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For purposes of this **Federal Register** document, ''United States'' means the territory of the several States, the District of Columbia, and Puerto Rico.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9967]

RIN 1545–BO92

Section 42, Low-Income Housing Credit Average Income Test Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations setting forth guidance on the average income test for purposes of the low-income housing credit. If a building is part of a residential rental project that satisfies this test, the building may be eligible to earn low-income housing credits. These final and temporary regulations affect owners of low-income housing projects, tenants in those projects, and State or local housing credit agencies that monitor compliance with the requirements for low-income housing credits.

DATES:

Effective date: These regulations are effective on October 12, 2022.

Applicability date: For the applicability date of the temporary regulations, see § 1.42–19T(f).

FOR FURTHER INFORMATION CONTACT: Dillon Taylor at (202) 317–4137.

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 42 of the Internal Revenue Code (the Code).

The Tax Reform Act of 1986, Public Law 99–514, 100 Stat. 2085 (1986 Act), created the low-income housing credit under section 42 of the Code.

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 (effectively, a credit rate) 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 section 42(d)). Section 42(c)(1)(B) defines applicable fraction as the smaller of the unit fraction or floor space fraction. The unit fraction is the number of low-income units in the building over the number of residential rental units (whether or not occupied) in the building. The floor space fraction is the total floor space of low-income units in the building over the total floor space of residential rental units (whether or not occupied) in the building. Subject to certain exceptions set forth in section 42(i)(3)(B), a low-income unit is defined in section 42(i)(3) as any unit in a building if the unit is rent-restricted and the individuals occupying the unit meet the income limitation under section 42(g)(1) that applies to the project of which the building is a part. Section 42(d)(1) and (2) define the eligible basis of a new building or 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 (the period of 15 taxable years beginning with the first taxable year of the credit period). To qualify as a low-income housing project, one of the section 42(g) minimum set-aside tests, as elected by the taxpayer, must be satisfied.

Prior to the enactment of the Consolidated Appropriations Act of 2018, Public Law 115–141, 132 Stat. 348 (2018 Act), section 42(g) set forth two minimum set-aside tests, known as the 20–50 test and the 40–60 test. If a taxpayer elects to apply the 20–50 test, at least 20 percent of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 50 percent or less of the area median gross income (AMGI). If a taxpayer elects to apply the 40–60 test, at least 40 percent of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 60 percent or less of AMGI.

The 2018 Act added section 42(g)(1)(C), which contains a third minimum set-aside test option—the average income test. If a taxpayer elects to apply the average income test, a project meets the minimum requirements of the average income test if 40 percent or more of the residential units in the project are both rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the specific unit. (In the case of a project described in section 142(d)(6)), ''40 percent'' in the preceding sentence is replaced with 25 percent.) Section 42(g)(1)(C)(ii)(I)–(III) provides special rules relating to the income limitation for the average income test. Specifically, unlike the 20–50 and 40–60 tests, section 42(g)(1)(C)(ii)(I) requires the taxpayer to designate each unit's imputed income limitation that is taken into account for purposes of the average income test. Section 42(g)(1)(C)(ii)(II) requires the average of the imputed income limitations designated under section 42(g)(1)(C)(ii)(I) not to exceed 60 percent of AMGI. Finally, section 42(g)(1)(C)(ii)(III) requires the imputed income limitation designated for any unit to be 20, 30, 40, 50, 60, 70, or 80 percent of AMGI.

Generally, under section 42(g)(2)(D)(i), if the income for the occupant of a low-income unit rises above the relevant income limitation, the unit continues to be treated as a low-income unit if the income of the occupant had initially met the income limitation and the unit continues to be rent-restricted. Section 42(g)(2)(D)(ii), however, provides an exception to the general rule in the case of the 20–50 test or the 40–60 test. Under this exception, the unit ceases to be treated as a low-income unit if two disqualifying conditions occur.

- The first condition is that the occupant's income increases above 140 percent of the income limitation applicable under section 42(g)(1) (applicable income limitation).
- The second condition is that a new occupant whose income exceeds the applicable income limitation occupies any residential rental unit in the building of a comparable or smaller size.

In the case of a deep rent skewed project described in section 142(d)(4)(B) of the Code ''170 percent'' is substituted for ''140 percent'' in applying the applicable income limitation under section 42(g)(1), and the second condition is that any low-income unit in the building is occupied by a new resident whose income exceeds 40 percent of AMGI.

The exception contained in section 42(g)(2)(D)(ii) is referred to as the next available unit rule. *See also* § 1.42–15 of the Income Tax Regulations.

The 2018 Act added a new next available unit rule in section 42(g)(2)(D)(iii), (iv), and (v) for situations in which the taxpayer has elected the average income test. Under this new rule, a unit ceases to be a low-income unit if two slightly different disqualifying conditions are met:

- First, the income of an occupant of a low-income unit increases above 140 percent of the greater of (i) 60 percent of AMGI, or (ii) the imputed income limitation designated by the taxpayer with respect to the unit; and
- Second, a new occupant whose income exceeds the applicable imputed income limitation occupies any other residential rental unit in the building that is of a comparable or smaller size. The applicable imputed income limitation for this purpose depends upon whether the unit being occupied was a low-income unit before becoming vacant.
  - If the new tenant occupies a unit that was taken into account as a low-income unit prior to becoming vacant, section 42(g)(2)(D)(v)(I) provides that the applicable imputed income limitation is the limitation designated with respect to the unit.
  - If the new tenant occupies a market-rate unit, section 42(g)(2)(D)(v)(II) provides that the applicable imputed income limitation is ''the imputed income limitation which would have to be designated with respect to such unit under [section 42(g)(1)(C)(ii)(I)] in order for the project to continue to meet the requirements of [section 42(g)(1)(C)(ii)(II)].'' (Those requirements mandate that the ''average of the imputed income limitations designated under [section 42(g)(1)(C)(ii)(I)] shall not exceed 60 percent of'' AMGI.)

Section 42(g)(2)(D)(iv) also provides a next available unit rule for deep rent skewed projects that elect the average income test.

Under section 42(g), once a taxpayer elects to use a particular set-aside test for a project, that election is irrevocable. Thus, if a taxpayer had previously elected to use the 20–50 test or the 40–60 test, the taxpayer may not subsequently elect to use the average income test. Under section 42(g)(4), the rules of sections 142(d)(2)(B) through (E), 142(d)(3) through (7), and 6652(j) of the Code apply to determine whether any project is a qualified low-income housing project and whether any unit is a low-income unit.

Section 42(m)(1) provides that the owners of an otherwise-qualifying building are not entitled to the housing credit dollar amount that is allocated to the building unless, among other requirements, the allocation is pursuant to a qualified allocation plan (QAP). A QAP provides standards by which a State or local housing credit agency (Agency) is to make these allocations. Under section 42(m)(1)(B)(iii), a QAP must contain a procedure that the Agency or its agent will follow in monitoring noncompliance with low-income housing credit requirements and in notifying the IRS of any such noncompliance. See § 1.42–5 of the Income Tax Regulations for rules implementing this requirement.

On October 30, 2020, the Department of Treasury (Treasury Department) and the IRS published a notice of proposed rulemaking (NPRM) (REG- 119890–18) in the **Federal Register** (85 FR 68816) proposing regulations setting forth guidance on the average income test under section 42(g)(1)(C). The Treasury Department and the IRS received 98 comments, including requests to testify at a public hearing on the proposed regulations and written testimony for the public hearing.

On March 24, 2021, the Treasury Department and the IRS held a public hearing on the proposed regulations. Fifteen taxpayers provided testimony at the hearing.

After consideration of the comments received and the testimony provided, the proposed regulations are adopted as modified by this Treasury Decision. The major areas of comment and the revisions to the proposed regulations are discussed in the following Summary of Comments and Explanation of Revisions. The comments are available for public inspection at *www.regulations.gov* or upon request. Other minor, non-substantive modifications that were made to the proposed regulations and adopted in these final regulations are not discussed in the Summary of Comments and Explanation of Revisions. In addition, the Treasury Department and the IRS are publishing in this Treasury Decision temporary regulations containing recordkeeping and reporting requirements that are needed to facilitate administrability of, and compliance with, changes made in the final regulations. Those changes were based on comments received on the proposed rule. These requirements are described in this preamble along with the substantive rules contained in the final regulations. The text of these temporary regulations also serves as the text of the proposed regulations (REG–113068–22) set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

Summary of Comments and Explanation of Revisions

These final regulations and temporary regulations set forth guidance on the average income test under section 42(g)(1)(C).

I. Section 1.42–15, Next Available Unit Rule for the Average Income Test

The proposed regulations updated the next available unit provisions in § 1.42–15 to reflect the new set-aside based on the average income test and to take into account section 42(g)(2)(D)(iii), (iv), and (v). One commentator recommended that no changes be made to the proposed regulations concerning the next available unit rule when the proposed regulations are finalized. No other comments were received on the next available unit rule.

While no comments requested changes, the final regulations for the next available unit rule were revised to be consistent with changes made to the provisions in § 1.42–19, which are described in section II of this Summary of Comments and Explanation of Revisions. The final regulations include revisions to the two limitations in § 1.42–15(c)(2)(iv) related to the imputed income designation of the next available unit, which relate to the limitations described in section 42(g)(2)(D)(v). The final regulations provide taxpayers with administrable rules and objective standards to apply when determining the designation of the next available unit. The first limitation in § 1.42–15(c)(2)(iv)(A) applies to units that met all of the requirements in § 1.42–19(b)(1)(i) through (iii) prior to becoming vacant. In other words, the unit was rent-restricted, the occupants satisfied the imputed income limitation for the unit (or the unit's low-income status continued under section 42(g)(2)(D)), and no other provision in section 42 or the regulations thereunder denied low-income status to the unit. For those units, which would have had a designated imputed income limitation prior to vacancy, the limitation is the unit's designated imputed income limitation. This rule is equivalent to the rule in the proposed regulations, which interpreted the definition of low-income unit as including only the requirements in § 1.42–19(b)(1)(i) through (iii). The second limitation in § 1.42–15(c)(2)(iv)(B) requires a taxpayer, in the case of any other unit (such as a market rate unit), to limit the imputed income limitation to a designation that will not cause the average of all imputed income designations of residential units in the project to exceed 60 percent of AMGI. This ensures that the next available unit is designated in such a way that maintains compliance with the averaging requirement in section 42(g)(2)(C)(ii)(II). This revision to the second limitation was necessary because the proposed regulations relied on a reference to the mitigating action provisions, which were removed from the final regulations as explained in section II.B. of this Summary of Comments and Explanation of Revisions.

Additionally, these final regulations provide that, if multiple units are over-income at the same time in a project that has elected the average income set-aside (average income project) and that has a mix of low-income and market-rate units, then the taxpayer need not comply with the next available unit rule in a specific order with respect to occupancy. Instead, renting any available comparable or smaller vacant unit to a qualified tenant maintains all over-income units' status as low-income units until the next comparable or smaller unit becomes available (or, in the case of a deep rent skewed project, the next low-income unit becomes available). The final regulations include an example illustrating the application of this rule. Note, the order in which units are designated, however, may affect the qualified group that is used for computing the applicable fraction. See further discussion in section II.B of this Summary of Comments and Explanation of Revisions.

II. § 1.42–19, Average Income Test

A. Requirements To Satisfy the Average Income Test

1. Proposed Regulations Approach to the Average Income Test

The proposed regulations provided that a project for residential rental property meets the requirements of the average income test under section 42(g)(1)(C) if (1) 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in the project are both rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit; (2) the taxpayer designated the imputed income limitations in the manner provided in § 1.42–19(b) of the proposed regulations; and (3) the average of the designated imputed income limitations of the low-income units in the project does not exceed 60 percent of AMGI. The proposed regulations would have required taxpayers to complete, not later than the close of the first taxable year of the credit period, the initial designation of imputed income limitations for all of the units taken into account for the average income test.

