

## §1.42-14

FINAL-REG, 2001FED ¶4384K, §1.42-14, **Allocation rules for post-1989 State housing credit ceiling amounts.--**

### **§1.42-14 Allocation rules for post-1989 State housing credit ceiling amounts.--**

(a) *In general.* The State housing credit ceiling for a State for any calendar year after 1989 is comprised of four components. The four components are--

(1) \$1.25 multiplied by the State population (the population component);

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

(3) The amount of State housing credit ceiling returned in the calendar year (the returned credit component); plus

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

(b) *The population component.* The population component of the State housing credit ceiling of a State for any calendar year is determined pursuant to section 146(j). Thus, a State's population for any calendar year is determined by reference to the most recent census estimate, whether final or provisional, of the resident population of the State released by the Bureau of the Census before the beginning of the calendar year for which the State's housing credit ceiling is set. Unless otherwise prescribed by applicable revenue procedure, determinations of population are based on the most recent estimates of population contained in the Bureau of the Census publication, *Current Population Report, Series P-25; Population Estimates and Projections, Estimates of the Population of States*. For convenience, the Internal Revenue Service publishes the population estimates annually in the Internal Revenue Bulletin. (See §601.601(d)(2)(ii)(b)).

(c) *The unused carryforward component.* The unused carryforward component of the State housing credit ceiling of a State for any calendar year is the excess, if any, of the sum of the population and returned credit components, over the aggregate housing credit dollar amount allocated for the year. Any credit amounts attributable to the national pool component of the State housing credit ceiling that remain unallocated at the close of a calendar year are not carried forward to the succeeding calendar year; instead, the credit expires and cannot be reallocated by any Agency.

(d) *The returned credit component--(1) In general.* The returned credit component of the State housing credit ceiling of a State for any calendar year equals the housing credit dollar amount returned during the calendar year that was validly allocated within the State in a prior calendar year to any project that does not become a qualified low-income housing project within the period required by section 42, or as required by the terms of the allocation. The returned credit component also includes credit allocated in a prior calendar year that is returned as a result of the cancellation of an allocation by mutual consent or by an Agency's determination that the amount allocated is not necessary for the financial feasibility of the project. For purposes of this section, credit is allocated within a State if it is allocated from the State's housing credit ceiling by an Agency of the State or of a constitutional home rule city in the State.

(2) *Limitations and special rules.* The following limitations and special rules apply for purposes of this paragraph (d).

(i) *General limitations.* Notwithstanding any other provision of this paragraph (d), returned credit does not include any credit that was--

(A) Allocated prior to calendar year 1990;

(B) Allowable under section 42(h)(4) (relating to the portion of credit attributable to eligible basis financed by certain tax-exempt bonds under section 103); or

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(C) Allocated during the same calendar year that it is received back by the Agency.

(ii) *Credit period limitation.* Notwithstanding any other provision of this paragraph (d), an allocation of credit may not be returned any later than 180 days following the close of the first taxable year of the credit period for the building that received the allocation. After this date, credit that might otherwise be returned expires, and cannot be returned to or reallocated by any Agency.

(iii) *Three-month rule for returned credit.* An Agency may, in its discretion, treat any portion of credit that is returned from a project after September 30 of a calendar year and that is not reallocated by the close of the calendar year as returned on January 1 of the succeeding calendar year. In this case, the returned credit becomes part of the returned credit component of the State housing credit ceiling for the succeeding calendar year. Any portion of credit that is returned from a project after September 30 of a calendar year that is reallocated by the close of the calendar year is treated as part of the returned credit component of the State housing credit ceiling for the calendar year that the credit was returned.

(iv) *Returns of credit.* Subject to the limitations of paragraphs (d)(2)(i) and (ii) of this section, credit is returned to the Agency in the following instances in the manner described in paragraph (d)(3) of this section.

