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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9420]

RIN 1545-BC22

Section 42 Utility Allowance Regulations Update

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations

SUMMARY: This document contains final regulations that amend the utility allowances regulations concerning the low-income housing tax credit. The final regulations update the utility allowance regulations to provide new options for estimating tenant utility costs. The final regulations affect owners of low-income housing projects who claim the credit, the tenants in those low-income housing projects, and the State and local housing credit agencies that administer the credit.

DATES: Effective Date: These regulations are effective **INSERT DATE OF**

PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER].

Applicability Date: For dates of applicability see §1.42-12(a)(4).

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

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) relating to the low-income housing credit under section 42 of the Internal Revenue Code (Code). On June 19, 2007, the IRS and Treasury Department published in the **Federal Register** proposed regulations under section 42(g)(2)(B)(ii) (72 FR 33703). Written and electronic comments responding to the proposed regulations were received and a public hearing was held on the proposed regulations on October 9, 2007. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision.

General Overview

Section 42(a) provides that, for purposes of section 38, the amount of the low-income housing credit determined under section 42 for any taxable year in the credit period is an amount equal to the applicable percentage of the qualified basis of each qualified low-income building. A qualified low-income building is defined in section 42(c)(2) as any building that is part of a qualified low-income housing project.

A qualified low-income housing project is defined in section 42(g)(1) as any project for residential rental property if the project meets one of the following tests elected by the taxpayer: (1) at least 20 percent of the residential units in the project are rent-restricted and occupied by individuals whose income is 50 percent or less of area median gross income; or (2) at least 40 percent of the residential units in the project are rent-restricted and occupied by individuals whose income is 60 percent or less of area

median gross income. If a taxpayer does not meet the elected test, the project is not eligible for the section 42 credit.

Under section 42(g)(4), section 142(d)(2)(B) applies when determining whether any project is a qualified low-income housing project under section 42(g)(1). Section 142(d)(2)(B) provides that the income of individuals and area median gross income is determined by the Secretary in a manner consistent with determinations of lower income families and area median gross income under section 8 of the United States Housing Act of 1937. Under Rev. Rul. 94-57 (1994-2 CB 5), taxpayers may rely on a list of income limits released by the Department of Housing and Urban Development (HUD) until 45 days after HUD releases a new list of income limits, or until HUD's effective date for the new list, whichever is later.

In order to qualify as a rent-restricted unit within the meaning of section 42(g)(2), the gross rent for the unit must not exceed 30 percent of the imputed income limitation applicable to the unit. Section 42(g)(2)(B)(ii) requires the inclusion in gross rent of a utility allowance determined by the Secretary after taking into account the determinations under section 8 of the United States Housing Act of 1937.

Section 1.42-10(a) provides that if utility costs (other than telephone) for a residential rental unit are paid directly by the tenant, then the gross rent for that unit includes the applicable utility allowance as determined under § 1.42-10. Section 1.42-10(b) provides rules for calculating the appropriate utility allowance based upon whether (1) the building receives rental assistance from the Farmers Home Administration (FmHA), now known as the Rural Housing Service; (2) the building has

any tenant that receives FmHA rental assistance; (3) the building is not described in (1) or (2) above and the building's rents and utility allowances are reviewed by HUD on an annual basis; or (4) the building is not described in (1), (2), or (3) above (other buildings).

Currently, under §1.42-10(b)(4), other buildings generally use the applicable Public Housing Authority (PHA) utility allowance established for the Section 8 Existing Housing Program or use a local utility company estimate. The local utility company estimate may be obtained by any interested party (including a low-income tenant, a building owner, or a State or local housing credit agency (Agency)).

The proposed regulations proposed two additional options for calculating utility allowances. The first option would permit a building owner to obtain a utility estimate for each unit in a building from the Agency that has jurisdiction over the building (the Agency estimate). The Agency estimate must take into account the local utility rates data, property type, climate variables by region in the State, taxes and fees on utility charges, and property building materials and mechanical systems. An Agency may also use actual utility company usage data and rates for the building. The second option would permit a building owner to calculate utility allowances using the "HUD Utility Schedule Model" found on the Low-Income Housing Tax Credits page at www.huduser.org/datasets/lihtc.html (or successor URL). The HUD Utility Schedule Model is based on data from the Residential Energy Consumption Survey (RECS) conducted by the Department of Energy. RECS data provides energy consumption by structure for heating, air conditioning, cooking, water heating, and other electric (lighting

and refrigeration). The HUD Utility Schedule Model incorporates building location and climate.