Under the proposed regulations, the 60 percent of AMGI limit on the average of designated imputed income limitations applied to all of the low-income units in the project. The requirement as so interpreted did not take into account whether fewer than all of those units could constitute a group of at least 40 percent of the residential units in the project such that the average of the limitations of the units in that group averaged to no more than 60 percent of AMGI.

In some cases, this interpretation magnified the adverse consequences of a single unit's failure to maintain low-income status. For example, under the proposed regulations, a unit losing low-income status would remove that unit's imputed income limitation from the computation of the average, but not impact the low-income status of any other units. If that unit's limitation was less than 60 percent of AMGI, the loss of the unit could cause the average of the remaining low-income units to rise above 60 percent of AMGI. That noncompliant average would cause the entire project to fail the average income test and therefore fail to be a qualified low-income housing project. In light of the potential adverse consequences of the rule, the proposed regulations provided for mitigating actions the taxpayer could take within 60 days of the close of the year for which the average income test might be violated.

2. Comments on the Proposed Set-Aside Rule

Many commenters disagreed with the adequacy of the proposed mitigation actions and with the correctness of the underlying interpretation of the average income test, which required testing of *all* low-income units.

i. Inadequacy of the Proposed Mitigation Actions

Commenters noted that the mitigation possibilities in the proposed regulations depended on the taxpayer both appreciating that the entire project might be jeopardized by a problem with a particular unit and knowing how to deploy the mitigation actions. Commenters also suggested that the mitigation proposal incorporated such a rigid deadline that even alert and well-advised taxpayers might be unable to timely take mitigating actions to be eligible to receive credits for their projects.

ii. Invalidity of the Underlying Interpretation

Commenters' central concern was the invalidity, as they saw it, of the underlying interpretation of the average income test. Under the interpretation in the proposed regulations, a single unit's falling out of compliance could result in the complete loss of tax credits for the entire project, or at least loss of credits for an entire year. Commenters noted that this result flowing from the interpretation in the proposed regulations suggested the invalidity of the interpretation. Several commenters observed that the proposed regulations imposed on projects electing the average income test a higher standard than that required for satisfying the other set-aside elections. Under the 20–50 test and 40–60 test, one noncompliant unit could not cause an entire project to fail the set-aside test if, without taking the noncompliant unit into account, there remained a sufficient number of compliant units to meet the statutory minimum percentage of all residential units. The commenters, therefore, concluded that the interpretation in the proposed regulations regarding the average income test could not have been the intent of Congress.

Most commenters recommended that the average income test be satisfied if any group of 40 percent of the units in the project have designations whose average does not exceed 60 percent of AMGI. In general, these commenters correctly asserted that the average income test is a minimum set-aside test, and, therefore, a project should meet the test if the minimum requirements of the test are satisfied, even if low-income units not necessary for the minimum are noncompliant.

Other commenters noted that even though the project should additionally meet an overall average test of no more than 60 percent of AMGI across all low-income units (as required by the proposed regulations), relief should nevertheless be built into the requirement. Thus, if a unit is out of compliance, causing the project-wide average to go above 60 percent of AMGI, the failure should be considered noncompliance for that unit only, and only that non-compliant unit should be subject to credit adjustment and recapture. They urged that this noncompliance should not be a violation of the minimum set-aside, provided that at least 40 percent of the units' designations still meet the 60 percent average.

This suggested approach, however, could create problems similar to those in the proposed regulations because one unit's noncompliance could cause the overall average of the remaining low-income units to rise above 60 percent of AMGI. For this reason, the comment was not adopted, but it was considered in connection with developing the final regulations' rules for determining low-income units and a building's applicable fraction, as is discussed later.

Some commenters believed that the average income test is satisfied as long as the original imputed income limitations of designated low-income units average to 60 percent, and 40 percent or more of those units continue to be rent-restricted and meet their respective imputed income limitations. Thus, the average must be met initially, but subsequently, the requirement is permanently satisfied, regardless of any changes in circumstances related to occupancy. Commenters suggested that a general anti-abuse rule could be adopted to allow the IRS to disregard designations made in bad faith.

The Treasury Department and the IRS do not agree that the averaging requirement of section 42(g)(1)(C)(ii)(II) is concerned only with the original designations. Like the other minimum set-aside tests, the average income test is an ongoing requirement for a project to maintain its status as a qualified low-income housing project. A project failing to maintain an average of 60 percent or less of AMGI across at least 40 percent of its residential units that qualify as low-income units violates the requirement. This is consistent with a plain reading of the statute, as the imputed income limitations of the units taken into account (meaning, counted for purposes of meeting the average income test) must not exceed 60 percent of AMGI. Section 42(g)(1)(C)(ii)(I) and (II). The rejected suggestion would allow an original imputed income limit designation of a subsequently disqualified unit to satisfy compliance with the minimum set-aside test throughout the entire compliance period. Treating such a situation as compliant would effectively waive the rule that a project consistently maintain its level of affordability—a central requirement of the low-income housing credit. Moreover, adoption of a general anti-abuse rule would miss many non-compliant situations, would increase administrative complexity for the IRS and the Agencies and would potentially create uncertainty for taxpayers.

A separate comment recommended that an out-of-compliance unit should maintain its designation if the owner can demonstrate due diligence when completing the initial income certification. The Treasury Department and IRS disagree with the suggestion that an out-of-compliance unit should not lose its designation if the owner can demonstrate due diligence when completing the initial income certification. Demonstrating due diligence upon initial income certification is not sufficient to satisfy ongoing compliance requirements. Further, similar to a general anti-abuse rule proposed by another commenter, this approach would increase administrative complexity for the IRS and Agencies and could potentially create uncertainty for taxpayers.

3. The Final Regulations' Interpretation of the Average Income Test

In response to the comments received, the Treasury Department and the IRS have revised their interpretation of the set-aside rule and incorporated the revised interpretation in the final regulations. In making these revisions, the Treasury Department and the IRS considered the plain language of section 42(g)(1)(C) as well as the definition of low-income unit for projects electing the average income test. When section 42(g)(1)(C)(i) and the special rules in section 42(g)(1)(C)(ii)(I) and (II) are read together, the taxpayer satisfies the average income test if at least 40 percent of the building's residential units are eligible to be low-income units and have designated imputed income limitations that collectively average 60 percent or less of AMGI. A project satisfying this minimum requirement satisfies the average income test. Thus, the final regulations have been revised so that it is no longer necessary to consider all low-income units in a project for residential rental property when determining whether the average income test is met.

While making this change, the Treasury Department and the IRS also considered the definition of ''low-income unit'' in a project electing the average income test, and the final regulations provide a clarifying definition of this term. As the final regulations no longer require a taxpayer to consider all of the low-income units in a project in order to satisfy the minimum set-aside requirement, the issue for consideration is whether a project's election of the average income test has any impact on whether a unit that is rent-restricted and whose occupants satisfy the imputed income limitation designated for the unit qualifies as a low-income unit as that term is defined in section 42(i)(3). This determination is relevant for the average income test as well as for purposes of the other provisions of the low-income housing credit, including a building's applicable fraction as explained later.

In defining the term ''low-income unit,'' section 42(i)(3)(A)(ii) requires that the individuals occupying the unit meet the income limitation applicable under section 42(g)(1) to the project of which the building is a part. With respect to the 20–50 and the 40–60 minimum set-asides, there is no difficulty in applying this language to specific units. Every unit in the project has an identical income limitation, namely the income limitation embodied in the set-aside test that the taxpayer elected for that project. If the taxpayer elects the 20–50 test, then the income limitation for each unit is 50% of AMGI. If the taxpayer elects the 40–60 test, the income limitation for each unit is 60% of AMGI.

For a project electing the average income test, however, the reference to ''the income limitation applicable . . . to the project'' poses a challenge because income limitations will typically vary among the units in the project. In addition, pursuant to section 42(g)(1)(C)(ii)(II), the average of the designated imputed income limitations for the units taken into account for meeting the minimum set-side test must not exceed 60% of AMGI. As a result, for purposes of the average income test, the fact that the occupants of a unit satisfy the imputed income limitation designated for that unit does not by itself establish that the unit satisfies the requirements in section 42(i)(3)(A).

The Treasury Department and the IRS considered interpreting the language in section 42(i)(3)(A)(ii) as referring only to the income limitation designated for a specific unit. Such an interpretation would be consistent with the approach under the 20–50 and 40–60 tests where a single unit's noncompliance does not impact the low-income status of any other low-income units in the project. It would also be in accord with many comments that argue the low-income status of one unit should not impact the status of other units if those other units meet their respective income limitations.

In a project electing the average income test, however, it is insufficient to read ''the income limitation applicable under [section 42(g)(1)] to the project'' as referring only to the designated imputed income limitation appliable to a unit. Under the average income test, a unit's status as a low-income unit for purposes of the set-aside and the applicable fraction depends not only on its own attributes but also on the income limitations of other units that are taken into account for these purposes. In contrast, under the historic set-asides, knowing that a unit satisfies the income limitation applicable to the unit is sufficient to know that the unit meets the project's income limitation for purposes of the minimum set-aside test and a building's applicable fraction.

This interpretation means that to qualify as a low-income unit in a project electing the average income test, a residential unit, in addition to meeting the other requirements to be a low-income unit under section 42(i)(3), must be part of a group of units such that the average of the imputed income limitations of the units in the group does not exceed 60 percent of AMGI. Thus, to provide clarity on the definition of low-income unit for a project electing the average income test, the final regulations include a definition of low-income unit that takes into account whether the unit is a member of a group of units with a compliant average limitation.

This definition of low-income unit in the final regulations is in accord with the definition of low-income unit as originally described in the Conference Report for the Tax Reform Act of 1986 (1986 Conference Report):

> A low-income unit includes any unit in a qualified low-income building if the individuals occupying such unit meet the income limitation elected for the project for purposes of the minimum set-aside requirement and if the unit meets the gross rent requirement, as well as all other requirements applicable to units satisfying the minimum set-aside requirement.

2 H.R. Conf. Rep. 99–841, 99th Cong., 2d Sess., II–94–95.

In that explanation, it is required that a low-income unit meet ''all other requirements applicable to units satisfying the minimum set-aside test.'' Although the average income test was not in existence at the time of the 1986 Conference Report, it is apparent that Congress wanted to avoid creating one standard for low-income units that qualified their projects as part of the 20–50 and 40–60 minimum set-asides and a different standard for any other low-income units that played some other role in the same project. Thus, it is consistent with how low-income units are defined under the 20–50 and 40–60 minimum set-aside tests for these final regulations to require all low-income units in an average income project to satisfy a consistent and equal set of standards—standards that, in the average income context, incorporate the average income limitations of the group of which the units are a part.

Accordingly, under the final regulations, a project for residential rental property meets the requirements of the average income test if the taxpayer's project contains a qualified group of units that constitutes 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in the project. Section 1.42–19(b)(2)(i) requires the units in a qualified group to, first, individually satisfy the criteria that would qualify each unit as a low-income unit under the 20–50 or 40–60 set-asides. Specifically, the rules in § 1.42–19(b)(1)(i) through (iii) require that each unit be rent-restricted, occupants of the unit meet the income limitation for the unit, and no other provision in section 42 or the regulations thereunder denies low-income status to the unit (including section 42(i)(3)(B)–(E)). In addition, § 1.42–19(b)(2)(ii) requires that the average of the designated imputed income limitations of the units in the group not exceed 60 percent of AMGI. The group of units must be identified as required in § 1.42–19(b)(3)(i). A taxpayer identifies the units in the group by recording the units in the taxpayer's books and records, and the taxpayer must communicate that annual identification to the applicable Agency as required in §§ 1.42–19(b)(3)(iii) and 1.42–19T(c)(1) of the associated temporary regulations. See further description in section II.C of this Summary of Comments and Explanation of Revisions.