(A) *Building not qualified within required time period.* If a building is not a qualified building within the time period required by section 42, it loses its credit allocation and the credit is returned. For example, a building is not qualified within the required time period if it is not placed in service within the period required by section 42 or if the project of which the building is a part fails to meet the minimum set-aside requirements of section 42(g)(1) by the close of the first year of the credit period.

(B) *Noncompliance with terms of the allocation.* If a building does not comply with the terms of its allocation, it loses the credit allocation and the credit is returned. The terms of an allocation are the written conditions agreed to by the Agency and the allocation recipient in the allocation document.

(C) *Mutual consent.* If the Agency and the allocation recipient cancel an allocation of an amount of credit by mutual consent, that amount of credit is returned.

(D) *Amount not necessary for financial feasibility.* If an Agency determines under section 42(m)(2) that an amount of credit allocated to a project is not necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period, that amount of credit is returned.

(3) *Manner of returning credit--(i) Taxpayer notification.* After an Agency determines that a building or project no longer qualifies under paragraph (d)(2)(iv)(A), (B), or (D) of this section for all or part of the allocation it received, the Agency must provide written notification to the allocation recipient, or its successor in interest, that all or part of the allocation is no longer valid. The notification must also state the amount of the allocation that is no longer valid. The date of the notification is the date the credit is returned to the Agency. If an allocation is cancelled by mutual consent under paragraph (d)(2)(iv)(C) of this section, there must be a written agreement signed by the Agency, and the allocation recipient, or its successor in interest, indicating the amount of the allocation that is returned to the Agency. The effective date of the agreement is the date the credit is returned to the Agency.

(ii) *Internal Revenue Service notification.* If a credit is returned within 180 days following the close of the first taxable year of a building's credit period as provided in paragraph (d)(2)(ii) of this section, and a Form 8609, *Low-Income Housing Credit Allocation Certification*, has been issued for the building, the Agency must notify the Internal Revenue Service that the credit has been returned. If only part of the credit has been returned, this notification requirement is satisfied when the Agency attaches to an amended Form 8610, *Annual Low-Income Housing Credit Agencies Report*, the original of an amended Form 8609 reflecting the correct amount of credit attributed to the building together with an explanation for the filing of the amended Forms. The Agency must send a copy of the amended Form 8609 to the taxpayer that owns

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the building. If the building is not issued an amended Form 8609 because all of the credit allocated to the building is returned, notification to the Internal Revenue Service is satisfied by following the requirements prescribed in §1.42-5(e)(3) for filing a Form 8823, *Low-Income Housing Credit Agencies Report of Noncompliance*.

(e) *The national pool component.* The national pool component of the State housing credit ceiling of a State for any calendar year is the portion of the National Pool allocated to the State by the Secretary for the calendar year. The national pool component for any calendar year is zero unless a State is a *qualified State*. (See paragraph (i) of this section for rules regarding the National Pool and the description of a qualified State.) Credit from the national pool component of a State housing credit ceiling must be allocated prior to the close of the calendar year or the credit expires and cannot be reallocated by any Agency. A national pool component credit that is allocated during a calendar year and returned after the close of the calendar year may qualify as part of the returned credit component of the State housing credit ceiling for the calendar year that the credit is returned.

(f) *When the State housing credit ceiling is determined.* For purposes of accounting for the State housing credit ceiling on Form 8610 and for purposes of determining the set-aside apportionment for projects involving qualified nonprofit organizations described in section 42(h)(5) and §1.42-1T(c)(5), the State housing credit ceiling for any calendar year is determined at the close of the calendar year.

(g) *Stacking order.* Under section 42(h)(3)(C), credit is treated as allocated from the various components of the State housing credit ceiling in the following order. The first credit allocated for any calendar year is treated as credit from the sum of the population and returned credit components of the State housing credit ceiling. Once all of the credit in these components has been allocated, the next credit allocated is treated as credit from the unused carryforward component of the State housing credit ceiling. Finally, after all of the credit from the population component, returned credit component, and unused carryforward component has been allocated, any further credit allocated is treated as credit from the national pool component.

