

**DEPARTMENT OF THE TREASURY**  
**WASHINGTON, D.C. 20220**

**September 7, 2022**



**TO:** Mancini, Deputy Administrator,  
Information & Regulatory Affairs, Office of Management & Budget

**FROM:** Ryan Law, Deputy Assistant Secretary for Privacy, Transparency, and Records

**SUBJECT:** Justification for Emergency Processing:  
Paperwork Requirements in Temporary Regulations Included in a Treasury  
Decision Finalizing Section 42, Low-Income Housing Credit Average Income  
Test Regulations (“LIHTC Average Income TD”) (1545-0988)

**(a) NEED FOR EMERGENCY PROCESSING**

**Summary**

The Department of the Treasury and the Internal Revenue Service (IRS) are requesting emergency processing and immediate approval of paperwork requirements that will appear for the first time in temporary regulations included in the forthcoming LIHTC Average Income TD. Taxpayers are seeking to rely on these final regulations as soon as possible, and enabling that reliance is a top priority of the Department. Reliance, however, will not practically be possible before these paperwork requirements receive OMB approval. Thus, emergency processing and immediate approval are in the public interest.

**Background**

The proposed regulations<sup>1</sup> were strongly criticized for undue rigidity. For example, once a taxpayer assigns a tenant-income limitation to a residential rental unit, the proposed regulations would have generally prohibited changing that limitation. Responding to these comments, the final regulations in the LIHTC Average Income TD will allow changes in these limitations for a variety of reasons.

The long-standing statutory structure makes State and local housing credit agencies (Agencies) responsible for monitoring taxpayers’ compliance with LIHTC requirements. Because changes in income limitations were expected to be rare under the provisions in the proposed regulations, those proposals did not require any specific paperwork to facilitate Agencies’ tasks of compliance monitoring. The new flexibility in the final regulations, however, makes it necessary to require that taxpayers not only record on their books a residential unit’s income limit when the limit is assigned but also communicate the new limit to the relevant Agency. The record in the taxpayer’s books and the substantially contemporaneous communication to the Agency are needed to facilitate the Agency’s confirmation that the residents of the unit comply with the income limitation.

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<sup>1</sup> 85 Fed. Reg. 68816, REG-119890-18, RIN 1545-BO92.

Similarly, final regulations in the LIHTC Average Income TD give taxpayers annual flexibility regarding which units satisfy the minimum set-aside and contribute to the year's low-income housing credits. Here too, when Agencies confirm taxpayers' compliance, the paperwork requirements in the temporary regulations will enable the Agencies to benefit from taxpayers' books and from substantially contemporaneous communications.

Because the paperwork requirements were not included in the proposed regulations that the LIHTC Average Income TD will finalize, the Treasury Department and the IRS are promulgating these requirements as immediately effective temporary regulations, which will be included in the LIHTC Average Income TD. Pursuant to the provision in 26 USC 7805(e)(2) regarding temporary tax regulations, the temporary regulations will expire in three years. Also, as required by 26 USC 7805(e)(1), the requirements in the temporary regulations will also be issued as accompanying proposed regulations. That notice of proposed rulemaking will seek regulatory notice and comment on these requirements.

### **Justification for expedition**

As is described above, however, although taxpayers are seeking to rely on the substantive final regulations as soon as they can, the necessary reliance will practically be impossible until the paperwork requirements receive OMB approval. It would, therefore, frustrate the public interest to delay the practical availability of the final regulations until some time after the simultaneous issuance of those regulations and the temporary paperwork regulations.

In general, the substantive final regulations provide significant flexibility with respect to satisfying the average income test set-aside, designating a qualified group of units for purposes of determining the applicable fraction, and changing the imputed income limitation designations of residential units. This increased flexibility is in response to taxpayer comments on the proposed regulations, including taxpayer complaints about burdens in the proposed regulations. It is this increased regulatory flexibility, however, that makes these paperwork requirements necessary. The requirements are needed to enhance administrability and certainty for the taxpayers and Agencies that will be taking advantage of the sought-for flexibility,

Moreover, the paperwork requirements are minimally burdensome. The recordkeeping requirements are like existing recordkeeping requirements for low-income housing projects, and Agencies may specify the time and manner of communication of the newly required information. Moreover, on a case-by-case basis the Agencies may waive any failure to comply.

Without immediate OMB approval of the paperwork requirements, most taxpayers would have to wait an extra year for the final regulations to be available to them. Most LIHTC taxpayers use the calendar year as their taxable year, and the substantive final regulations are generally applicable to taxable years beginning after December 31, 2022. Immediate approval will ensure that the requirements can be complied with by this date, as described below. In addition, taxpayers may elect to apply the final regulations to a tax year beginning after the date of publication of the final regulations and before January 1, 2023. (The first taxable year to which the final regulations apply is called here "the first reg year.") Regardless of whether a taxpayer elects to apply the final regulations early, the taxpayer must make "catch up" designations of imputed income limitations for any unit that was occupied at the end of the last year before the

first reg year and that is to be treated as a low-income unit as of the beginning of the first reg year. These “catch up” designations require compliance with the paperwork requirements.

***In all cases, those catch-up designations must be complete before the start of the first reg year.***

Thus, all taxpayers electing the average income set-aside need to rely on the new paperwork requirements for actions that they must take before the first day of the first reg year. For taxpayers electing to apply the final regulations early, that need for reliance is particularly urgent. In the absence of immediate approval, even taxpayers that do not accelerate their first reg year will find it virtually impossible to rely on the paperwork requirements in making catch-up designations of units’ income limitations. For that reason, emergency processing and immediate approval are necessary to avoid the need to delay by a full year the general effective date of the final regulations.

**Conclusion**

The Treasury Department and IRS therefore believe that emergency processing and immediate approval are in the public interest. Emergency processing and immediate approval will allow expedited reliance on the paperwork requirements contained in the temporary regulations—and thus on the flexible substantive rules that the final regulations provide under the average income set-aside.

**(b) REQUESTED SCHEDULE FOR APPROVAL**

In order to permit the information requirements to be immediately effective upon publication of the final and temporary regulations, OMB review and approval is requested by September 30, 2022. The preamble of the LIHTC Average Income TD will provide the OMB Control number (1545-0988) on which taxpayers may rely in complying with the paperwork requirements in the temporary regulations.

The preamble to the temporary regulations (which will provide notice of the new paperwork rules) will also initiate a 60-day PRA public comment period. Those comments will be considered and incorporated into a subsequent information collection request to be submitted following the standard PRA process in order to extend the approval of 1545-0988 for a full three years.

**(c) EFFORTS TO MINIMIZE BURDEN**

Consistent with the need for immediate approval, the Treasury Department and the IRS have undertaken the following efforts to minimize burden:

- Much of the recordkeeping for which taxpayers will be responsible parallels existing recordkeeping responsibilities under Treasury Regulation § 1.42–5;
- The temporary regulations generally give Agencies the ability to specify the time and manner in which information is to be communicated to them; and
- The paperwork requirements were necessitated by regulatory changes responding to taxpayer complaints about burdens in the average-income proposed regulations. Although the complaints related to non-paperwork matters, the Treasury Department and

the IRS believe that taxpayers will welcome the paperwork requirements in conjunction with the requested elimination of the substantive burdens in the proposed regulations.