These revisions provide more flexibility for meeting the average income test than had been available under the proposed regulations. Most importantly, the revised rules limit the impact of one unit's noncompliance on the ability of a project to satisfy the average income test. The status of additional units beyond the minimum number of units needed to satisfy the test does not impair satisfaction of the average income test as discussed in section II.B of this Summary of Comments and Explanation of Revisions. By removing the proposed requirement applicable to *all* low-income units and thus allowing a project to satisfy the average income test if it contains a qualified group of units meeting the minimum requirements, the final regulations generally avoid the outsized impact that one unit's loss of low-income status could have under the proposed regulations. The interpretation of the average income set-aside in the final regulations is consistent with the majority of comments on this issue.

In addition, this interpretation creates more parallels between the average income test and the 20–50 and 40–60 tests. Under either of those latter tests, when there are more than the minimum number of low-income units, one unit going out of compliance would not cause a project to fail the minimum set-aside test. Similarly, under the final regulations, one unit's loss of low-income status will not jeopardize the entire project's status as a qualified low-income housing project subject to the average income test if there are a sufficient number of remaining units that comprise a qualified group of units that satisfy the minimum set-aside.

B. Determining Qualified Groups of Units for Use in Applicable Fraction Determinations

1. Role of the Applicable Fraction Under Section 42

As mentioned earlier, the amount of low-income housing credits earned by a building in a taxable year depends on a computation that includes a number called the building's ''applicable fraction'' for that year. This fraction is based on the number and size of the low-income and non-low-income units in the building and can be thought of as an indicator of the extent to which the building is dedicated to affordable housing. Thus, the applicable fraction plays a role both in determining credits during the credit period and in demonstrating continued dedication to affordable housing during the extended use period. *See* section 42(h)(6)(B)(i).

2. The Proposed Regulations' Resolution of Issues Posed by Computation of the Applicable Fraction in an Average Income Project

The proposed regulations provided an approach to addressing continuous compliance with the average income requirement by using the same group of low-income units for both satisfying the minimum set-aside requirement and determining the applicable fraction. The proposed regulations also provided for a removed unit, which was a low-income unit identified by the taxpayer that was not taken into account for purposes of the set-aside test or the applicable fraction but was taken into account for purposes of reducing recapture. As described earlier in this Summary of Comments and Explanation of Revisions, taxpayers strongly criticized the set-aside rule. In response, the final regulations both allow the minimum set-aside test to be satisfied by any qualified group of units that is no smaller than the statutory minimum (40 percent) and also add a clarifying definition of ''low-income unit'' for projects electing the average income test. To implement the statutory requirement regarding the average of the imputed income limitations of residential units in a project, this clarifying definition is sensitive to the imputed income limitations of the other residential units in the same group.

The approach in the final regulations for the average income test differs from the other two set-asides in that the final regulations allow for a distinction between the group of low-income units taken into account for satisfying the minimum set-aside and the (usually larger) group of units taken into account for computing credits. However, under the final regulations, the units included in both groups are subject to the same standards.

Congress acknowledged the absence of such a distinction in the 20–50 and 40–60 tests in its discussion of the low-income housing credit in the 1986 Conference Report:

> Qualified residential rental projects must remain as rental property and must satisfy the minimum set-aside requirement, described above, throughout a prescribed compliance period. Low-income units comprising the qualified basis on which additional credits are based are required to comply continuously with all requirements in the same manner as units satisfying the minimum set-aside requirements. Units in addition to those meeting the minimum set-aside requirement on which a credit is allowable also must continuously comply with the income requirement.

2 H.R. Conf. Rep. 99–841, 99th Cong., 2d Sess., II–95.

Thus, under the 20–50 and 40–60 tests, units included in qualified basis in addition to those needed to satisfy the minimum set-aside must meet the same requirements as the units used to satisfy the minimum set-aside. This application under the 20–50 and 40–60 tests is straightforward, however, because all low-income units have to be at or less than a single elected AMGI standard, either 50 percent or 60 percent of AMGI (assuming other requirements are met). Under either test, the minimum set-aside units and any additional low-income units are effectively interchangeable, so there was no need to clarify treatment between the groups.

For the average income test, however, units are not interchangeable because they have a range of imputed income limitations and cannot be evaluated in isolation because there is an income averaging requirement in section 42(g)(1)(C)(ii)(II). By stating that additional units beyond those meeting the minimum set-aside test must continuously comply with the income requirement, the 1986 Conference Report identified the necessity of developing a common standard for all residential units in projects electing the 20–50 and 40–60 tests. As discussed in section II.A.3 of this Summary of Comments and Explanation of Revisions, this principle is reflected in the final regulations' definition of low-income units, and it impacts the treatment of units that may be taken into account for computing a building's applicable fraction.

3. Comments on Determining the Applicable Fraction

In the context of the 20–50 or 40–60 minimum set-asides, commenters noted, non-compliance by one or more units (for example, not being suitable for occupancy) reduces a building's applicable fraction only with respect to the units that are non-compliant as of the taxpayer's year end. These commenters recommended similar treatment in the average income context. They advocated evaluating eligibility of units for inclusion in the applicable fraction on a unit-by-unit basis (that is, taking into account only facts about the particular unit, without taking into account the designated imputed income limitation of other units).

In the context of removed units, some comments argued that the proposed applicable fraction treatment of these units amounted to ''double counting.'' Not only did the proposed regulations exclude the noncompliant unit from the computation of the applicable fraction of the building containing the unit, but by taking into account the average of the group's income limitations, they could force a taxpayer to exclude one or more compliant units from the applicable fraction(s) of the building(s) containing the compliant unit(s).

The Treasury Department and the IRS considered the proposal to include units in applicable fraction computations on a unit-by-unit basis but did not adopt it. To be sure, that proposal would preserve the requirement that units satisfying the set-aside requirement must have income limitations whose average does not exceed 60 percent of AMGI. The proposal, however, would not apply this average requirement to the units that are taken into account for the project's applicable fractions. The proposed approach would thus be inconsistent with the language of section 42(c)(1)(c)(i), which provides that the numerator of the applicable fraction is number of ''low-income units'' in the building. As explained earlier in the discussion of the average income test, the definition of low-income unit for a project electing the average income test necessarily includes the requirement that the average of the designated income limitations of the units taken into account as low-income units includes that the average designated income limitations of the units not exceed 60% of AMGI.

In addition, the failure to apply the average income limitation in determining the applicable fraction would allow a taxpayer to include units in the qualified basis even if they are a majority of the units in a project and their average limitation greatly exceeds 60 percent of AMGI. If accepted, the proposal would have allowed a taxpayer to give appropriate income limitations to 40 percent of a project's units but to designate limitations of 80 percent of AMGI for all the remaining low-income units in the project and receive credits for all of these units.

In the context of determining what units to include in the applicable fraction, another commenter recommended revising the proposed regulations to include an exception for units that are not habitable due to a casualty loss, such as from a fire in the unit. The commenter asserted that because the noncompliance was not the fault of taxpayer, the regulations should not require the taxpayer to remove another unit from an applicable fraction to offset the noncompliance associated with the casualty loss. The Treasury Department and the IRS did not adopt this suggestion. An approach that requires a determination of fault would create additional complexity for taxpayers, Agencies, and the IRS. In addition, while the 20–50 and 40–60 set-asides do not have the same issue, adopting rules allowing for special treatment in the case of casualties would necessitate a broader section 42 regulatory project.

4. Determination of the Applicable Fraction in the Final Regulations

Under the final regulations, the determination of a group of units to be taken into account in the applicable fractions for the buildings in a project follows the same approach as determining a group of units to be taken into account for purposes of the set-aside test. Essentially, a taxpayer can determine this group of units by including the low-income units identified for the average income test, and any other residential units that can qualify as low-income units if they are part of a group of units such that the average of the imputed income limitations of all of the units in the group does not exceed 60 percent of AMGI. If the average exceeds 60 percent of AMGI, then the group is not a qualified group. For example, if a unit was designated at 80 percent of AMGI and if including that unit in an otherwise qualified group of units causes the average of the imputed income limitations of the group to exceed 60 percent of AMGI, then the taxpayer cannot include the 80 percent unit in the otherwise qualified group. Only the otherwise qualified group of units, without the 80 percent unit, is a qualified group of units used to determine the project's buildings' applicable fractions.

Once a qualified group of units in a project has been identified for a taxable year, the applicable fraction for each building in the project is computed using the units that are in both the qualified group and the building at issue. (Although the qualified group of units for a project must have an average limitation no greater than 60 percent of AMGI, this is not true of the average limitation of the units used to compute the applicable fraction of individual buildings in the project.) This method of determining a building's applicable fraction applies both for ascertaining low-income housing credits earned for a year in the credit period and for complying with the extended use requirement in section 42(h)(6)(B)(i).

The Treasury Department and the IRS determined that the approach to determining the applicable fraction in the final regulations better aligns with the 20–50 and 40–60 set-aside tests than the approach in the proposed regulations in that it creates parallel requirements for both ''minimum set-aside units'' and any ''additional units'' that may contribute to earning low-income housing credits. This rule in the final regulations is also consistent with the description of the low-income units and the principle regarding set-aside units and additional units in the other set-aside tests that is described in the 1986 Conference Report discussion quoted earlier. The rule is also consistent with comments stating that the low-income units in a project should have an overall average that does not exceed 60 percent of AMGI.

The potential downside of this approach to an owner is that if one unit loses low-income status, then it is possible that other units' status as low-income units may be impacted. Specifically, an owner may have to exclude one or more otherwise qualifying units from the qualified group of units for use in applicable fraction determinations for the group to retain an average income limitation that does not exceed 60% of AMGI. This, however, will not always be the case. For example, if a unit designated at 60, 70, or 80 percent of AMGI loses low-income status and no other changes occurred, then the owner could maintain the required average limitation of the qualified group of units without excluding any of the other units from the qualified group of units that had been taken into account in the previous year. Also, as is discussed later, in some cases a unit may be included in the qualified group of units after its income limitation has been designated or redesignated to a lower income limitation.

5. Proposed Regulations' Special Rule for Determining the Applicable Fraction for Purposes of Recapture

The proposed regulations, in some cases, would have caused a compliant low-income unit with a relatively high-income limitation not to have been taken into account in computing low-income housing credits earned for a year in the credit period. The mechanisms for achieving this result were called ''mitigating actions'' and ''removed units''. To minimize recapture, the proposed regulations would have included these units in the computations underlying section 42(j) so that the units' inclusion avoided having their absence contribute to recapture of credits. As described in section II.B.6. of this Summary of Comments and Explanation of Revisions, however, the Treasury Department and the IRS deleted the mitigating actions concept from the final regulations. For this reason, the final regulations do not include the proposed regulations' rule related to recapture.

6. Deletion of Mitigating Actions From Final Regulations

As described previously, the proposed regulations would have created a risk that, in some situations, one unit losing its low-income status could have caused an entire project to fail the average income test. To reduce that risk, the proposed regulations described two possible mitigating actions that a taxpayer could have taken to avoid disqualifying the project. Because the final regulations differ from the proposed regulations in a way that avoids that risk, there is no longer a need for mitigating actions. For this reason, the final regulations do not include rules related to mitigating actions.

C. Recordkeeping and Reporting Requirements

In response to comments on the proposed rule, the final rule provides significant flexibility regarding the qualified group of units used to satisfy the average income set-aside and the qualified group of units used for purposes of computing the applicable fraction. Providing the requested flexibility necessitates that the taxpayer have the discretion and responsibility to make these identifications and that the contemporary identification of the units be unambiguous.

Specifically, to implement the changes made in response to the comments on the proposal rule, § 1.42–19(b)(3) of the final regulations provides that a taxpayer separately identifies (i) units in the qualified group of units used for satisfying the average income set-aside and (ii) units in the qualified group for purposes of the applicable fractions. Section 1.42–19T(c)(1) of the temporary regulations requires that this be done by recording these identifications in the taxpayer's books and records (where the identification must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2)) and by communicating that identification annually to the applicable Agency. These rules promote certainty and administrability. The rules, in conjunction with the other procedures provided in § 1.42–19T(c)(3), will allow taxpayers, Agencies, and the IRS to more easily verify the status, including the average imputed income limitation, of the qualified group of units used for purposes of satisfying the average income set-aside and the qualified group of units used for purposes of determining the applicable fraction(s).