Summary of Comments and Explanation of Changes

Exclusions from utility allowance

Prior to these final regulations, §1.42-10(a) provided for the exclusion of telephone costs in determining the amount of the utility allowance to be included in gross rent. The proposed regulations excluded cable television costs as well as telephone costs. The final regulations retain the exclusions for cable television and telephone costs and also exclude Internet costs. The IRS and Treasury Department believe it is appropriate to exclude cable television and Internet costs as comparable to telephone costs.

Additional option for determining utility allowances

Commentators stated that the Agency estimate in the proposed regulations may be administratively burdensome for some Agencies. As an alternative, commentators suggested adding an option that would allow utility estimates to be calculated by a state-certified engineer or other qualified professional. The commentators specified that, under this option, computer software could be developed that would estimate the energy or water and sanitary sewer service cost for each type of unit in a building. The estimates would be determined based on the applicable current local utility billing rate schedule and would be applied to all comparable units in the building using specific information about the design, materials, equipment, and location of the building.

A computer software model that incorporates specific information about the design and location of the building for which the utility allowances are being developed, and that can be updated with actual consumption data and with consumption estimates as new efficiency measures and improvements are undertaken, would provide more accurate estimates of utility consumption. Therefore, the final regulations also include a new option allowing building owners to retain the services of a qualified professional to calculate utility allowances based on an energy consumption model.

The use of this new option is subject to several special rules. First, the energy consumption model must, at a minimum, take into account specific factors including, but not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of the building location. Second, the utility estimates must be calculated by either (1) a properly licensed engineer or (2) a qualified professional approved by the Agency that has jurisdiction over the building (together, qualified professional). The qualified professional and the building owner must not be related within the meaning of section 267(b) or 707(b). Third, the building owner must furnish a copy of the estimates derived from the energy consumption model to the Agency and make copies of the estimates available to all tenants in the building. Finally, the building owner must pay for all costs incurred in obtaining the utility estimates from the qualified professional and providing the estimates to the Agency and tenants.

Default option/option ordering

One commentator suggested that the final regulations should provide a default option because, in the absence of a definitive standard for determining utility allowances, building owners would use the option that yields the lowest utility estimates. Commentators further requested clarification as to which option should be used when multiple options are available, whether building owners may use different options for different utilities, and whether owners may change the options used for calculating utilities from time to time.

An energy consumption model developed by a qualified professional that takes into account specific information about the design and location of the building for which the utility allowances are being developed should produce the most accurate utility estimates. It is expected that this more accurate model will be the model most commonly used by most building owners, particularly those with buildings that are not very old. However, if a building owner selects an option that yields higher utility allowances, the building owner should be free to accept a lower amount of rent from tenants. Therefore, there is no need for a stated default option or option ordering rule. Further, the final regulations neither prohibit using different options for different utilities nor prohibit changing the options used for calculating utilities. If an Agency determines that a building owner has understated the utility allowances for the building under the particular option chosen by the owner for calculating the utility allowance, and the building's units are not rent-restricted units under section 42(g)(2) as a result, the Agency must report the noncompliance on Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition.

Application of newly calculated utility allowances

Under current §1.42-10(c) of the regulations, if the applicable utility allowance for units changes, the new utility allowance must be used to compute gross rent of rent-restricted units due 90 days after the change (the 90-day period). The proposed regulations limited the effective date of any new utility allowances to the earlier of the date the building has achieved 90 percent occupancy for a period of 90 consecutive days or the end of the first year of the credit period. The proposed regulations also modified §1.42-10(c) by requiring that a building owner must review at least annually the basis on which utility allowances have been established and must update the applicable utility allowance. The review must take into account any changes to the building such as any energy conservation measures that affect energy consumption and changes in utility rates.

Commentators suggested that building owners should be obligated to adjust utility allowances when utility rates increase by a stated percentage, for example, 10 percent, which is the rule for revising utility allowance schedules for PHAs under 24 CFR 982.517(c). This HUD rule provides that a PHA must review its schedule of utility allowances each year and revise its allowance for a utility category if the utility rate has changed by 10 percent or more since the utility allowance schedule was last revised. The commentators did not address decreases in utility rates. A commentator also suggested that the final regulations should require an Agency to review or have owners review local utility rates quarterly to determine if rates have increased

sufficiently to require an adjustment. A different commentator suggested limiting reviews to no more than once per year.