(h) *Nonprofit set-aside--(1) Determination of set-aside.* Under section 42(h)(5) and §1.42-1T(c)(5), at least 10 percent of a State housing credit ceiling in any calendar year must be set aside exclusively for projects involving qualified nonprofit organizations (the nonprofit set-aside). However, credit allocated from the nonprofit set-aside in a calendar year and returned in a subsequent calendar year does not retain its nonprofit set-aside character. The credit becomes part of the returned credit component of the State housing credit ceiling for the calendar year that the credit is returned and must be included in determining the nonprofit set-aside of the State housing credit ceiling for that calendar year. Similarly, credit amounts that are not allocated from the nonprofit set-aside in a calendar year and are returned in a subsequent calendar year become part of the returned credit component of the State housing credit ceiling for that year and are also included in determining the set-aside for that year.

(2) *Allocation rules.* An Agency may allocate credit from any component of the State housing credit ceiling as part of the nonprofit set-aside and need not reserve 10 percent of each component for the nonprofit set-aside. Thus, an Agency may satisfy the nonprofit set-aside requirement of section 42(h)(5) and §1.42-1T(c)(5) in any calendar year by setting aside for allocation an amount equal to at least 10 percent of the total State housing credit ceiling for the calendar year.

(i) *National Pool--(1) In general.* The unused housing credit carryover of a State for any calendar year is assigned to the Secretary for inclusion in a national pool of unused housing credit carryovers (National Pool) that is reallocated among qualified States the succeeding calendar year. The assignment to the Secretary is made on Form 8610.

(2) *Unused housing credit carryover.* The unused housing credit carryover of a State for any calendar year is the excess, if any, of the unused carryforward component of the State housing credit ceiling for the calendar year over the excess, if any, of--

(i) The total housing credit dollar amount allocated for the year; over

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(ii) The sum of the population and returned credit components of the State housing credit ceiling for the year.

(3) *Qualified State--(i) In general.* The term *qualified State* means, with respect to any calendar year, any State that has allocated its entire State housing credit ceiling for the preceding calendar year and for which a request is made by the State, not later than May 1 of the calendar year, to receive an allocation of credit from the National Pool for that calendar year. Except as provided in paragraph (i)(3)(ii) of this section, a State is not a qualified State in a calendar year if there remains any unallocated credit in its State housing credit ceiling at the close of the preceding calendar year that was apportioned to any Agency within the State for the calendar year.

(ii) *Exceptions--(A) De minimis amount.* If the amount remaining unallocated at the close of a calendar year is only a de minimis amount of credit, the State is a qualified State eligible to participate in the National Pool. For that purpose, a credit amount is de minimis if it does not exceed 1 percent of the aggregate State housing credit ceiling of the State for the calendar year.

(B) *Other circumstances.* Pursuant to the authority under section 42(n), the Internal Revenue Service may determine that a State is a qualified State eligible to participate in the National Pool even though the State's unallocated credit is in excess of the 1 percent safe harbor set forth in paragraph (A) of this section. The Internal Revenue Service will make this determination based on all the facts and circumstances, weighing heavily the interests of the States who would otherwise qualify for the National Pool. The Internal Revenue Service will generally grant relief under this paragraph only where a State's unallocated credit is not substantial.

(iii) *Time and manner for making request.* For further guidance as to the time and manner for making a request of housing credit dollar amounts from the National Pool by a qualified State, see Rev. Proc. 92-31, 1992-1 C.B. 775. (See 601.601(d)(2)(ii)(b)).

(4) *Formula for determining the National Pool.* The amount allocated to a qualified State in any calendar year is an amount that bears the same ratio to the aggregate unused housing credit carryovers of all States for the preceding calendar year as that State's population for the calendar year bears to the population of all qualified States for the calendar year.