In addition, taxpayers are required to report specified information to Agencies and to maintain records in sufficient detail to establish the accuracy of the project's applicable fractions, the satisfaction of the average income set-aside, and compliance with requirements in section 42 and the applicable regulations. Section 1.6001–1 requires the keeping of records ''sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.'' *See* §§ 1.6001–1 and 1.42–5.

D. Designation of Imputed Income Limitations and Identification of Units

Section 42(g)(1)(C)(ii) contains substantive requirements for income limitations applicable in the average income test. Specifically, the taxpayer must designate the imputed income limitation for each unit taken into account under the average income test; the average of those imputed income limitations cannot exceed 60 percent of AMGI; and the designated imputed income limitation of any unit must be 20, 30, 40, 50, 60, 70, or 80 percent of AMGI. That statutory provision, however, does not contain procedural requirements to specify the manner in which taxpayers must designate the imputed income limitation of units.

Filling this gap, the proposed regulations added procedural requirements that a taxpayer must designate each imputed income limitation in accordance with: (1) any procedures established by the IRS in forms, instructions, or publications or in other guidance published in the Internal Revenue Bulletin pursuant to § 601.601(d)(2)(ii)(*b*); and (2) any procedures established by the Agency that has jurisdiction over the low-income housing project that contains the units to be designated, to the extent that those Agency procedures are consistent with IRS guidance and the governing regulations.

No negative comments were submitted regarding these provisions, but, on review, and in conjunction with other revisions made based on comments received, the Treasury Department and the IRS determined that more detailed designation rules were needed to promote certainty and administrability. Section 1.42–19T(c)(3)(iv) of the temporary regulations provides that a taxpayer designates a unit's imputed income limitation by recording the limitation in its books and records, where it must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2). The final regulations require the initial designation of a unit to be made no later than when a unit is first occupied as a low-income unit. *See* § 1.42–19(c)(3)(i). Under § 1.42–19T(c)(3)(iv) of the temporary regulations, the designation must also be communicated annually to the applicable Agency, and the applicable Agency may establish the time and manner in which information is provided to it. *See* § 1.42–19T(c)(2)(i).

In the context of the final regulations' provision of significant flexibility with respect to satisfying the average income test and identifying a qualified group of units, these designation and identification rules will facilitate taxpayer access to this additional flexibility. Providing a specific method of designation will give taxpayers more certainty than the proposed regulations as to how to meet the statutory requirement of designation. The rule will also benefit administration by ensuring a contemporaneous record of designation, without creating a significant burden on taxpayers. The final regulations also revise timing of the designation so that it is no longer required by the end of the first year of the credit period, and instead is based on when a unit is first occupied as a low-income unit. This rule better aligns the timing of designation with the rental of low-income units and should allow a taxpayer to make designations after having a chance to evaluate the market for a particular unit. Finally, requiring annual communication of the information to the applicable Agency will help the Agency determine whether a project is in compliance with the requirements of section 42. The temporary regulations give flexibility to Agencies to determine the best time and manner for taxpayers to communicate the information so each Agency can ensure the system best serves that particular Agency with minimal burden.

Importantly, the temporary regulations also provide Agencies with the discretion, on a case-by-case basis, to waive in writing any failure to comply with the temporary regulations' recordkeeping and reporting requirements. *See* § 1.42–19T(c)(4). The waiver may be done up to 180 days after discovery of the failure, whether by taxpayer or Agency. At the discretion of the applicable Agency, this waiver may treat the relevant requirements as having been satisfied.

In providing Agencies with the ability to waive and the timeline for waiving, the Treasury Department and the IRS considered comments made in response to the proposed regulations regarding the rules for ''removed units'' and the timing for completing ''mitigating actions.'' In response to the proposed regulations' rules on removed units, Agencies commented that they do not have authority to determine the tax consequences of noncompliance with respect to the requirements of section 42, and, instead, Agencies are only responsible for determining the existence of noncompliance itself. The ability of Agencies to waive the failure to comply with the procedural requirements provided by the final regulations is not inconsistent with the scope of Agency responsibility, and the IRS itself will ultimately determine the tax consequences of noncompliance.

With respect to timing, many commenters suggested that a 60-day period in which to take mitigating actions beginning on the first day after the year of noncompliance was too short and began before the noncompliance may be known. Commenters recommended various time periods, and also suggested that the time period run from the time of discovery of the noncompliance. Although the Agency waiver rule in the temporary regulations involves a different situation, commenters' recommendations provide valuable information regarding Agencies' need for a sufficient period of time to consider whether to grant the waiver and that this time period should begin when the failure to comply is discovered. Thus, the temporary regulations provide that the period to provide a waiver is the 180-day period after discovery of the failure to comply by taxpayer or Agency.

E. Timing of Designation of Income Limitations

One commenter expressed concern that, in some situations, a multiple-building project claims the section 42 credit beginning in two different years depending on when the different buildings in the project are fully leased, and thus, the credit period for one building in the project may begin in one taxable year and the credit period for a second building in the same project may begin during the subsequent taxable year. In such a situation, the commenter requested, the regulations should permit the taxpayer to make unit designations at the end of the respective taxable years in which the credit period begins for each building in the same project.

The final regulations require a designation of the imputed income limitation for a unit by the time the unit is first occupied as a low-income unit, which could take place in different taxable years for different units. This rule also allows conversion of a market-rate unit to low-income status, with designation of an income limitation occurring any time before it is first occupied as a low-income unit. Thus, the final regulations provide the flexibility that may be needed by multiple-building projects. In addition, as described later, the final regulations permit the changing of a unit's imputed income limitation in certain circumstances. For an unoccupied unit that is subject to a change in imputed income limitation, the final regulations provide that the taxpayer must designate the unit's changed imputed income limitation prior to occupancy of that unit. For an occupied unit that is subject to a change in imputed income limitation, the taxpayer must designate the unit's changed imputed income limitation prior to the end of the taxable year in which the change occurs.

F. Changing a Unit's Imputed Income Designation

1. The Proposed Regulations on Changes to Income Designations

In general, the proposed regulations did not allow income limitations to be changed after they had been designated.

The preamble to the proposed regulations, however, requested comments on an alternative mitigating approach for situations in which a unit losing status as a low-income unit had caused the average of unit limitations to rise above 60 percent of AMGI as of the close of a taxable year. The mitigating approach would have allowed the taxpayer to redesignate the imputed income limitation of a low-income unit to return the average of unit limitations to 60 percent of AMGI or lower.

2. Comments Seeking Ability To Change Designations

Numerous commenters disagreed with the proposed regulations' disallowance of modifying the designated imputed income limitation of a unit. In general, these commenters stressed that greater flexibility to change unit designations would align with what multiple Agencies had been pursuing to implement existing State and local policies. Some commentators observed that the proposed regulations may conflict with other Federal or State laws or programs that, in certain cases, require rental housing to accommodate a tenant's need to move to another unit. Additionally, some commentators noted that after enactment of section 42(g)(1)(C), some Agencies adopted their own guidance with which the subsequently published proposed regulations were in conflict.

Multiple commenters recommended that the final regulations allow taxpayers to modify unit designations if the Agency with jurisdiction over the project at issue allows for that in its policies and the Agency consents to the change. A different commenter suggested that the final regulations should allow taxpayers to adjust imputed income limitation designations over time, provided that the taxpayer's adjusted designations continue to satisfy the requirements of the average income test (that is, at all times 40 percent of the units remain rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the owner, and the average of the imputed income limitation designations does not exceed 60 percent of AMGI in any given year).

3. Final Regulations on Changing Designations of Income Limitations

The Treasury Department and the IRS agree with taxpayers that the final regulations should allow greater flexibility in changes in unit designations than the proposed regulations did. Because not all Agencies may want the exact same standards for permitting redesignations, the final regulations address these taxpayer concerns by providing Agencies significant flexibility in determining procedures.

Under the final regulations, a taxpayer may change the imputed income limitation designation of a previously designated low-income unit in any of the following circumstances:

(1) In accordance with any procedures established by the IRS in forms, instructions, or guidance published in the Internal Revenue Bulletin pursuant to § 601.601(d)(2)(ii)(*b*) of this chapter.

(2) In accordance with an Agency's publicly available written procedures, if those procedures are available to all of the Agency's projects that have elected the average income test.

(3) To enhance protections set forth in the Americans With Disabilities Act of 1990 (ADA), Public Law 101–336, 104 Stat. 328; the Fair Housing Amendments Act of 1988, Public Law 100–430, 102 Stat. 1619; the Violence Against Women Act of 1994, Public Law 103–322, 108 Stat. 1902; the Rehabilitation Act of 1973, Public Law 93–112, 87 Stat. 394; or any other State, Federal, or local law or program that protects tenants and that is identified by the IRS or an Agency in a manner described in (1) or (2) above. The tenant protections that apply to an average-income project and that redesignation may enhance do not necessarily have any specific connection to section 42. For example, the protections may be ones that apply to all multifamily rental housing, or they may apply to the project at issue because some congressionally authorized spending supported the project with Federal financial assistance. Even if a tenant protection does not legally apply to a particular average-income project but does apply to analogous multifamily rental housing, the owner of the project may redesignate income limitations to implement the protection for the project's residents.

(4) To enable a current income-qualified tenant to move to a different unit within a project keeping the same income limitation (and thus the same maximum gross rent), with the newly occupied unit and the vacated unit exchanging income limitations.

(5) To restore the required average income limitation for purposes of identifying a qualified group of units either for purposes of satisfying the average income set-aside or for purposes of identifying the units to be used in computing applicable fraction(s). This rule is limited to newly designated, or redesignated, units that are vacant or are occupied by a tenant that would satisfy the new, lower imputed income limitation.

Also, the temporary regulations provide that a taxpayer effects a change in a unit's imputed income limitation by recording the limitation in its books and records, where it must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2). *See* § 1.42–19T(d)(2). The new designation must also be communicated to the applicable Agency in the time and manner required by the applicable Agency and must become part of the annual report to the Agency of income designations. As part of its discretion to specify the manner of communicating the new designation, the Agency may, if it wishes, require identification of the justification for the redesignation. The prior designation must be retained in the books and records for the period specified in § 1.42–19T(c)(3)(iv). These requirements for redesignations are consistent with those for initial designation of a unit's imputed income limitation and, similarly, are intended to increase both certainty and administrability with respect to redesignations.

G. Applicability Dates

Three commenters recommended that the final regulations should provide relief for projects that have elected the average income minimum set-aside prior to the publication of the final rule. These commenters suggested that taxpayers that elected the average income test before the finalization of the regulations did so based on a set of expectations that may be in conflict with how the final regulations actually work. For example, one commenter stated that the final regulations should provide taxpayers the opportunity to choose a different minimum set-aside.

Section 42 provides that an election of a minimum set-aside is irrevocable. Therefore, these final regulations do not permit taxpayers to change a minimum set-aside election.

In general, the final regulations apply to taxable years beginning after December 31, 2022. Section 1.42–19(f)(2) provides rules for residential units in projects that were already occupied prior to the applicability date of the regulations. The final regulations in both §§ 1.42–15(i)(2) and 1.42–19(f)(3) also contain provisions that makes them more broadly available for taxpayers that desire their application. For taxable years prior to the first taxable year to which these regulations apply, taxpayers may rely on a reasonable interpretation of the statute in implementing the average income test for taxable years to which these regulations do not apply.

H. Good Cause

For the reasons discussed above, the Treasury Department and the IRS consider the recordkeeping and reporting requirements contained in the temporary regulations to be a logical outgrowth of the proposed rule. In any event, the Treasury Department and the IRS determine that there would be good cause to issue the temporary regulations contained in this Treasury Decision without additional notice and the opportunity for public comment. This action may be taken pursuant to section 553(b)(3)(B) of the Administrative Procedure Act, which provides that advance notice and the opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Under the ''public interest'' prong of 5 U.S.C. 553(b)(3)(B), the good cause exception appropriately applies where notice-and-comment would harm, defeat, or frustrate the public interest, rather than serving it.