The IRS and Treasury Department do not believe that fluctuations in utility rates within a given year should trigger recalculations of utility allowances more than once a year. The IRS and Treasury Department do not believe that the additional burden of updating the utility allowances more than once a year is warranted at this time. Utility rates generally do not change more than once a year, and yearly updated utility allowances would reflect average rates applicable to all tenants in a building from year to year. Therefore, the final regulations require building owners to calculate new utility allowances once during the calendar year regardless of any percentage change in utility rates. Building owners may choose, however, to calculate new utility allowances more frequently than once during the calendar year provided the owner complies with the requirements of these regulations, including the notification requirements to the Agency and tenants.

Another commentator suggested that new utility allowances should be implemented within 90 days after HUD publishes its annual income limits (which are used in determining section 42 rents), but in no case later than June 30 of any year. Section 42 rents under section 42(g)(2) may or may not increase depending on HUD's calculation of area median gross income. Therefore, the IRS and Treasury Department do not believe that the rules should require that the effective date of any new utility allowance coincide with the section 42 effective date of HUD's income lists. Building

owners, however, may choose to implement any new utility allowances on the section 42 effective date of HUD's income lists.

To bring financial stability to a project during the beginning of its operations, the final regulations clarify that the building owner is not required to review the utility allowances, or implement new utility allowances, until the earlier of the date the building has achieved 90 percent occupancy for a period of 90 consecutive days or the end of the first year of the credit period.

Procedural safeguards for tenants

One commentator made several recommendations regarding procedural safeguards for tenants including: owners should be required to give tenants 30 days notice before the effective date of any utility allowance; tenants should be provided with all information used in calculating the utility allowances; tenants should be given the opportunity to comment on the proposed allowances; and owners should be required to review those comments prior to the utility allowances becoming effective. The commentator believed that the new options for determining utility allowances should be available only after one full year of occupancy and one full year after the building is placed in service. A commentator also recommended that a building owner should be allowed to use the new options only if the owner provides all data to the Agency no later than February 15 and the Agency informs the owner whether the proposed utility allowances are approved by March 31.

To provide tenants with the opportunity to comment on proposed utility allowances to the Agency and building owner, the final regulations apply the existing

disclosure requirement under current §1.42-10(b)(4)(ii)(B) (regarding the utility company estimate) to an owner using a utility company estimate, the HUD Utility Schedule Model, or an energy consumption model. Therefore, an owner must submit copies of the proposed utility allowances to the Agency and make the proposed utility allowances available to all tenants in the building at the beginning of the 90-day period before the utility allowances are used in determining the gross rents of rent-restricted units. Similarly, the final regulations require that any utility estimates obtained under the Agency estimate option must be made available to all tenants in the building at the beginning of the 90-day period. An Agency may continue to require additional information from the owner during the 90-day period.

Commentators suggested that the final regulations should limit the use of the HUD Utility Schedule Model to data for a twelve-month period ending in the most recent calendar year and require the owner to certify the accuracy of the data and the calculations of the utility allowances. However, the HUD Utility Schedule Model already incorporates consumption data derived from RECS data. Thus, building owners using this option need not be required to use consumption data for any particular twelve-month period. These final regulations, however, provide that the use of the energy consumption model is limited to consumption data for a twelve-month period ending no earlier than 60 days prior to the beginning of the 90-day period. In the case of newly constructed or renovated buildings with less than twelve months of consumption data, the energy consumption model allows a qualified professional to use consumption data for the twelve-month period of units of similar size and construction in the geographic

area in which the building containing the units is located. Further, the final regulations require that utility rates used for the HUD Utility Schedule Model, the Agency estimate option, and the energy consumption model must be no older than the rates in place 60 days prior to the beginning of the 90-day period.

In addition to these safeguards, if an Agency determines that a building owner has understated the utility allowances for the owner's building under the particular option chosen, and, therefore, some or all of the units in the building are not rent-restricted units under section 42(g)(2), then the Agency must report the noncompliance to the Service on Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition.

