

November 14, 2011

Ms. Emily S. McMahon
Acting Assistant Secretary (Tax Policy)
Office of the Tax Legislation Counsel
U.S. Department of the Treasury
1500 Pennsylvania Ave., NW, Room 3044
Washington, DC 20220

Re: Guidance under §4944 Treasury Regulation § 53.4944-3 and on Program-Related Investments

Dear Ms. McMahon:

On behalf of the members in the New Markets Tax Credit (“NMTC”) Working Group, we request that you consider our recommendations below regarding the treatment of certain investments in a NMTC transaction made by private foundations as program related investments. The members of the NMTC Working Group are participants in the NMTC industry who work together to resolve technical NMTC program issues and create recommendations to make the NMTC program ever more efficient in delivering benefits to qualified businesses located in low-income communities throughout the country. Our group includes allocatees, nonprofit and for profit community development entities (CDEs), investors, accountants and lawyers. We commend the Treasury’s Office of Tax Policy and the Internal Revenue Service for including guidance related to program-related investments in its 2011-2012 priority guidance plan and appreciate the opportunity to submit our recommendations. We have provided our comments below to recommend new language be added to the Regulations for §4944 to provide a safe harbor for investments in NMTC transactions. We hope that you will contact us if you have any questions regarding our comments.

Program Related Investments and NMTC Transactions

We request that Treasury provide a program-related investments safe harbor for private foundations that make loans to or equity investments in an entity that makes a qualified equity investment, as defined in §45D(b)(1). For purposes of determining the amount of NMTC allowable under § 45D of the Internal Revenue Code, the amount of the qualified equity investment (“QEI”) made by a limited liability company (“LLC”) classified as a partnership includes cash from a nonrecourse¹ or recourse² loan to the LLC that the LLC invests as equity in a qualified community development entity. It has been our experience that private foundations are generally hesitant to make a loan to or equity investments in an entity that will use the proceeds to make a QEI because the regulations related to

¹ Revenue Ruling 2003-20.

² Revenue Ruling 2010-17.

program-related investments under Treasury Regulation § 53.4944-3 are unclear if it would meet the requirements. We believe that the intent of the NMTC Program to provide below-market rate investments to qualified businesses in low-income communities meets the intent of the exceptions provided for program-related investments that don't jeopardize the carrying out of exempt purposes of a private foundation as described in Treasury Regulation § 53.4944-3. Therefore, we recommend that the following safe harbor be added to Treasury Regulation § 53.4944-3(a)(2)(i):

(A) A loan to or equity investment in an entity that makes a qualified equity investment in accordance with section 45D(b)(1) shall be considered as made primarily to accomplish one or more of the purposes described in section 170(c)(2)(B).

We also recommend a similar safe harbor be added to Treasury Regulation § 53.4944-3(a)(2)(iii):

(A) A loan to or an equity investment in an entity that makes a qualified equity investment in accordance with section 45D(b)(1) shall be presumed to not have as a significant purpose the production of income or the appreciation of property.

We believe that such guidance will give private foundations the comfort necessary to make direct investments in an entity that will use the investment to make a QEI. Without such guidance, private foundations are likely to avoid NMTC transactions or incur additional structuring costs to make the investment, diluting the overall benefit that can be passed on to qualified businesses located in low-income communities.

Conclusion

We commend the Department of Treasury and IRS for its continuing efforts to improve and clarify tax guidance for exempt organizations and the NMTC program in order to ensure their continuing success. We 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 private foundations due to the uncertainties of the qualification of certain investments in a NMTC structure as program-related investments. 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 believe that the program can become even more efficient and deliver more subsidy to the end users within low-income communities if this recommended guidance is provided. Thank you in advance for your time and careful consideration of this issue.

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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



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by
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cc: Ruth Madrigal
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