It would frustrate the public interest to delay the applicability date of the regulations until the recordkeeping and reporting requirements have received additional notice and comment. Taxpayers are seeking to rely on the substantive final regulations as soon as possible, and taxpayers cannot do so prior to the applicability date of the requirements in the temporary regulations. In general, these substantive final regulations provide significant flexibility with respect to satisfying the average income test, identifying a qualified group of units for use in the average income set-aside test and applicable fraction determinations, and changing the imputed income limitation designations of residential units. This increased flexibility was in response to taxpayer comments on the proposed regulations, including taxpayer complaints about burdens in the proposed regulations. The increased regulatory flexibility, in turn, necessitates these recordkeeping and reporting requirements to enhance administrability and certainty for the taxpayers and Agencies that will be taking advantage of the flexibility. In addition, these requirements are minimally burdensome. The recordkeeping requirements are similar to existing recordkeeping requirements for low-income housing projects, and Agencies may specify the time and manner of communication of regulatorily required information and may waive any failure to comply.

There is also good cause to find notice is ''unnecessary'' within the meaning of 5 U.S.C. 553(b)(3)(B). The Treasury Department and the IRS are responding to commenters by providing the flexibility they sought, which requires enhanced tracking to prevent abuse. The recordkeeping additions do not alter the substance of the basic rule provisions, which are a logical outgrowth of the NPRM. And because the recordkeeping requirements provide what is minimally necessary to ensure compliance and oversight, soliciting further comment would not alter these minimal recordkeeping requirements.

Accordingly, the Treasury Department and IRS have determined that notice is unnecessary and that it is in the public interest to allow expedited reliance on the recordkeeping and reporting requirements contained in the temporary regulations. At the same time, as set forth above, the Treasury Department and IRS are soliciting comments on the recordkeeping and reporting requirements in the notice of proposed rulemaking published contemporaneously with this final rule. At the time of publication, the Office of Management and Budget (OMB) has considered and approved these recordkeeping and reporting requirements under the Paperwork Reduction Act so that taxpayers can rapidly access the flexibility provided in these final regulations regarding the average income test.

Special Analyses

Regulatory Planning and Review—Economic Analysis

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

These final regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) (MOA) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these final regulations as significant under section 1(b) of the MOA.

A. Background

The Tax Reform Act of 1986, Public Law 99–514, 100 Stat. 2085, created the low-income housing credit under section 42 of the Code. Section 42(a) provides that the credit amount earned by a qualified low-income building depends on the number of low-income units in the building, among other factors. Among other requirements, a low-income unit as defined in section 42(i)(3) must be rent-restricted, and the individuals occupying the unit must meet the income limitation applicable to the project of which the building is a part.

To qualify as a low-income housing project, one of the section 42(g) minimum set-aside tests, as elected by the taxpayer, must be satisfied. Prior to the enactment of the Consolidated Appropriations Act of 2018, Public Law 115–141, 132 Stat. 348 (2018 Act), section 42(g) set forth two minimum set-aside tests, known as the 20–50 test and the 40–60 test. Under the 20–50 test, at least 20 percent of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 50 percent or less of AMGI. Under the 40–60 test, at least 40 percent of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 60 percent or less of AMGI. To be rent restricted, a unit must have maximum gross rent no more than 30 percent of the unit's income limitation.

The 2018 Act added section 42(g)(1)(C), which contains a third minimum set-aside test—the average income test. A project meets the minimum requirements of the average income test if 40 percent or more of the residential units in the project are both rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the specific unit. (In the case of a project described in section 142(d)(6), 40 percent in the preceding sentence is replaced by 25 percent.) For a project to meet the average income test, among other criteria, the average of the imputed income limitations must not exceed 60 percent of AMGI.

B. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of these final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

C. Economic Analysis

These final regulations provide guidance on the average income test under section 42(g)(1)(C). Despite the absence of this guidance, between 2018 and 2022 approximately 200 taxpayers elected the average income test for projects containing, in the aggregate, just over 2,000 buildings. With the benefit of this guidance, we project that an additional 100 taxpayers will elect the average income test annually, for around 1,000 buildings in aggregate, relative to a baseline scenario of no guidance.

These final regulations are expected to increase election of the average income test because the regulations will reduce uncertainty regarding the interpretation of 42(g)(1)(C). Absent these regulations, some taxpayers might shy away from the average income test, fearing adverse tax consequences if their interpretation of the statute is determined to be incorrect as well as lost time and expense for litigation, even if their interpretation is eventually confirmed. Instead, these or other taxpayers would elect either the 20–50 test or the 40–60 test.

Projects electing the average income test may be more financially stable and more likely to be mixed income than if they had to rely on the 20–50 or 40–60 tests; however, in aggregate, the final regulations are expected to have essentially no immediate effect on the number of affordable housing units produced. The pool of potential low-income housing credits allocated by state housing agencies is capped annually and is generally oversubscribed. Thus any increase in allocated credits flowing to projects electing the average income test is expected to be offset by a concomitant reduction in credits flowing to projects electing one of the other two set-aside tests.

Despite having no measurable impact on the stock of affordable housing, these final regulations will likely have some economic effect. First, there will likely be a minor efficiency gain to taxpayers electing the average income set-aside compared to the situation of taxpayers that, in the absence of this guidance, would experience uncertainty interpreting section 42(g)(1)(C). These taxpayers may save on consulting fees or hours of effort. Second, there may be a minor efficiency gain from avoiding time spent in litigation regarding the interpretation of section 42(g)(1)(C). These are unambiguous benefits of providing the final regulations, even if quantitatively small. Third, there may be costs associated with the record-keeping requirements of these final regulations. In Section II of these Special Analyses, we estimate that the annual paperwork burden for this regulation is $676,712 in aggregate. These costs fall upon low-income housing tax credit (LIHTC) building owners who choose to incur them when electing the average income test.

Less directly, the final regulations will likely result in a marginal geographic redistribution in the location of LIHTC-supported housing, away from densely populated areas and towards more sparsely populated ones. Absent an option to elect the average income test, property owners seeking LIHTCs must rely on either the 20–50 or 40–60 tests. These tests set a single income standard for all LIHTC-generating units in a building. For a building to be financially feasible, its owners must be confident that there is a sufficiently large pool of potential renters having incomes in these relatively narrow ranges (just under 50 or 60 percent of AMGI). These conditions are more easily met in densely populated areas.

In contrast, with income averaging, developers have leeway to establish a variety of income limitations in a building. Thus, in a sparsely populated area where there are not enough people in the relatively narrow required range of incomes to support a 20–50 or 40–60 building, an average income building may be financially feasible. Despite the low population density, the wider range of potential tenant incomes may enable the building owner to fill the low-income units with qualifying tenants from that vicinity. That ability could make the difference in whether or not the project is feasible.

To be sure, most of the effect of the average income test on the geographic distribution of affordable housing is a direct consequence of statutory amendments to section 42 made by the 2018 Act, independent of this regulatory guidance. However, to the extent that the final regulations encourage some taxpayers to use the average income test who otherwise would not, the regulations reinforce the statutory effect. The end result is a marginal transfer of economic well-being from renters and LIHTC property developers in densely populated areas towards renters and LIHTC property developers in sparsely populated areas.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) requires that a Federal agency obtain the approval of OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. The collections of information contained in these regulations has been approved by OMB under control number 1545–0988.

The collections of information that are needed for certainty and administrability of the final regulations are included in § 1.42–19T of the temporary regulations. Section 1.42–19T(c)(1) provides recordkeeping and reporting requirements related to the identification of a qualified group of units for each of (i) satisfaction of the average income set-aside test and (ii) applicable fraction determinations. Section 1.42–19T(c)(2) provides reporting requirements to the Agency with jurisdiction over a project. Section 1.42–19T(c)(3)(iv) provides recordkeeping and reporting requirements related to designations of the imputed income limitations for residential units. Section 1.42–19T(d)(2) provides recordkeeping and reporting requirements related to changing a unit's designated imputed income limitation.

This information in the collections of information will generally be used by the IRS and Agencies for tax compliance purposes and by taxpayers to facilitate proper reporting and compliance. Specifically, the collections of information in § 1.42–19T apply to taxpayer owners of projects that receive the low-income housing credit and elect the average income set-aside. With respect to the recordkeeping requirements in § 1.42–19T(c)(3)(iv) and (d)(2) and section 42(g)(1)(C)(ii)(I) requires that the taxpayer designate the imputed income limitations of the units taken into account for purposes of the average income test. Thus, the recordkeeping requirements that are provided allow for a process of designation that will result in a reliable record of both the original designations of the imputed income limitations of low-income units and any redesignations of units' limitations within a project.

The recordkeeping rules in § 1.42–19T(c)(1) with respect to a qualified group of units are similarly needed to ensure there is a reliable record to show that the units used for purposes of the average income set-aside test, and for determining a building's applicable fraction were part of a group of units within the project whose average designated imputed income limitations do not exceed 60 percent of AMGI. This limitation is consistent with the requirement in section 42(g)(1)(C)(ii)(II). The annual reporting requirements in § 1.42–19T(c)(1) and (3) and (d)(2) are also similar in substance to other annual certifications required of taxpayers. For example, minimum certifications by taxpayers are required in qualified allocation plans as provided in § 1.42–5(c). The reporting requirements in these final regulations also provide added flexibility by allowing the applicable Agency to determine the time and manner that the reporting is made under § 1.42–19T(c)(2)(i). Also, § 1.42–19T(c)(4) gives Agencies the ability to waive any failure of reporting on a case-by-case basis.

A summary of paperwork burden estimates follows:

Estimated number of respondents: Approximately 200 taxpayers elected the average income test for just over 2,000 buildings between 2018 and 2022. When viewed annually, we project that approximately 100 additional taxpayers will have eligible buildings and 1,000 additional buildings will be eligible under the average income test.

Estimated burden per response: We estimate that identifying which units are for use in the average income set-aside test and applicable fraction determinations and designating a unit's imputed income limitation takes an average of 15 minutes per unit. Based on an estimated average of 15 units per building and an average 15 minutes of time per unit, an impacted taxpayer will incur an average of 225 minutes per building to record the additional designations due to the flexibility under the regulations for the average income test. Total average annual burden for recording the designations per building is 11,250 hours (15 units × 15 minutes × 3,000 buildings).

Taxpayers are also required to report redesignation of units, and why they are required to redesignate units during the year. For purposes of this analysis, we assume that an average of 4 units per building will be redesignated annually. We estimate each redesignation will take an average of 10 minutes. Thus, we estimate the average number of minutes per year to record redesignations for an impacted taxpayer to be 40 minutes per building for a total average annual burden of 2,000 hours (40 minutes × 3,000 buildings).

In addition, we estimate an annual reporting burden related to the expanded flexibility rules to average 20 minutes per impacted taxpayer for a total burden of 100 hours (20 minutes × 300 taxpayers).

Estimated frequency of response: Annual.

Estimated total burden hours: The annual burden hours for this regulation is estimated to be 13,350 hours. Using a monetization rate of $50.69 per hour (2020 dollars), the burden for this regulation is $676,712 for impacted taxpayers.

A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6), it is hereby certified that this final regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that, prior to the publication of this final regulation and before the enactment of the 2018 Act, taxpayers were already required to satisfy either the 20–50 test or the 40–60 test, as elected by the taxpayer, in order to qualify as a low-income housing project. The 2018 Act added a third minimum set-aside test (the average income test) that taxpayers may elect. This final regulation sets forth requirements for the average income test, and the costs associated with the average income test are similar to the costs associated with the 20–50 test and 40–60 test. In addition, affected taxpayers, including some who end up not electing the average income test) will incur minimal costs in reading and understanding the regulations. The Treasury Department and the IRS estimate that the burden involved in reading and understanding the regulations will be approximately 3 to 5 hours and largely will be borne by advisors and trade media. A portion of the cost to such advisors and trade media will be passed on to taxpayers.

As described in more detail in the Paperwork Reduction Act section of this preamble, approximately 200 taxpayers elected the average income test between 2018 and 2022. When that figure is viewed annually, the Treasury Department and the IRS project that approximately 100 additional taxpayers will elect the average income test due to the final regulations. For the 300 taxpayers affected, the annual burden hours for this regulation is estimated in the Paperwork Reduction Act analysis to be 13,350 hours. Thus, the average annual burden hours amount to 44.5 hours per affected small entity. This estimate reflects all recordkeeping and reporting requirements associated with the final regulations, including (i) identifying which units are for use in the average income set-aside test, (ii) identifying which units are for use in applicable fraction determinations, (iii) designating a unit's imputed income limitation, (iv) reporting redesignation of units, (v) reporting reasons why units are redesignated, and (v) the reporting burden related to the expanded flexibility rules.

Monetized at $50.69 per hour (2020 dollars), the average annual burden hours represent a cost of $2,256 per affected small entity. This amount is likely quite small relative to the entity's revenue. A precise estimate of typical revenue is not possible with the data available to the Treasury Department and the IRS. However, the Treasury Department and the IRS estimate that the typical annual LIHTC allocation to an affected entity is between $125,000 and $1,450,000. Relative to these sums, the $2,256 annual cost of the regulations is not a significant economic impact.

Accordingly, it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the RFA.

For the applicability of the RFA to the temporary regulations, refer to the Special Analyses section of the preamble to the notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**.

IV. Section 7805(f)

Pursuant to section 7805(f), the proposed regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received. The Treasury Department and the IRS also requested comments from the public.

V. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or by the private sector in excess of that threshold.

VI. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These regulations do not have federalism implications and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C 804(2).

Drafting Information

The principal authors of these regulations are Dillon Taylor, Office of the Associate Chief Counsel (Passthroughs and Special Industries), and Michael J. Torruella Costa, formerly at Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Treasury Department and the IRS 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 adding in numerical order entries for §§ 1.42–19 and 1.42–19T to read, in part, as follows:

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

Section 1.42–15 also issued under 26 U.S.C. 42(n);

* * * * *

Section 1.42–19 also issued under 26 U.S.C. 42(n);

Section 1.42–19T also issued under 26 U.S.C. 42(n);

* * * * *

■ Par. 2. Section 1.42–0 is amended by:

■ 1. In the introductory text, removing ''1.42–18'' and adding ''1.42–19'' in its place.

■ 2. In § 1.42–15:

■ i. Revising paragraph (c).

■ ii. Adding paragraphs (c)(1) and (2) and (c)(2)(i) through (iv).

■ iii. Revising paragraph (i).

■ iv. Adding paragraphs (i)(1) and (2).

■ 3. Adding a heading and entries for § 1.42–19.

The additions and revisions read as follows:

§ 1.42–0 Table of contents.

* * * * *

§ 1.42–15 Available unit rule.

* * * * *

(c) Exceptions.

(1) In general.

(2) Rental of next available unit in case of the average income test.

(i) Basic rule.

(ii) No requirement to comply with the next available unit rule in a specific order.

(iii) Deep rent skewed projects.

(iv) Limitation.

* * * * *

(i) Applicability dates.

(1) In general.

(2) Applicability dates under the average income test.

* * * * *

§ 1.42–19 Average income test.

(a) Average income set-aside.

(b) Definition of low-income unit and qualified group of units.

(1) Definition of low-income unit.

(2) Definition of qualified group of units.

(3) Identification of qualified groups of units.

(i) Average income set-aside test.

(ii) Applicable fraction determinations.

(iii) Identification of units.

(c) Procedures.

(1) [Reserved]

(2) [Reserved]

(3) Designation of imputed income limitations.

(i) Timing of designation.

(ii) 10-percent increments.

(iii) Continuity.

(iv) [Reserved]

(4) [Reserved]

(d) Changing a unit's designated imputed income limitation.

(1) Permitted changes.

(i) Federally permitted changes.

(ii) *Housing credit agency* (Agency)-permitted changes.

(iii) Certain laws.

(iv) Tenant movement.

(v) Restoring compliance with average income requirements.

(2) [Reserved]

(e) Examples.

(f) Applicability dates.

(1) General rule.

(2) Designations of occupied units.

(3) Applicability of this section to taxable years beginning before January 1, 2023.

■ Par. 3. Section 1.42–15 is amended by:

■ 1. Revising the definition of *Over-income unit* in paragraph (a).

■ 2. In paragraph (c):

■ i. Revising the heading.

■ ii. Designating the text as paragraph (c)(1) and adding a heading for newly designated paragraph (c)(1).

■ 3. Adding paragraph (c)(2).

■ 4. In paragraph (i):

■ i. Revising the heading.

■ ii. Designating the text as paragraph (i)(1).

■ 5. In newly designated paragraph (i)(1):

■ i. Adding a heading.

■ ii. Removing ''This section'' and adding ''Except for paragraph (c)(2) of this section, this section'' in its place.

■ 6. Adding paragraph (i)(2).

The revisions and additions read as follows:

§ 1.42–15 Available unit rule.

(a) * * *

Over-income unit means, in the case of a project with respect to which the taxpayer elects the requirements of section 42(g)(1)(A) or (B) (that is, the 20–50 or 40–60 tests), a low-income unit in which the aggregate income of the occupants of the unit increases above 140 percent of the applicable income limitation under section 42(g)(1)(A) and (B), or above 170 percent of the applicable income limitation for deep rent skewed projects described in section 142(d)(4)(B). In the case of a project with respect to which the taxpayer elects the requirements of section 42(g)(1)(C) (that is, the average income test), *over-income unit* means a residential unit described in § 1.42–19(b)(1)(i) through (iii) in which the aggregate income of the occupants of the unit increases above 140 percent (170 percent in case of deep rent skewed projects described in section 142(d)(4)(B)) of the greater of 60 percent of area median gross income or the imputed income limitation designated with respect to the unit under § 1.42–19(b).

* * * * *

(c) *Exceptions*—(1) *In general.* * * *

(2) *Rental of next available unit in case of the average income test*—(i) *Basic rule.* In the case of a project with respect to which the taxpayer elects the average income test, if a unit becomes an over-income unit within the meaning of paragraph (a) of this section, that unit ceases to be described in § 1.42–19(b)(1)(ii) if—

(A) Any residential rental unit (of a size comparable to, or smaller than, the over-income unit) is available, or subsequently becomes available, in the same low-income building; and

(B) That available unit is occupied by a new resident whose income exceeds the limitation described in paragraph (c)(2)(iv) of this section.

(ii) *No requirement to comply with the next available unit rule in a specific order.* Where multiple units in a building are over-income units at the same time—

(A) The order in which available units are occupied makes no difference for purposes of complying with the rules in this section (next available unit rule); and

(B) In making imputed income limitation designations, the taxpayer must take into account the limitations described in paragraphs (c)(2)(iii) and (iv) of this section.

(iii) *Deep rent skewed projects.* In the case of a project described in section 142(d)(4)(B) with respect to which the taxpayer elects the average income test, if a unit becomes an over-income unit within the meaning of paragraph (a) of this section, that unit ceases to be a unit described in § 1.42–19(b)(1)(ii) if—

(A) Any residential unit described in § 1.42–19(b)(1)(i) through (iii) is available, or subsequently becomes available, in the same low-income building; and

(B) That unit is occupied by a new resident whose income exceeds the lesser of 40 percent of area median gross income or the imputed income limitation designated with respect to that unit.

(iv) *Limitation.* The limitation described in this paragraph (c)(2)(iv) is—

(A) In the case of a unit that was described in § 1.42–19(b)(1)(i) through (iii) prior to becoming vacant, the imputed income limitation designated with respect to the available unit for the average income test under § 1.42–19(b); and

(B) In the case of any other unit, the highest imputed income limitation that could be designated (consistent with section 42(g)(1)(C)(ii)(III)) for that available unit under § 1.42–19(c) such that the average of all imputed income designations of residential units in the project does not exceed 60 percent of area median gross income (AMGI).

(v) *Example.* The operation of paragraph (c)(2) of this section (that is, the next available unit rule for the average income test) is illustrated by the following example.

(A) *Facts.* (*1*) A single-building housing project received an allocation of housing credit dollar amount for 10 low-income units. The taxpayer who owns the project constructs the building with 10 identically sized units and elects the average income test. In the first year, the taxpayer intended to have 8 units that will qualify as low-income units (within the meaning of § 1.42–19(b)(1)), and 2 units that are market-rate units. The taxpayer properly and timely designates the imputed income limitations for the 8 units as follows: 4 units at 80 percent of AMGI; and 4 units at 40 percent of AMGI.

TABLE 1 TO PARAGRAPH (c)(2)(v)(A)(*1*)

Unit No.	Imputed income limitation of the unit
1	80 percent of AMGI.
2	80 percent of AMGI.
3	80 percent of AMGI.
4	80 percent of AMGI.
5	Market Rate.
6	40 percent of AMGI.
7	40 percent of AMGI.
8	40 percent of AMGI.
9	40 percent of AMGI.
10	Market Rate.

(*2*) In the first taxable year of the credit period (Year 1), the project is fully leased and occupied by income-qualified residents in Units ##1–4 and 6–9. In Year 2, Unit #1 and Unit #6 become over-income. The tenant residing in Unit #5 vacated that unit. Taxpayer then designated an imputed income limitation of 40 percent of AMGI for Unit #5. Later in Year 2, the tenant residing in Unit #10 vacated that unit. Taxpayer designated an imputed income limitation of 80 percent of AMGI for Unit #10. After those designations, Unit #10 was occupied by a new income-qualified tenant, and then later, Unit #5 was occupied by a new income-qualified resident.

(B) *Analysis.* Taxpayer sought to maintain the status of the over-income units (Unit #1 and Unit #6) as units described in § 1.42–19(b)(1)(ii). As the then-market rate units (Units ##5 and 10) became available to rent, Taxpayer designated imputed income limitations for them at 40 percent and 80 percent of AMGI, respectively. Immediately after each designation, the average of the designations in the project does not exceed 60 percent AMGI. Pursuant to the rule in paragraph (c)(2)(ii) of this section, when there are multiple over-income units, Taxpayer is not required to rent the next-available units in a specific order, even though they may have different imputed income limitations. Thus, Taxpayer complied with the rules of the next available unit rule, and Unit #1 and Unit #6 maintain status as units described in § 1.42–19(b)(1)(ii).

* * * * *

(i) *Applicability dates*—(1) *In general.* * * *

(2) *Applicability dates under the average income test.* The requirements of the second sentence of the definition of *over-income unit* in paragraph (a) of this section and paragraph (c)(2) of this section apply to taxable years beginning after December 31, 2022. A taxpayer may choose to apply this section to a taxable year beginning after October 12, 2022, and before January 1, 2023, provided that the taxpayer chooses to apply § 1.42–19 to the same taxable year.

■ Par. 4. Section 1.42–19 is added to read as follows:

§ 1.42–19 Average income test.

(a) *Average income set-aside.* A project for residential rental property satisfies the average income test in section 42(g)(1)(C) for a taxable year if the project contains a qualified group of units (within the meaning of paragraph (b)(2) of this section) that constitutes 40 percent or more of the residential units in the project. (In the case of a project described in section 142(d)(6), ‘‘40 percent’’ in the preceding sentence is replaced with ‘‘25 percent.’’)

(b) *Definition of low-income unit and qualified group of units*—(1) *Definition of low-income unit.* For purposes of this section, a residential unit is a low-income unit if and only if –

(i) Such unit is rent-restricted (as defined in section 42(g)(2));

(ii) The individuals occupying such unit satisfy the imputed income limitation of that unit designated by the taxpayer in accordance with paragraphs (c)(3) and (d) of this section and with § 1.42–19T(c) and (d), or the unit meets the requirements under section 42(g)(2)(D);

(iii) No provision in section 42 (including section 42(i)(3)(B)–(E)) or in the regulations under section 42 denies low-income status to that unit; and

(iv) The unit is part of a qualified group of units under paragraph (b)(2) of this section.