Commentators requested that building owners should be required to certify the estimate and the accuracy of the data used under the new options,. Because Agencies may request additional information at any time during their mandatory review of proposed utility allowances, and must report any noncompliance to the Service, the final regulations do not require building owners to provide such certification.

Utility allowances for tenants with special needs

One commentator suggested that the calculation of utility allowances should take into account any special needs tenants such as people with disabilities who require high energy consumption equipment. Section 42 does not require that the owner's calculation of utility allowances be based on a tenant's particular use of utility services. If such a requirement were imposed, owners and Agencies would have to determine the utility allowance for the tenants in each unit, as opposed to allowances based on the

size of the unit, which would greatly increase burden. Additionally, it is unclear whether it is appropriate to implement rules that might encourage tenants to be indifferent to their energy consumption. Such indifference could lead to cost overruns by owners, and the viability of low-income housing could be jeopardized. Therefore, the final regulations do not require the calculation of utility allowances based on consumption by particular tenants.

Calculation of utility company estimate option for deregulated utilities

Section 1.42-10(b)(4)(ii)(B) currently provides that any interested party (including an owner, low-income tenant, or Agency) may obtain a local utility company estimate for a unit. The estimate is obtained when the interested party receives, in writing, information from a local utility company providing the estimated cost of that utility for a unit of similar size and construction for the geographic area in which the building containing the units is located. In light of utility services deregulation, the proposed regulations proposed to amend this option by requiring the interested party to obtain cost estimates from the local utility company that include combined rate charges from multiple utility companies.

Commentators thought this proposed amendment would require the interested party to obtain utility consumption estimates from every utility company providing the same utility service and stated that this would present an unworkable administrative burden in deregulated jurisdictions with multiple utility providers. In some jurisdictions, many utility providers may be available for a given building. The proposed amendment was not intended to require the interested party to obtain utility consumption estimates

from every utility company providing the same utility service. The amendment was proposed to address deregulation by requiring the interested party to obtain estimates for all the components of the utility service if the service is divided between two or more types of service providers (for example, electric generation and electric transmission). The final regulations clarify that, in the case of deregulated utility services, the interested party is required to obtain an estimate from only one utility company even if multiple companies can provide the same utility service to a unit. However, the utility company furnishing the estimate must offer utility services to the building in order for that utility company's rates to be used in calculating utility allowances. The estimate should include all component charges for providing the utility service.

Agency costs/administrative burden

One commentator requested that specific language be added to address when Agencies may charge a reasonable fee for making a determination pursuant to the Agency estimate option, and who bears the fee when a particular option is used. The proposed regulations provided that costs incurred in obtaining an Agency estimate are borne by the building owner. The final regulations adopt this provision, and further require building owners to pay for all costs incurred in obtaining the estimates under the HUD Utility Schedule Model and the energy consumption model and in providing estimates to Agencies and tenants.

Effective/applicability date

The proposed regulations were proposed to be effective for taxable years beginning on or after the date of publication of the final regulations in the **Federal**

Register. A commentator suggested that the final regulations be effective earlier on the basis that if they are published after 2007, they would not be effective until 2009 for calendar year taxpayers. The IRS and Treasury Department believe that the burden associated with an earlier effective date is not warranted. Therefore, the final regulations do not adopt this suggestion. However, in order to allow a building owner to implement the utility allowances as of the first day of the owner's taxable year beginning on or after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**, the final regulations provide that taxpayers may rely on the rules for determining utility allowances before the first day of the owner's taxable year beginning on or after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]** provided that any utility allowances so calculated are effective no earlier than the first day of the owner's taxable year beginning on or after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the information has previously been reviewed and approved under OMB

control number 1545-1102, and that the information required by these final regulations adds no new burden to the existing requirements. Accordingly, a Regulatory Flexibility Analysis under the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is David Selig, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

Par. 2. Section 1.42-10 is amended by:

1. Revising the first sentence of paragraph (a).
2. Revising paragraphs (b)(1), (b)(2), and (b)(3), and the introductory text of paragraph (b)(4).

3. Adding two sentences at the end of paragraph (b)(4)(ii)(A).
4. Adding three sentences after the second sentence in paragraph (b)(4)(ii)(B).
5. Adding paragraphs (b)(4)(ii)(C), (b)(4)(ii)(D), and (b)(4)(ii)(E).
6. Revising paragraph (c).
7. Adding paragraph (d).

