

LIHTC Community Supports Legislative Proposals to Bolster Market

By Michael J. Novogradac, CPA

It is no big revelation to report that the low-income housing tax credit (LIHTC) industry is struggling to find sufficient demand from investors to match the supply of tax credits, nor is the fact that many of the nation's top LIHTC practitioners are working nonstop to bring new investors and renewed life to the world of housing tax credits.

The good news is that there may be some help on the way, from Congress.

In efforts to encourage new investment in all businesses, Maine Republican Sen. Olympia Snowe on April 2 introduced legislation that would permit many companies to carry back losses from 2008 and 2009 for up to five years. Under current law, most businesses can carry back losses for two years only. For tax credits, including the LIHTC, the carryback is only one year. Snowe's bill, the Net Operating Loss (NOL) Carryback Act, was introduced as S. 823 and was referred to the Senate Finance Committee. A companion bill, H.R. 2452, was introduced on May 15 by Reps. Richard Neal, D-Mass., and Patrick Tiberi, R-Ohio, and is being considered in the House Ways & Means Committee.

Unfortunately, under both proposals, companies that received federal bailout money under the Troubled Asset Relief Program (TARP) would not be eligible for the extended loss carrybacks. These NOL carryback bills were welcome news in the low-income housing tax credit industry, but the expected strong support for the measures was muted, since TARP recipients would not be eligible and the typical current LIHTC investor is (or was) a TARP recipient. The proposals do enjoy strong support from many top lawmakers who say they want to see the five-year carryback passed this year and made available to all companies. In addition, President Obama in his budget has proposed an expansion of the five-year net operating

loss carryback provision to all businesses. It is worth noting that descriptions of the carryback provision contained in the President's budget did not exclude TARP recipients.

The bills are similar to a provision that was proposed in the American Recovery and Reinvestment Act (Recovery Act) of 2009 that during last-minute negotiations was scaled back and limited to small businesses. The Recovery Act allows small businesses with gross annual receipts of less than \$15 million in revenue to reclaim taxes paid during profitable years dating to early 2003. Larger companies were not included in the enacted legislation.

If the NOL carryback provision is extended to five years as is being advocated, it is likely to have a demonstrably positive impact on the LIHTC community only if TARP recipients are eligible. If current and former LIHTC investors, many of which are TARP recipients, can carryback and, therefore, use up any net operating losses they have generated, then tax credits that they have can be used that much sooner. The sooner they are using tax credits, the sooner they will increase their level of tax credit investing.

In his remarks on the House floor when introducing the bill, Neal said the bill provides a simple change in the rules for businesses with net operating losses, allowing all companies, not just the small businesses covered by the Recovery Act, to use the NOL carryback rules to help them smooth out the inevitable ups and downs of the economy.

A report issued by the Congressional Research Service (CRS) on May 27 noted that most economists agree that a period longer than two years for using the NOL carryback would be beneficial to most companies. It was less clear to Congress, however, to what extent, if at all, the proposal would benefit the U.S. economy. The Congress-

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sional Budget Office has estimated that extending the carryback period would result in additional economic activity of between zero and 40 cents for every dollar in NOL carrybacks.

Industry Support for the Carryback Extension

The LIHTC industry has thrown its considerable weight behind getting introduced in Congress a similar five year carryback period for the LIHTC. Supporters include the Affordable Housing Investors Council (AHIC), the Affordable Housing Tax Credit Coalition (AHTCC), the National Association of Homebuilders, Enterprise and a host of tax credit housing and financial services industry organizations, including Novogradac and Company LLP.

AHIC and AHTCC Join Forces

The Affordable Housing Investors Council working closely with the Affordable Housing Tax Credit Coalition has prepared a legislative LIHTC carryback pro-

posal, saying that further legislative action is required to encourage a quicker return of private equity into the LIHTC program.

As we go to press, the industry is waiting for an Ernst & Young study on the effectiveness of the LIHTC carryback proposal; that study is but one of the parts of the industry's efforts to gain support for the five year LIHTC carryback provision. Armed with the study's data, AHTCC and AHIC will work at the grass roots level, continuing to meet with key congressional committee members to convince them that a carryback extension for the LIHTC is the best way to generate additional investment in affordable housing.

"We want to gain the clear support of our strongest supporters," said Jim Miller, a partner in the Washington, D.C. offices of Winston & Strawn LLP and legislative counsel for AHTCC. Miller says the industry is in frequent communication with Charles Rangel, D-N.Y., chairman of the House Ways & Means Committee, Max Baucus, D-Mont., chairman of the Senate Finance Com-

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mittee, and the Administration, whose main domestic efforts have been focused on health-care and energy issues. AHTCC and AHIC are also working with U.S. Department of Housing and Urban Development Secretary Shaun Donovan who is focusing on the issue's tax side in discussion with the White House.

Miller says any carryback legislation is not likely until the fall. "To get it done, we have to make the case that it's the best way to get the job done," said Miller. "We have to make the case that it's the best mousetrap."

