qualify for credit from the 2004 National Pool.

*Example 4—(i) Additional facts.* The \$10 of returned credit component was returned prior to October 1, 2003. However, a \$40 credit that had been allocated in calendar year 2002 to a project involving a qualified nonprofit organization was returned to the Agency by a mutual consent agreement dated November 15, 2003. By the close of 2003, Agency A had allocated \$170 of the State M’s housing credit ceiling, including \$17 of credit to projects involving qualified nonprofit organizations.

(ii) *Effect of three-month rule.* Under the three-month rule of paragraph (d)(2)(iii) of this section, Agency A may treat all or part of the \$40 of previously allocated credit as returned on January 1, 2004. If Agency A treats all of the \$40 amount as having been returned in calendar year 2004, the State M housing credit ceiling for 2003 is \$170. This entire amount, including the \$17 nonprofit

set-aside, has been allocated in 2003. Under paragraph (i)(3) of this section, State M qualifies for the 2004 National Pool.

(iii) *If three-month rule not used.* If Agency A treats all of the \$40 of previously allocated credit as returned in calendar year 2003, the State housing credit ceiling for the 2003 calendar year will be \$210 of which \$50 will be attributable to the returned credit component (\$10 + \$40 = \$50). Because credit amounts allocated to a qualified nonprofit organization in a prior calendar year that are returned in a subsequent calendar year do not retain their nonprofit character, the nonprofit set-aside for calendar year 2003 is \$21 (10% of the \$210 State housing credit ceiling). The \$170 that Agency A allocated during 2003 is first treated as allocated from the unused carryforward component of the State housing credit ceiling. The \$170 of allocated credit exceeds the \$50 attributable to the unused carryforward component by \$120. Because the unused carryforward component is fully utilized no credit will be forfeited by State M to the 2004 National Pool. The remaining \$120 of allocated credit will next be treated as allocated from the \$160 in credit determined by aggregating the population, returned credit, and national pool components (\$110 + 50 + 0 = \$160). The \$40 of unallocated credit (which includes \$4 of unallocated credit from the \$21 nonprofit set-aside) remaining in State M's 2003 housing credit ceiling (\$160 - 120 = \$40) represents the unused carryforward component of State M's 2004 housing credit ceiling. Under paragraph (i)(3) of this section, State M does not qualify for credit from the 2004 National Pool.

(1) *Effective dates*—(1) *In general.* Except as provided in paragraph (1)(2) of this section, the rules set forth in § 1.42-14 are applicable on January 1, 1994.

(2) *Community Renewal Tax Relief Act of 2000 changes.* Paragraphs (a), (b), (c), (e), (i)(2) and (k) of this section are applicable for housing credit dollar amounts allocated after January 6, 2004. However, paragraphs (a), (b), (c), (e), (i)(2) and (k) of this section may be applied by Agencies and taxpayers for housing credit dollar amounts allocated after December 31, 2000, and on or before January 6, 2004. Otherwise, subject to the applicable applicability dates of the corresponding statutory provisions, the rules that apply for housing credit dollar amounts allocated on or before January 6, 2004 are contained in this section in effect on and before January 6, 2004 (see 26 CFR part 1 revised as of April 1, 2003).

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

Approved: December 19, 2003.

**Pamela F. Olson,**

*Assistant Secretary of the Treasury.*

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 301

[TD 9111]

RIN 1545-AY94

#### Definition of Agent for Certain Purposes

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations relating to the definition of agent for certain purposes. The final regulations clarify that the term agent in certain provisions of section 6103 of the Internal Revenue Code (Code) includes contractors.

**DATES:** *Effective Date:* These regulations are effective January 6, 2004.

*Applicability Date:* For dates of applicability, see §§ 301.6103(l)-1(b) and 301.6103(m)-1(b).

**FOR FURTHER INFORMATION CONTACT:** Helene R. Newsome, (202) 622-4570 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Background

This document contains amendments to 26 CFR part 301 under section 6103(l) and (m) of the Code. On February 1, 2002, the **Federal Register** published a notice of proposed rulemaking (REG-120135-01) regarding the definition of agent for certain purposes (67 FR 4938). No public comments or requests for hearing were received. The Treasury decision adopts the regulations as proposed.

Generally, returns and return information are confidential under section 6103 of the Code unless a specific statutory exception applies. In cases of non-tax-related disclosures, returns and return information generally may be disclosed only to officers and employees of Federal, state, and local government agencies, and not to contractors or agents of such agencies. In certain limited circumstances, however, Congress has permitted disclosures to "agents" of these agencies. See section 6103(l)(6)(B), (l)(12), (m)(2), (m)(4), (m)(5), (m)(7).

This document contains final regulations that clarify that the term *agent* in section 6103(l) and (m) includes contractors. Clarification that the term *agent* includes contractors is necessary for the purpose of bringing certain statutory grants of disclosure authority into alignment with the reality of many agencies' operations. Agencies

generally procure the services of third parties under public contracting laws, which do not necessarily incorporate common law concepts of *agent*. This clarification is also consistent with Congressional intent. For example, the Senate Finance Committee, in amending section 6103(m)(2), stated, "[a]gents are those who are engaged directly in performing or assisting in collection functions for the federal government, presumably, private collection agencies who have contracted with the government to collect claims \* \* \* ." S. Rep. No. 97-378, at 15 (1982).

This clarification does not provide any new disclosure authority, nor does it authorize the disclosure of return information to contractors that Congress has not previously specifically authorized in the Code. With regard to protection of taxpayer data, agents/contractors are subject to safeguard requirements, redisclosure prohibitions, and civil and criminal penalties for unauthorized disclosures. Accordingly, the regulations do not have an impact on taxpayer privacy.

#### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel of the Small Business Administration for comment on its impact on small businesses.

#### Drafting Information

The principal author of these regulations is Helene R. Newsome, Office of the Associate Chief Counsel (Procedure & Administration), Disclosure & Privacy Law Division.

#### List of Subjects in 26 CFR part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

#### Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 301 is amended as follows: