

December 23, 2008

Internal Revenue Service
CC:PA:LPD:PR (REG-142339-05)
Courier's Desk
1111 Constitution Avenue, NW
Ben Franklin Station
Washington, D.C. 20224

Re: New Markets Tax Credit Targeted Populations Project

Dear Ladies and Gentlemen:

On behalf of members of the New Markets Tax Credit ("NMTC") Working Group, I am respectfully submitting our responses to your request for comments on the proposed NMTC targeted populations regulations issued September 24, 2008. We have provided comments regarding start-up businesses and the gross income test in addition to responding to the comments you requested regarding measurement of an individual's income, the definition of gross income, and additional requirements for the employee test. We believe that our suggestions for guidance will help clarify and minimize confusion related to current questions in the NMTC program regarding targeted populations.

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 believe that further guidance, as requested by this letter, will expand the NMTC program to better serve its intended purpose, bringing capital to individuals that have historically had inadequate access to capital, by lessening the current risk to investors due to the uncertainties of the NMTC program. We will also attend the scheduled public hearing to give our oral statements on the comments we have below.

Start-up businesses

We request that additional consideration be given to allow a start-up entity to qualify as a qualified active low-income community business ("QALICB") serving targeted populations. We have seen a tremendous amount of NMTC allocation used successfully to provide the necessary gap financing for start-up businesses operating in low-income communities. We believe that a similar impact can be achieved by allowing start-up businesses to serve targeted populations. To disallow start-up entities to serve targeted populations would significantly limit the effectiveness of the NMTC as a tool to serve individuals that have historically lacked access to much needed capital. The NMTC Program already allows start-ups to participate in low-income communities by meeting a reasonable expectations test as defined in Section 1.45D-1(d)(4)(iv)(A) that considers a qualified business to be active in the conduct of a trade or business. Allowing start-up businesses would allow community development entities ("CDEs") to finance new facilities such as charter schools and health care facilities that serve low-income individuals.

You have noted your concern that an entity that intends to build a facility such as a charter school or healthcare center that will serve targeted populations could be built and never serve a targeted population for three years if there were a safe harbor similar to the active conduct of a trade or business safe harbor in section 1.45D-1(d)(4)(iv)(A). In the example of a healthcare center built to serve a targeted population that did not generate any revenue at the end of the three year period, the only activity generated would be the construction expenditures incurred in the moderate income area that meets the

income restrictions of sections 3.03(3) or 3.04(4) of Notice 2006-60. We believe this situation is similar for any project that uses the active conduct of a trade or business safe harbor to be treated as a QALICB. For example, if the healthcare facility was built in a low-income community and had a reasonable expectation that it would generate revenue within 3 years, there would still be a possibility that it wouldn't generate revenue. If the facility never generated revenue, then the net result would be that construction expenditures were incurred in the low-income area. This is the same result for the healthcare facility built to serve a targeted population. The net result would be construction expenditures incurred in a moderate income community as outlined in Notice 2006-60.

Furthermore, in the example where a property was built and never served a targeted population, it would raise serious questions as to how the reasonable expectations were ever met. This possibility raises serious concerns for investors. In order to be satisfied that the reasonable expectations test will be met, investors generally perform extensive due diligence on a project and its financial viability. We believe that there is little risk that an investor would allow a start-up business to operate in a manner that did not serve targeted populations. And if they did, the Internal Revenue Service could challenge whether they satisfied the reasonable expectations test.

Gross income test

We request that the final regulations conclude that the term "derived from" in section 3.03(2)(a)(i) of Notice 2006-60 includes gross income derived from payments made directly by low-income persons to the purported QALICB and amounts and contributions of property or services provided to the QALICB on behalf of low-income persons. Accordingly, a QALICB's gross income under section 3.03(2)(a)(i) that is derived from sales, rentals, services, or other transactions with individuals who are low-income persons for purposes of § 45D(e)(2) include federal, state, or local grants, charitable donations, or in-kind contributions, as well as collected fees, insurance re-imbursements, and other sources of income, as long as these payments and contributions are provided on behalf of low-income persons on an individual basis or as a class of individuals. We believe this is consistent with the current treatment of the regulation and additional clarification would avoid any further confusion.

In addition to payments and contributions provided on behalf of low-income persons, we believe there should be additional clarification for an entity whose sole business is the rental to others of real property. Generally, such an entity doesn't have employees and therefore would need to meet the gross income or ownership test. However, the entity's income would be from rent from tenants and in many instances, such entities are formed by one or more joint-venture partners and don't have individual owners to meet the ownership test. We recommend that the gross income requirement be deemed satisfied if the tenant that the QALICB is renting to would otherwise meet the requirements for low-income targeted populations under Section 1.45D-1(d)(9)(i)(B)(1).

Measurement of an individual's income

We believe that the final regulations should clarify that qualified businesses may use any reasonable measure of income to determine an individual's income, adjusted for family size, for purposes of the definition of low-income person. The measures of income used by the U.S. Census Bureau, the measure of income on the IRS Form 1040, and the measure of income used in 24 CFR Part 5, which is used for certain HUD program and other Federal programs, are all reasonable methods and should be allowed as part of this recommended safe harbor to determine an individual's income for purposes of the definition of low-income person. If you decide to pick one method, we prefer that the measure of income used in 24 CFR Part 5 be used since it is consistent with low-income determinations used in the Section 8 rental voucher program and the low-income housing tax credit industry. There is much more guidance

and experience using this measure than any of the others to ensure compliance with a federal tax credit program.

Gross income definition – inclusion of fair market value of goods and services provided

We believe that a CDE should have the option to include the fair market value of goods and services provided to low-income persons in the gross income requirements of Section 1.45D-1(d)(9)(i)(B)(1)(i). If a qualified business provides its goods and services at a discount to low-income persons, it would otherwise be at a disadvantage to qualify as a QALICB for low-income targeted populations if it isn't allowed to include the fair market value of those goods and services. As a practical matter, this would only impact businesses that provide goods and services at both fair market value to non low-income persons and at a discount to low-income persons. Therefore, it would not cause any unnecessary burden since the business will have data to determine fair market value from the goods and services it provides to its non low-income customers.

Employee requirements


We believe that the current requirements for the employee test are sufficient to meet the intended purposes of serving targeted populations as defined by Congress and should not be changed. Any additional restrictions may greatly limit many CDEs from pursuing their mission. Any additional restrictions would also create an additional compliance burden for CDEs. We believe that additional requirements, to the extent they are deemed appropriate, should be addressed in the NMTC allocation application by the Community Development Financial Institution Fund.

Conclusion

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 with targeted populations. We appreciate the opportunity to submit our suggestions for issues regarding the NMTC regulations for targeted populations. We believe that further guidance on these issues is essential to sustain and increase the impact of the NMTC program on targeted populations. Thank you in advance for your time and consideration.

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


Michael J. Novogradac