(j) *Coordination between Agencies.* The Agency responsible for filing Form 8610 on behalf of all Agencies within a State and making any request on behalf of the State for credit from the National Pool (the Filing Agency) must coordinate with each Agency within the State to ensure that the various requirements of this section are complied with. For example, the Filing Agency of a State must ensure that all Agencies within the State that were apportioned a credit amount for the calendar year have allocated all of their respective credit amounts for the calendar year before the Filing Agency can make a request on behalf of the State for a distribution of credit from the National Pool.

(k) *Examples.* (1) The operation of the rules of this section may be illustrated by the following examples. Unless otherwise stated in an example, Agency A is the sole Agency authorized to make allocations of housing credit dollar amounts in State M, all of Agency A's allocations are valid, and for calendar year 1994 Agency A has available for allocation a State housing credit ceiling consisting of the following housing credit dollar amounts:

|                                   |       |       |
|-----------------------------------|-------|-------|
| A. population component:          | ..... | \$100 |
| B. unused carryforward component: | ..... | \$ 50 |
| C. returned credit component:     | ..... | \$ 10 |
| D. national pool component:       | ..... | \$ 0  |
|                                   |       | ----  |
| Total                             | ..... | \$160 |

(2) In addition, the \$10 of returned credit component was returned before October 1, 1994.

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*Example 1--(i) Additional facts.* By the close of 1994, Agency A had allocated \$80 of the State M housing credit ceiling. Of the \$80 allocated, \$16 was allocated to projects involving qualified nonprofit organizations.

(ii) *Application of stacking rules.* The first credit allocated is treated as allocated from the population and returned credit components of the State housing credit ceiling, to the extent of those components. In this case, the \$80 of credit allocated is less than the sum of the population and returned credit components. The excess of the sum of the population and returned credit components over the total amount allocated for the calendar year ( $\$110 - 80 = \$30$ ) becomes the unused carryforward component of State M's 1995 State housing credit ceiling. Because Agency A did not allocate credit in excess of the sum of the population and returned credit components, no credit is treated as allocated from State M's \$50 unused carryforward component in 1994. Because none of this component may be carried forward, all \$50 is assigned to the Secretary for inclusion in the National Pool. Under paragraph (i)(3) of this section, State M does not qualify for credit from the National Pool for the 1995 calendar year.

(iii) *Nonprofit set-aside.* Agency A allocated exactly the amount of credit to projects involving qualified nonprofit organizations as necessary to meet the nonprofit set-aside requirement (\$16, 10% of the \$160 ceiling).

*Example 2--(i) Additional facts.* By the close of 1994, Agency A had allocated \$130 of the State M housing credit ceiling. Of the \$130 allocated, \$20 was allocated to projects involving qualified nonprofit organizations.

(ii) *Application of stacking rules.* The first \$110 of credit allocated is treated as allocated from the population and returned credit components. In this case, because all of the population and returned credit components are allocated, no amount is included in State M's 1995 State housing credit ceiling as an unused carryforward component. The next \$20 of credit allocated is treated as allocated from the \$50 unused carryforward component. The \$30 remaining in the unused carryforward component is assigned to the Secretary for inclusion in the National Pool for the 1995 calendar year. Under paragraph (i)(3) of this section, State M does not qualify for credit from the National Pool for the 1995 calendar year.

(iii) *Nonprofit set-aside.* Agency A allocated \$4 more credit to projects involving qualified nonprofit organizations than necessary to meet the nonprofit set-aside requirement. This does not reduce the application of the 10% nonprofit set-aside requirement to the State M housing credit ceiling for the succeeding year.

*Example 3--(i) Additional fact.* None of the applications for credit that Agency A received for 1994 are for projects involving qualified nonprofit organizations.

