

October 15, 2010

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2010-62)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20224

Re: Codification of Economic Substance and New Markets Tax Credits

Dear Ladies and Gentlemen:

The members of the NMTC Working Group are participants in the New Markets Tax Credit (“NMTC”) industry who work together to resolve technical NMTC Program issues. In response to the request for comments in Notice 2010-62, we request specific guidance on the application of economic substance, which is an issue of importance in structuring NMTC transactions. In the Health Care and Education Affordability Reconciliation Act of 2010 (the “Act”), the economic substance doctrine was codified in Section 7701(o) of the Internal Revenue Code and is effective for transactions entered into after March 30, 2010. In a technical explanation prepared by the Joint Committee on Taxation (“JCT”) explaining revenue provisions of the Act, footnote 344¹ clarified that the codification of the economic substance doctrine is not intended to disallow tax credits in a transaction that achieves the basic purpose or plan for which the tax credit was designed by Congress. The NMTC community, as well as other tax credit communities, applaud the explanatory guidance provided by this footnote since it recognizes and is consistent with the Congress’ legislative intent in codifying the economic substance doctrine as well as Congress’ legislative intent in enacting tax credits that provide incentives for investment in affordable rental housing, historic properties, underserved economic areas, and renewable energy resources.

We request that Treasury provide guidance that it will follow the documented legislative intent included in footnote 344. While we believe that case law and historical Treasury guidance is generally consistent with the interpretation provided in footnote 344, we also believe that industry participants and practitioners can more readily rely on written guidance from Treasury expressing Treasury’s agreement with the explanatory statements provided in footnote 344. Such guidance from Treasury would receive greater deference by a court interpreting the economic substance statute than the JCT explanatory footnote.

We commend the Department of Treasury and IRS for its continuing efforts to improve and clarify tax guidance for the NMTC program in order to ensure its continuing success. We

¹ Joint Committee on Taxation Technical Explanation of the Revenue Provisions of the “Reconciliation Act of 2010,” as Amended, in Combination with the “Patient Protection and Affordable Care Act”, JCX-18-10, March 21, 2010, page 152.

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believe that further guidance, as requested by this letter, will expand the NMTC program to better serve its intended purpose, bringing capital to communities that have historically had inadequate access to capital, by lessening the current risk to investors due to the uncertainties of the NMTC program. We are excited about the positive impact that the NMTC Program is having on the nation's low-income communities and low-income persons and the potential for future success. However, we feel that the program can become even more efficient and deliver more subsidy to the end users within low-income communities if this guidance is provided. Thank you in advance for your time and careful consideration of this issue.

Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,
Novogradac & Company LLP

by 
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by 
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