The additions and revisions read as follows:

§1.42-10 Utility allowances.

(a) * * * If the cost of any utility (other than telephone, cable television, or Internet) for a residential rental unit is paid directly by the tenant(s), and not by or through the owner of the building, the gross rent for that unit includes the applicable utility allowance determined under this section. * * *

(b) Applicable utility allowances--(1) Buildings assisted by the Rural Housing Service. If a building receives assistance from the Rural Housing Service (RHS-assisted building), the applicable utility allowance for all rent-restricted units in the building is the utility allowance determined under the method prescribed by the Rural Housing Service (RHS) for the building (whether or not the building or its tenants also receive other state or federal assistance).

(2) Buildings with Rural Housing Service assisted tenants. If any tenant in a building receives RHS rental assistance payments (RHS tenant assistance), the applicable utility allowance for all rent-restricted units in the building (including any units occupied by tenants receiving rental assistance payments from the Department of Housing and Urban Development (HUD)) is the applicable RHS utility allowance.

(3) Buildings regulated by the Department of Housing and Urban Development.

If neither a building nor any tenant in the building receives RHS housing assistance, and the rents and utility allowances of the building are reviewed by HUD on an annual basis (HUD-regulated building), the applicable utility allowance for all rent-restricted units in the building is the applicable HUD utility allowance.

(4) Other buildings. If a building is neither an RHS-assisted nor a HUD-regulated building, and no tenant in the building receives RHS tenant assistance, the applicable utility allowance for rent-restricted units in the building is determined under the following methods.

* * * * *

(ii) * * * (A) * * * However, if a local utility company estimate is obtained for any unit in the building under paragraph (b)(4)(ii)(B) of this section, a State or local housing credit agency (Agency) provides a building owner with an estimate for any unit in a building under paragraph (b)(4)(ii)(C) of this section, a cost estimate is calculated using the HUD Utility Schedule Model under paragraph (b)(4)(ii)(D) of this section, or a cost estimate is calculated by an energy consumption model under paragraph (b)(4)(ii)(E) of this section, then the estimate under paragraph (b)(4)(ii)(B), (C), (D), or (E) becomes the applicable utility allowance for all rent-restricted units of similar size and construction in the building. Paragraphs (b)(4)(ii)(B), (C), (D), and (E) of this section do not apply to units to which the rules of paragraphs (b)(1), (2), (3), or (4)(i) of this section apply.

(B) * * * In the case of deregulated utility services, the interested party is required to obtain an estimate only from one utility company even if multiple companies can provide the same utility service to a unit. However, the utility company must offer utility services to the building in order for that utility company's rates to be used in calculating utility allowances. The estimate should include all component deregulated charges for providing the utility service. * * *

(C) Agency estimate. A building owner may obtain a utility estimate for each unit in the building from the Agency that has jurisdiction over the building provided the Agency agrees to provide the estimate. The estimate is obtained when the building owner receives, in writing, information from the Agency providing the estimated per-unit cost of the utilities for units of similar size and construction for the geographic area in which the building containing the units is located. The Agency estimate may be obtained by a building owner at any time during the building's extended use period (see section 42(h)(6)(D)). Costs incurred in obtaining the estimate are borne by the building owner. In establishing an accurate utility allowance estimate for a particular building, an Agency (or an agent or other private contractor of the Agency that is a qualified professional within the meaning of paragraph (b)(4)(ii)(E) of this section) must take into account, among other things, local utility rates, property type, climate and degree-day variables by region in the State, taxes and fees on utility charges, building materials, and mechanical systems. If the Agency uses an agent or other private contractor to calculate the utility estimates, the agent or contractor and the owner must not be related within the meaning of section 267(b) or 707(b). An Agency may also use actual utility

company usage data and rates for the building. However, use of the Agency estimate is limited to the building's consumption data for the twelve-month period ending no earlier than 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section and utility rates used for the Agency estimate must be no older than the rates in place 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section. In the case of newly constructed or renovated buildings with less than 12 months of consumption data, the Agency (or an agent or other private contractor of the Agency that is a qualified professional within the meaning of paragraph (b)(4)(ii)(E) of this section) may use consumption data for the 12-month period of units of similar size and construction in the geographic area in which the building containing the units is located.