(ii) *Nonprofit set-aside.* Because at least 10% of the State housing credit ceiling must be set aside for projects involving a qualified nonprofit organization, Agency A can allocate only \$144 of the \$160 State housing credit ceiling for calendar year 1994 ( $\$160 - 16 = \$144$ ). If Agency A allocates \$144 of credit, the credit is treated as allocated \$110 from the population and returned credit components and \$34 from the unused carryforward component. The \$16 of unallocated credit that is set aside for projects involving qualified nonprofit organizations is treated as the balance of the unused carryforward component, and is assigned to the Secretary for inclusion in the National Pool. Under paragraph (i)(3) of this section, State M does not qualify for credit from the National Pool for the 1995 calendar year.

*Example 4--(i) Additional facts.* The \$10 of returned credit component was returned prior to October 1, 1994. However, a \$40 credit that had been allocated in calendar year 1993 to a project involving a qualified nonprofit organization was returned to the Agency by a mutual consent agreement dated November 15, 1994. By the close of 1994, Agency A had allocated \$160 of the State M housing credit ceiling, including \$16 of credit to projects involving qualified nonprofit organizations.

(ii) *Effect of three-month rule.* Under the three-month rule of paragraph (d)(2)(iii) of this section, Agency A may treat all or part of the \$40 of previously allocated credit as returned on January 1, 1995. If

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Agency A treats all of the \$40 amount as having been returned in calendar year 1995, the State M housing credit ceiling for 1994 is \$160. This entire amount, including the \$16 nonprofit set-aside, has been allocated in 1994. Under paragraph (i)(3) of this section, State M qualifies for the National Pool for the 1995 calendar year.

(iii) *If three-month rule not used.* If Agency A treats all of the \$40 of previously allocated credit as returned in calendar year 1994, the State housing credit ceiling for the 1994 calendar year will be \$200 of which \$50 will be attributable to the returned credit component ( $\$10 + \$40 = \$50$ ). Because credit amounts allocated in a prior calendar year that are returned in a subsequent calendar year do not retain their nonprofit character, the nonprofit set-aside for calendar year 1994 is \$20 (10% of \$200). The \$160 that Agency A allocated during 1994 is first treated as allocated from the population and returned credit components, which total \$150. The next \$10 of credit allocated is treated as allocated from the unused carryforward component. The \$40 of unallocated credit from the unused carryforward component includes the \$4 of unallocated nonprofit set-aside. The entire \$40 of credit from the carryforward component is assigned to the Secretary for inclusion in the National Pool for the 1995 calendar year. State M does not qualify for credit from the National Pool for the 1995 calendar year.

*Example 5--(i)(A) Additional facts.* For calendar year 1994, Agency A has a State housing credit ceiling that consists of the following housing credit dollar amounts:

|   |       |
|---|-------|
| A. population component: .....          | \$100 |
| B. unused carryforward component: ..... | \$ 0  |
| C. returned credit component: .....     | \$ 20 |
| D. national pool component: .....       | \$ 10 |
|   | ----  |
| Total .....                             | \$130 |
| Minimum nonprofit set-aside .....       | \$ 13 |
| Ceiling amount not set-aside .....      | \$117 |

In addition, the \$20 of returned credit component was returned before October 1, 1994. By the close of 1994, Agency A had allocated \$100 of the State housing credit ceiling.

(ii) *Application of stacking rules.* The \$20 excess of the sum of the population component and the returned credit component over the total amount allocated for the calendar year ( $\$120 - 100 = \$20$ ) becomes the unused carryforward component of the State housing credit ceiling for the 1995 calendar year. The \$10 of unallocated credit from the national pool component expires and cannot be reallocated. This amount is neither carried over to 1995 by State M nor assigned to the Secretary for inclusion in the National Pool. Under paragraph (i)(3) of this section, State M does not qualify for credit from the National Pool for the 1995 calendar year.

(l) *Effective date.* The rules set forth in §1.42-14 are effective January 1, 1994. [Reg. §1.42-14.]

**.01 Historical Comment:** Proposed 12/29/93. Adopted 9/30/94 by T.D. 8563 (corrected 1/13/95).