(2) *Definition of qualified group of units.* A group of residential units is a qualified group of units for a taxable year if and only if—

(i) Each unit in the group satisfies the requirements of paragraphs (b)(1)(i) through (iii) of this section; and

(ii) The average of the imputed income limitations of all of the units in the group does not exceed 60 percent of area median gross income (AMGI).

(3) *Identification of qualified groups of units*—(i) *Average income set-aside test.* For each taxable year in the extended use period, the taxpayer must identify a qualified group of units that constitute 40 percent or more of the residential units in the project. The requirements in paragraph (b)(3)(iii) of this section apply to these identifications.

(ii) *Applicable fraction determinations.* For each taxable year in the extended use period, the taxpayer must identify a qualified group of units to be used in determining the applicable fractions for the buildings in the project.

(A) *Identification of the units in the qualified group of units used for determining applicable fractions.* The residential units that are identified for purposes of this paragraph (b)(3)(ii) include the units that, under paragraph (b)(3)(i) of this section, are included in the qualified group of units identified for purposes of the set-aside qualification of the project. The taxpayer may identify additional units for inclusion in the group of units used in determining the applicable fractions for buildings in the project provided that the resulting group is a qualified group of units within the meaning of paragraph (b)(2) of this section.

(B) *Computing applicable fractions of buildings.* For a taxable year, the applicable fraction of a building in a project is computed using the units that are in the particular building and that are also in the qualified group of units for the project identified for purposes of this paragraph (b)(3)(ii). The units included in the applicable fraction of a building do not have to be a qualified group of units on their own. *See Example 4* of paragraph (e) of this section.

(iii) *Identification of units.* The recordkeeping and reporting requirements in § 1.42–19T(c)(1) apply both to the identification of units that is required by paragraph (b)(3)(i) of this section and the identification of units that is described in paragraph (b)(3)(ii) of this section.

(c) *Procedures.* (1)–(2) [Reserved]

(3) *Designation of imputed income limitations*—(i) *Timing of designation.* (A) Before a unit is first occupied as a low-income unit, or, except as provided in paragraph (c)(3)(i)(B) of this section, is first occupied under a changed income limit, the taxpayer must designate the unit's imputed income limitation or changed imputed income limitation.

(B) For an occupied unit that is subject to a change in imputed income limitation pursuant to paragraph (d) of this section, the taxpayer must designate the unit's changed imputed income limitation not later than the end of the taxable year in which the change occurs.

(ii) *10-percent increments.* Under section 42(g)(1)(C)(ii)(III), a designation is valid only if it is one of the following: 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of AMGI.

(iii) *Continuity.* Except as provided in paragraph (d) of this section, the imputed income limitation of a residential unit does not change.

(iv) [Reserved]

(4) [Reserved]

(d) *Changing a unit's designated imputed income limitation*—(1) *Permitted changes.* Notwithstanding paragraph (c)(3)(iii) of this section, the taxpayer may change the imputed income limitation of a unit in the following circumstances subject to the timing of designation requirement in paragraph (c)(3)(i)(B) of this section.

(i) *Federally permitted changes.* Permission for the change is contained in IRS forms, instructions, or guidance published in the Internal Revenue Bulletin pursuant to § 601.601(d)(2)(ii)(*b*) of this chapter.

(ii) *Housing credit agency (Agency)-permitted changes.* The Agency with jurisdiction of the project has issued public written guidance that provides conditions for a permitted change and that applies to all average income test projects under the jurisdiction of the Agency.

(iii) *Certain laws.* The change in designation is required or appropriate to enhance protections contained in the following, as amended—

(A) The Americans with Disabilities Act of 1990 (ADA), Pub. L. 101–336, 104 Stat. 328, 42 U.S.C. 12101, *et seq.;*

(B) The Fair Housing Amendments Act of 1988, Pub. L. 100–430, 102 Stat.1619, 42 U.S.C. 3601, et. seq.;

(C) The Violence Against Women Act of 1994, Pub. L. 103–322, 108 Stat. 1902, 34 U.S.C. 12291, et. seq.;

(D) The Rehabilitation Act of 1973, Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 701, *et seq.;* or

(E) Any other State, Federal, or local law or program that protects tenants and that is identified pursuant to paragraph (d)(1)(i) or (ii) of this section.

(iv) *Tenant movement.* If a current income-qualified tenant moves to a different unit in the project—

(A) The unit to which the tenant moves has its imputed income designation, if any, changed to the limitation of the unit from which the tenant is moving; and

(B) The vacated unit takes on the prior limitation, if any, of the tenant's new unit.

(v) *Restoring compliance with average income requirements.* If one or more units lose low-income status or if there is a change in the imputed income limitation of some unit and if either event would cause a previously qualifying group of units to cease to be described in paragraph (b)(2)(ii) of this section, then the taxpayer may designate an imputed income limitation for a market rate unit or may reduce the existing imputed income limitations of one or more other units in the project in order to restore compliance with the average income requirement. The rule in this paragraph (d)(1)(v) may be applied to market-rate, vacant, or low-income units, but, in the case of occupied units, the current tenants must qualify under the new, lower imputed income limitation.

(2) [Reserved]

(e) *Examples.* The operation of this section is illustrated by the following examples.

(1) *Example 1*—(i) *Facts.* (A) A single-building housing project received an allocation of housing credit dollar amount. The taxpayer who owns the project elects the average income test, intending for the 10-unit building to have 100 percent low-income occupancy. The taxpayer properly and timely designates the imputed income limitations for the 10 units as follows: 5 units at 80 percent of AMGI; and 5 units at 40 percent of AMGI. Also, for the first credit year, the taxpayer follows proper procedure in identifying 4 units as the qualified group of units that are to be used for qualifying under the average income set-aside (Units ##1, 2, 6, and 7). Additionally, for the first credit year, the taxpayer follows proper procedure in identifying all 10 units as the qualified group of units that are to be used for the applicable fraction determination. All of the units in the project are described in paragraphs (b)(1)(i) through (iii) of this section.

TABLE 1 TO PARAGRAPH (e)(1)(i)(A)

Unit No.	Imputed income limitation of the unit
1	80 percent of AMGI.
2	80 percent of AMGI.
3	80 percent of AMGI.
4	80 percent of AMGI.
5	80 percent of AMGI.
6	40 percent of AMGI.
7	40 percent of AMGI.
8	40 percent of AMGI.
9	40 percent of AMGI.
10	40 percent of AMGI.

(B) In the first taxable year of the credit period (Year 1), the project is fully leased and occupied.

(ii) *Analysis.* The identified groups are qualified groups under paragraph (b)(2) of this section. All units in both of the groups are described in paragraphs (b)(1)(i) through (iii) of this section, and the averages of the imputed income limitations of both the 4-unit group (Units ##1, 2, 6, and 7) and the 10-unit group do not exceed 60 percent of AMGI.

(A) *Average income set-aside.* The project qualifies under the average income set-aside because the identified group of 4 units (Units ##1, 2, 6, and 7) is a qualified group of units that comprise at least 40% of the residential units in the project.

(B) *Qualified basis.* All 10 units in the identified qualified group of units are used in the applicable fraction determination when calculating qualified basis for purposes of determining the annual credit amount under section 42(a).

(2) *Example 2*—(i) *Facts.* Assume the same facts as *Example 1* of paragraph (e)(1) of this section. In Year 2, Unit #6 (which has a designated imputed income limitation of 40 percent of AMGI) becomes uninhabitable. Repair work on Unit #6 is completed in Year 3. For Year 2, Taxpayer identifies the following as a qualified group of units that are to be used for both the set-aside requirement and the applicable fraction determination: Units ##1–4 and 7–10. For Year 3, Taxpayer identifies all 10 units as the qualified group of units that are to be used for the set-aside requirement and the applicable fraction determination.

(ii) *Analysis.* For Year 2, the identified group is a qualified group under paragraph (b)(2) of this section. All 8 units in the group are described in paragraphs (b)(1)(i) through (iii) of this section, and the average of the imputed income limitations of the 8 units in the group of units does not exceed 60 percent of AMGI.

(A) *Average income set-aside.* For Year 2, the project qualifies for the average income set-aside because the project contains a qualified group of units that comprises at least 40% of the residential units in the project.

(B) *Qualified basis.* To determine qualified basis in Year 2, the 8 units in the identified qualified group of units are used in the applicable fraction determination when calculating qualified basis for purposes of determining the annual credit amount under section 42(a). Unit #6 could not have been identified in the qualified group of units for use in the applicable fraction determination because its lack of habitability prevents it from being a low-income unit. Further, Taxpayer could not have identified all 9 of the habitable units to be used in the qualified group of units for the applicable fraction determination because the average of imputed income limitations of those 9 exceeds 60 percent of AMGI. Taxpayer had a choice of which of Units ##1–5 it was going to not identify for use in the applicable fraction determination. Omitting any one of them reduces the average limitation of the remaining group of 8 units to an amount that does not exceed 60 percent of AMGI. Given taxpayer's decision to leave out Unit #5, Units ##1, 2, 3, 4, 7, 8, 9, and 10 are taken into account in the applicable fraction.

(C) *Recapture.* At the close of Year 2, Unit #6's unsuitability for occupancy precludes it from being described in paragraph (b)(1)(iii) of this section. Unit #6's resulting failure to be a low-income unit prevents it from being in a qualified group for purposes of computing the applicable fraction. The decline in the applicable fraction yields a decline in qualified basis, which results in credit recapture under section 42(j) for Year 2. Additionally, Unit #5 is not a low-income unit because the taxpayer did not include it in the qualified group of units identified for determining the building's applicable fraction. The exclusion of Unit #5 from the qualified group of units further reduces the applicable fraction for Year 2 and so reduces qualified basis for that year as well. Thus, this exclusion increases the credit recapture amount under section 42(j).

(D) *Restoration of habitability and of qualified basis.* As described in the facts in paragraph (e)(2)(i) of this section, in Year 3, after repair work is complete, the formerly uninhabitable Unit #6 is again occupied by a qualified tenant at the same imputed income limitation, and the Taxpayer identifies all 10 units as the qualified group of units that are to be used for the set-aside requirement and the applicable fraction determination. The identified group is a qualified group under paragraph (b)(2) of this section. All 10 units in the group are described in paragraphs (b)(1)(i) through (iii) of this section, and the average of the imputed income limitations of the 10 units in the group of units does not exceed 60 percent of AMGI. For Year 3, all 10 units are included in the qualified group of units for purposes of the average income set-aside test and are a qualified group of units for the applicable fraction determination.

(3) *Example 3*—(i) *Facts.* Assume the same facts as *Example 2* of paragraph (e)(2) of this section, except that the income for the tenant residing in Unit #5 has declined so that tenant's income does not exceed 60 percent of AMGI. For Year 2, taxpayer timely redesignates Unit #5 pursuant to the rule in paragraph (d)(1)(v) of this section so that the imputed income limitation is 60 percent of AMGI instead of 80 percent of AMGI. Taxpayer also makes revisions so that Unit #5 is rent-restricted under the redesignated imputed income limitation. Taxpayer identifies 9 units (Units ##1–5 and 7–10) as the qualified group of units that are to be used for the set-aside requirement and the applicable fraction determination.

TABLE 2 TO PARAGRAPH (e)(3)(i)

Unit No.	Imputed income limitation of the unit
1	80 percent of AMGI.
2	80 percent of AMGI.
3	80 percent of AMGI.
4	80 percent of AMGI.
5	60 percent of AMGI.
6	40 percent of AMGI.
7	40 percent of AMGI.
8	40 percent of AMGI.
9	40 percent of AMGI.
10	40 percent of AMGI.