(D) HUD Utility Schedule Model. A building owner may calculate a utility estimate using the "HUD Utility Schedule Model" that can be found on the Low-Income Housing Tax Credits page at www.huduser.org/datasets/lihtc.html (or successor URL). Utility rates used for the HUD Utility Schedule Model must be no older than the rates in place 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section.

(E) Energy consumption model. A building owner may calculate utility estimates using an energy and water and sewage consumption and analysis model (energy consumption model). The energy consumption model must, at a minimum, take into account specific factors including, but not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of the

building location. The utility consumption estimates must be calculated by either a properly licensed engineer or a qualified professional approved by the Agency that has jurisdiction over the building (together, qualified professional), and the qualified professional and the building owner must not be related within the meaning of section 267(b) or 707(b). Use of the energy consumption model is limited to the building's consumption data for the twelve-month period ending no earlier than 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section, and utility rates used for the energy consumption model must be no older than the rates in place 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section. In the case of newly constructed or renovated buildings with less than 12 months of consumption data, the qualified professional may use consumption data for the 12-month period of units of similar size and construction in the geographic area in which the building containing the units is located.

(c) Changes in applicable utility allowance--(1) In general. If, at any time during the building's extended use period (as defined in section 42(h)(6)(D)), the applicable utility allowance for units changes, the new utility allowance must be used to compute gross rents of the units due 90 days after the change (the 90-day period). For example, if rent must be lowered because a local utility company estimate is obtained that shows a higher utility cost than the otherwise applicable PHA utility allowance, the lower rent must be in effect for rent due at the end of the 90-day period. A building owner using a utility company estimate under paragraph (b)(4)(ii)(B) of this section, the HUD Utility Schedule Model under paragraph (b)(4)(ii)(D) of this section, or an energy consumption

model under paragraph (b)(4)(ii)(E) of this section must submit copies of the utility estimates to the Agency that has jurisdiction over the building and make the estimates available to all tenants in the building at the beginning of the 90-day period before the utility allowances can be used in determining the gross rent of rent-restricted units. An Agency may require additional information from the owner during the 90-day period. Any utility estimates obtained under the Agency estimate under paragraph (b)(4)(ii)(C) of this section must also be made available to all tenants in the building at the beginning of the 90-day period. The building owner must pay for all costs incurred in obtaining the estimates under paragraphs (b)(4)(ii)(B), (C), (D), and (E) of this section and providing the estimates to the Agency and the tenants. The building owner is not required to review the utility allowances, or implement new utility allowances, until the building has achieved 90 percent occupancy for a period of 90 consecutive days or the end of the first year of the credit period, whichever is earlier.

(2) Annual review. A building owner must review at least once during each calendar year the basis on which utility allowances have been established and must update the applicable utility allowance in accordance with paragraph (c)(1) of this section. The review must take into account any changes to the building such as any energy conservation measures that affect energy consumption and changes in utility rates.

(d) Record retention. The building owner must retain any utility consumption estimates and supporting data as part of the taxpayer's records for purposes of §1.6001-1(a).

Par. 3. Section 1.42-12 is amended by adding paragraph (a)(4) to read as follows:

§1.42-12 Effective dates and transitional rules.

(a) * * *

(4) Utility allowances. The first sentence in §1.42-10(a), §1.42-10(b)(1), (2), (3), and (4), the last two sentences in §1.42-10(b)(4)(ii)(A), the third, fourth, and fifth sentences in §1.42-10(b)(4)(ii)(B), §1.42-10(b)(4)(ii)(C), (D), and (E), and §1.42-10(c) and (d) are applicable to a building owner's taxable years beginning on or after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**. Taxpayers may rely on these provisions before the beginning of the building owner's taxable year beginning on or after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]** provided that any utility allowances calculated under these provisions are effective no earlier than the first day of the building owner's taxable year beginning on or after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**. The utility

allowances provisions that apply to taxable years beginning before **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]** are contained in §1.42-10 (see 26 CFR part 1 revised as of April 1, 2008).

/s/ Linda E. Stiff

Deputy Commissioner for Services and Enforcement.

Approved: July 20, 2008

/s/ Eric Solomon

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2008-17268 Filed 07/28/2008 at 8:45 am; Publication Date: 07/29/2008]