The AHIC and AHTCC carryback proposal consists of two parts. The two groups say their proposal would provide an immediate increase in investment in low-income housing by allowing investors to carry back credits for up to five years. Under current law, credits may be carried back for one year.

The first part of the proposal would allow investors to carry back existing tax credits for five years. To qualify for the five-year carryback, however, investors would need to make new LIHTC investments. For this purpose, new LIHTC investments would be evidenced by a binding commitment to invest in a building for which LIHTCs are first claimed after 2008. For example, a taxpayer that makes a binding commitment to make new LIHTC investments of \$10 million in 2009 would be permitted to carry back for up to five years as much as \$10 million of accumulated LIHTCs from its taxable year 2008 return, which the taxpayer would usually file in the fall of 2009. The groups also contend that in order to be fully effective in stimulating additional investment, the LIHTCs that would be carried back should be usable against the alternative minimum tax.

The second part of the proposal would permit taxpayers to carry back the credits generated by new LIHTC investments up to five years as those credits are generated during the 10-year credit period. Both AHIC and AHTCC say this second part of the carryback proposal will increase the attractiveness of the LIHTC program for investors concerned about their ability to continue using the tax credits over a 10-year horizon. Given current economic uncertainties, it is more difficult to find

investors willing to invest in a program that requires an investor to have 10 consecutive years of positive taxable income in which to realize expected returns. The provision would apply only to investments in buildings for which credits are first claimed after 2008.

NAHB Lends Its Weight

The 200,000-member National Association of Home Builders (NAHB) has said it supports "the fullest and most robust NOL carryback provision possible" and it met in early April with the Department of the Treasury's Office of Tax Policy and the staff of the Joint Committee on Taxation to advocate an expanded NOL carryback for all businesses. During that meeting, NAHB stressed that the \$15 million gross receipts is very low and effectively excludes those who construct more than 45 homes a year.

The builders organization's Housing Credit Group (HCG), during its spring board of directors meeting in Washington, D.C., approved resolutions to expand the LIHTC investor base and help rural households. Those measures are now part of NAHB's LIHTC lobbying efforts.

The first resolution, Expanding Investor Market for Low Income Housing Tax Credits, urges Congress to amend the passive loss rules contained in Section 469 of the Internal Revenue Code in order to expand the LIHTC investor base to individual investors, including owners of S corporations, LLCs, partnerships and closely-held C corporations. (More information on this topic is available in the related article on page 13). The resolution also urges Congress to implement legislative changes that will improve the corporate investment market, such as extending the carryback proposal being supported by several industry groups. Each of these proposals is meant to expand the LIHTC investor base, a critical issue for the program.

The second resolution, Providing Affordable Housing for Rural Americans, urges Congress to amend Section 142 of the Internal Revenue Code to establish an income limit calculation for two-earner families based on the higher of the local or national minimum wage rate that will allow them access to housing-credit and tax-exempt bond financed units. Currently, the resolution says, in-

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come limits for the LIHTC program unnecessarily discriminate against two-person households earning minimum wage in more than 77 percent of rural communities across the United States. According to income limits published by the Department of Housing and Urban Development, these two-person households are considered over-income and therefore ineligible for LIHTC units, a situation that NAHB characterizes as a “flaw that needs to be resolved within the program.”

NAHB says there is a need to act on these issues quickly so that the industry can make it through the present economic crisis.

The builder’s group says it wants to see consideration of limited changes to the passive loss rules. One option it suggests is to suspend the passive loss rules for the LIHTC altogether, or increase the limitation on passive losses, now at \$25,000, to an amount that makes individual investment viable.

NAHB also seeks to prevent the dumping of existing LIHTCs back onto the market by increasing the value of the credits to existing investors. So, in addition to its strong support of expanding the LIHTC carryback rule from one to five years, the organization recommends making the LIHTC a refundable tax credit. This would provide a tax refund for LIHTCs regardless of taxpaying status, stimulating investment and ensuring that existing credits are not resold in the syndication market, thus

checking the decline in LIHTC prices.

Other issues on HCG’s agenda are efforts to gain legislation on expanding the Community Reinvestment Act, providing gap financing for LIHTC projects, extending the exchange program, allowing TARP recipients to offset dividend payments with LIHTC investments, and accelerating the amount of credit claimed in the early years of the credit period.

In addition to AHIC, AHTCC and NAHB, several organizations have signed-on in support of the LIHTC five year carryback. They include Enterprise Community Partners, the Housing Affairs Group, the Local Initiatives Support Corporation, the National Affordable Housing Trust, the National Leased Housing Association and the Stewards of Affordable Housing for the Future.

As Enterprise noted in a statement about the proposal, the five-year carryback would reactivate the market; reassure prospective investors that there is a successful future for LIHTCs, even in economic uncertainty; and lessen the inclination to sell current holdings.

I want to urge tax credit professionals to watch the progress of the NOL carryback measure, and its applicability to TARP recipients, closely because the reception that this measure gets from Congress could indicate how open lawmakers could be to a similar carryback provision for low-income housing tax credits. ♦

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