(ii) *Analysis.* For Year 2, the identified group is a qualified group under paragraph (b)(2) of this section. All 9 units in the group are described in paragraphs (b)(1)(i) through (iii) of this section, and the average of the imputed income limitations of the 9 units in the group of units does not exceed 60 percent of AMGI.

(A) *Average income set-aside.* For Year 2, project contains a qualified group of units that comprises at least 40% of the residential units in the project.

(B) *Qualified basis.* To determine qualified basis, all 9 units in the identified qualified group of units are used in the applicable fraction determination when calculating qualified basis for purposes of determining the annual credit amount under section 42(a). Unit #6 could not have been identified in the qualified group of units for use in the applicable fraction determination because its lack of habitability prevents it from being a low-income unit. Thus, Units ##1, 2, 3, 4, 5, 7, 8, 9, and 10 are taken into account in the applicable fraction determination.

(C) *Recapture.* At the close of Year 2, the amount of the qualified basis is less than the amount of the qualified basis at the close of Year 1, because Unit #6's unsuitability for occupancy prohibits it from being a low-income unit. Unit #6's failure to be a low-income unit results in a credit recapture amount under section 42(j) for Year 2 related to Unit #6. Because Units ##1–5 and 7–10 are all included in the qualified group of units for use in the applicable fraction determination, Units ##1–5 and 7–10 are included in qualified basis for Year 2 when determining the recapture amount.

(4) *Example 4*—(i) *Facts.* (A) A multiple-building housing project consisting of two buildings received an allocation of housing credit dollar amount, and the taxpayer who owns the project elects the average income test. The taxpayer intends for the buildings (each containing 5 units) to have 100

percent low-income occupancy. The taxpayer properly and timely designates the imputed income limitations for the 10 units in Buildings 1 and 2 as follows: Building A contains 2 units at 80 percent of AMGI and 3 units at 40 percent of AMGI; and Building B contains 2 units at 40 percent of AMGI and 3 units at 80 percent of AMGI.

TABLE 3 TO PARAGRAPH (e)(4)(i)(A)

Building A, Unit No.	Imputed income limitation of the unit
A1	80 percent of AMGI.
A2	80 percent of AMGI.
A3	40 percent of AMGI.
A4	40 percent of AMGI.
A5	40 percent of AMGI.
Building B, Unit No.	
B1	40 percent of AMGI.
B2	40 percent of AMGI.
B3	80 percent of AMGI.
B4	80 percent of AMGI.
B5	80 percent of AMGI.

(B) In the first taxable year of the credit period (Year 1), the project is fully leased and occupied. Also, for the first credit year, the taxpayer follows proper procedure in identifying all 10 units as a qualified group of units for the minimum set-aside and the applicable fraction determination.

(ii) *Analysis.* For Year 1, the identified group is a qualified group under paragraph (b)(2) of this section. All 10 units in the group are described in paragraphs (b)(1)(i) through (iii) of this section, and the average of the imputed income limitations of the 10 units in the group of units does not exceed 60 percent of AMGI.

(A) *Average income test.* The multiple-building project meets the average income test as the project contains a qualified group of units that comprises at least 40% of the residential units in the project. The fact that the average of the income limitations of the units in Building B exceeds 60 percent of AMGI does not impact this result.

(B) *Qualified basis.* To determine qualified basis, all 10 units in the identified qualified group of units across Building A and Building B are used in the applicable fraction determination when calculating qualified basis of each building for purposes of determining the annual credit amount under section 42(a). The fact that the average of the units in Building B exceeds 60 percent of AMGI does not impact the applicable fraction of Building B because the average of the identified group of units across both buildings does not exceed 60 percent of AMGI.

(5) *Example 5*—(i) *Facts.* A single-building housing project received an allocation of housing credit dollar amount, and the taxpayer who owns the project elects the average income test. During Year 2 of the credit period, the tenant residing in a unit with a designated imputed income limitation of 40 percent of AMGI moves to a market-rate unit within the same project. The tenant's income continues to be at or below 40 percent of AMGI.

(ii) *Analysis.* Under the rule in paragraph (d)(1)(iv) of this section, when the current income-qualified tenant moves to a different unit in the project, the unit to which the tenant moves is eligible for the taxpayer to designate as a unit with a designated imputed income limitation of 40 percent of AMGI. If the taxpayer makes those designations, the unit vacated by the tenant takes on the prior limitation, if any, of the tenant's new unit. In this situation, the vacated unit formerly occupied by the tenant is now a market-rate unit.

(6) *Example 6*—(i) *Facts.* A single-building housing project received an allocation of housing credit dollar amount, and the taxpayer who owns the project elects the average income test. During Year 2 of the credit period, the disability status under the ADA of a tenant changes, and therefore under the provisions of the ADA, the tenant now needs to reside in a different unit with different accommodations. The tenant currently resides in a unit with a designated imputed income limitation of 40 percent of AMGI. A unit that would meet the tenant's needs is available on the first-floor of the building, but it was previously a low-income unit with a designated imputed income limitation of 70 percent of AMGI and thus a higher maximum gross rent than the tenant's current unit. The tenant moves to the first-floor unit.

(ii) *Analysis.* The tenant's move was required under the ADA. Accordingly, the taxpayer is permitted to change the designation of the imputed income limitation of the first-floor unit so that the unit's designation is 40 percent of AMGI. Under paragraph (d)(1)(iv) of this section, the vacated unit takes on the prior limitation of 70 percent of AMGI of the tenant's new unit.

(f) *Applicability dates*–(1) *In general.* Except as provided in paragraph (f)(3) of this section, this section applies to taxable years beginning after December 31, 2022.

(2) *Designations of occupied units.* (i) If a residential unit is occupied at the end of the most recent taxable year ending before the first taxable year to which this section applies and if the unit is to be taken into account as a low-income unit under this section as of the beginning of the first taxable year to which this section applies, then not later than the first day of such first taxable year, the taxpayer must designate an imputed income limitation for the unit. The first taxable year to which this section applies means the first taxable year beginning after December 31, 2022, if paragraph (f)(1) of this section applies, or the taxable year described in paragraph (f)(3) of this section if the taxpayer chooses to apply paragraph (f)(3) of this section.

(ii) The designation required by paragraph (f)(2)(i) of this section must comply with paragraph (c)(3)(ii) of this section and § 1.42–19T(c)(3)(iv), without taking into account § 1.42–19T(c)(4). Section 1.42–19T(c)(2) applies to these designations, except that the Agency may allow the notification to be made along with any other notifications for the first taxable year beginning after December 31, 2022.

(iii) The designated imputed income limitation for the unit may not be less than the income that the current occupant of the unit had when that occupancy began.

(3) *Applicability of this section to taxable years beginning before January 1, 2023.* A taxpayer may choose to apply this section to a taxable year beginning after October 12, 2022, and before January 1, 2023, provided that the taxpayer chooses to apply § 1.42–15 to the same taxable year.

■ Par. 5. Section 1.42–19T is added to read as follows:

§ 1.42–19T Average income test (temporary).

(a)–(b) [Reserved]

(c) *Procedures*—(1) *Identification of low-income units for use in the average income set-aside test or the applicable fraction determination*—(i) *In general.* For a taxable year, a taxpayer must follow the procedures described in paragraph (c)(1)(ii) of this section to identify—

(A) A qualified group of units that satisfy the average income set-aside test; and

(B) A qualified group of units used to determine the applicable fraction.

(ii) *Recording and communicating.* The procedures described in this paragraph (c)(1)(ii) are—

(A) Recording the identification in its books and records, where the identification must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2); and

(B) Communicating the annual identifications to the applicable *housing* *credit agency* (Agency) as provided in paragraph (c)(2) of this section.

(2) *Notifications to the Agency with jurisdiction over a project*—(i) *Agency flexibility.* An Agency may establish the time and manner in which information is annually provided to it.

(ii) *Example.* An Agency may allow a taxpayer to describe a current year's information by reporting differences from the previous year's information or by reporting that there are no such differences. Various Agencies may choose to apply this manner of reporting to the identity of a qualified group of units for use in the average income set-aside or applicable fraction determination, or the imputed income limits designated for the various units in a project.

(3) *Designation of imputed income limitations.* (i)–(iii) [Reserved]

(iv) *Recording, retention, and annual communications related to designations.* A taxpayer designates a unit's imputed income limitation by recording the limitation in its books and records, where it must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2). The preceding sentence applies both to units whose first occupancy is as a low-income unit and to previously market-rate units that are converted to low-income status. The designation must also be communicated annually to the applicable Agency as provided in paragraph (c)(2) of this section.

(4) *Waiver for failure to comply with procedural requirements.* On a case-by-case basis, the Agency has the discretion to waive in writing any failure to comply with the requirements of paragraph (c)(1) or (2) or (c)(3)(iv) of this section up to 180 days after discovery of the failure, whether by taxpayer or Agency. If an Agency exercises this discretion, then the relevant requirements are treated as having been satisfied. In such a case, the tax consequences under this section correspond to that deemed satisfaction.

(d) *Changing a unit's designated imputed income limitation.* (1) [Reserved]

(2) *Process for changing a unit's designated imputed income limitation.* The taxpayer effects a change in a unit's imputed income limitation by recording the limitation in its books and records, where it must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2). The new designation must also be communicated to the applicable Agency as provided in paragraph (c)(2) of this section and must become part of the annual report to the Agency of income designations. The prior designation must be retained in the books and records for the period specified in paragraph (c)(3)(iv) of this section. A designation under this paragraph (d)(2) is considered to be made in a manner consistent with paragraph (c)(3) of this section.

(e) [Reserved]

(f) *Applicability dates*—(1) *In general.* Except as provided in paragraph (f)(3) of this section, this section applies to taxable years beginning after December 31, 2022.

(2) *Designations of occupied units.* (i) If a residential unit is occupied at the end of the most recent taxable year ending before the first taxable year to which this section applies and if the unit is to be taken into account as a low-income unit under this section as of the beginning of the first taxable year to which this section applies, then not later than the first day of such first taxable year, the taxpayer must designate an imputed income limitation for the unit. The first taxable year to which this section applies means the first taxable year beginning after December 31, 2022, if paragraph (f)(1) of this section applies, or the taxable year described in paragraph (f)(3) of this section if the taxpayer chooses to apply paragraph (f)(3) of this section.

(ii) The designation required by paragraph (f)(2)(i) of this section must comply with § 1.42–19(c)(3)(ii) and paragraph (c)(3)(iv) of this section, without taking into account paragraph (c)(4) of this section. Paragraph (c)(2) of this section applies to these designations, except that the Agency may allow the notification to be made along with any other notifications for the first taxable year beginning after December 31, 2022.

(iii) The designated imputed income limitation for the unit may not be less than the income that the current occupant of the unit had when that occupancy began.

(3) *Applicability of this section to taxable years beginning before January 1, 2023.* A taxpayer may choose to apply this section to a taxable year beginning after October 12, 2022, and before January 1, 2023, provided that the taxpayer chooses to apply § 1.42–15 to the same taxable year.

(4) *Expiration date.* The applicability of this section expires on October 7, 2025.

Paul J. Mamo,

Assistant Deputy Commissioner for Services and Enforcement.

Approved: September 30, 2022.

Lily L. Batchelder,

Assistant Secretary (Tax Policy).

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2022–0819]

RIN 1625–AA00

Safety Zone; Atchafalaya River—Berwick Bay, Morgan City, LA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone of 100-meters from the western side of the channel in the Atchafalaya River through Berwick Bay between mile marker (MM) 119 and MM 121. This temporary safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the recreational paddling race, Tour Du Teche 135. Entry of vessels into this zone is prohibited unless specifically authorized the Captain of the Port Houma or a designated Patrol Commander.

DATES: This rule is effective from 10 a.m. through 5 p.m. on October 9, 2022.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2022–0819 in the search box and click ''search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this action, call or email Lieutenant Jenelle Piché, MSU Morgan City, LA, U.S. Coast Guard; telephone (985) 855–0724, email *D08-SMB-MSUMorganCity-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Houma