

**Novogradac Report on Tax Credits**  
**Transcript: Febraury 16, 2010**

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(Intro music)

Hello! It's Tax Credit Tuesday and I'm Michael Novogradac.

**Today is February 16th, 2010. The House and Senate are on their Presidents Day recess, so there will be no House or Senate votes this week. The biggest news this week is the status of the jobs legislation being drafted in the Senate.**

Several proposals were put forward last week and in a few minutes I'll discuss those different proposals. I'll also discuss the path that jobs legislation may take during the next several weeks.

**But first, I have additional information about a data collection effort planned by the CDFI Fund that I discussed briefly last week.**

As you may recall, the CDFI Fund recently announced plans for new information collection activities associated with an independent, multi-year evaluation of the new markets tax credit program. The data collected is intended to describe and assess program activities, as well as identify both project-specific and community-level outputs and outcomes.

The evaluation is intended to help answer important policy questions, including how and in what manner the program is affecting the flow of new private capital to low-income communities. The CDFI Fund also seeks to learn where, in what timeframe, and how that capital is being invested, as well as information about the quantity,

**Novogradac Report on Tax Credits**  
**Transcript: Febraury 16, 2010**

nature, and quality of the benefits to low-income communities and persons that can potentially be attributed to the NMTC program.

The CDFI Fund says the evaluation will involved multiple research methods and include:

- a review of relevant literature;
- interviews with key NMTC stakeholders;
- an analysis of NMTC administrative data;
- the development of a typology of NMTC projects; and
- an examination of secondary public and private data.

To address key evaluation issues, the CDFI Fund says new data on NMTC projects must be gathered beyond what is being collected already. As such, the CDFI Fund has requested approval from the Office of Management and Budget, or OMB, to collect information about case style data related to approximately 80 randomly sampled NMTC projects.

Collecting the information will consist of semi-structured telephone interviews with approximately 80 community development entities or CDEs, it'll also involve interviews with 80 qualified active low income community businesses or QALICBs, 80 investors, and 80 other key project stakeholders.

The CDFI Fund has also requested clearance for a web-based, predominantly closed-ended survey of representatives of approximately 380 QALICBs, as well as a similar survey of approximately 380 local community economic development officials.

Additional information about the data collection plan can be found in the February 4<sup>th</sup> *Federal Register* notice. A copy of the notice

**Novogradac Report on Tax Credits**  
**Transcript: February 16, 2010**

can be downloaded from [www.newmarketscredits.com](http://www.newmarketscredits.com). That's [www.newmarketscredits.com](http://www.newmarketscredits.com).

We also expect to learn more about the data collection effort at our June new markets tax credit conference that will be held in Washington, D.C.

**While we're on the subject of the new markets tax credit, I would like to review two private letter rulings that provide very welcome guidance for NMTC professionals. These rulings while very welcome, were also expected. Members of the New Markets Tax Credit Working Group are already familiar with them, as we have previously discussed them during our monthly phone calls.**

In late January the Internal Revenue Service released two private letter rulings that address the question as to whether or not CDEs that fail to meet the substantially-all requirement within the initial 12 months can avail themselves of the six-month cure period that's generally provided for in NMTC program regulations.

The applicability of the cure period has long been the subject of debate among industry participants. Until recently, it wasn't clear that the cure period described in the Treasury Regulations was available to correct a community development entity's failure to invest substantially all the proceeds of a qualified equity investment, or QEI, in qualified low-income community investments within the initial 12-month period required by the regulations. The cure period is intended to help CDEs avoid a potential recapture or disallowance of NMTCs.

**Novogradac Report on Tax Credits**  
**Transcript: February 16, 2010**

The IRS clearly states in PLR 201004008 and PLR 201004021 that the six-month cure period is, that's right is, available for this purpose but cautions that the cure period is not automatically tacked on to the end of the initial 12-month period. The rulings emphasize that the cure period begins on the date the CDE becomes aware — or reasonably should become aware — of its impending failure to invest substantially all of the QEI in QLICs. The reasonably should have been aware standard is an important aspect of the ruling.

For example, in the facts discussed in the PLR, the investors say that they had been working diligently to satisfy the substantially all requirement. Because of difficult market conditions, it was especially onerous for developers to obtain third-party financing and some developers were putting some otherwise viable projects on hold until market conditions improved. At least 15 projects were considered by the investors described in the ruling, with the greatest amount of time being spent on four potential projects.

On a certain date, dubbed "k" in the ruling, the investors received notice that the two most viable deals could not be closed prior to the end of the initial 12-month period. However, the investors continued to work on these projects and other projects in anticipation of a *potential* closing within the cure period. Therefore, given the facts, the date of "k" was the date that the IRS said the cure period began.

While it's important to note that the letter rulings themselves cannot be used or cited as precedent, the position taken by the IRS provides some much needed clarification for the NMTC community

**Novogradac Report on Tax Credits**  
**Transcript: February 16, 2010**

regarding use of the cure period. This positive guidance will allow investors and CDEs to continue to work toward closing and making investments during the cure period, even if for unexpected reasons they cannot close within the initial 12-month period.

If you have a situation where you think these rulings may provide you comfort, and you want to learn more details, you can contact my partner, Brad Elphick, in our Atlanta office.

Copies of PLR 201004008 and PLR 201004021 are available online at [www.newmarketscredits.com](http://www.newmarketscredits.com). Additional analysis of the rulings is also available in the February issue of the Novogradac Journal of Tax Credits. Laurel Tinsley, a partner in the St. Louis, Missouri office of Husch Blackwell Sanders LLP authored an article that examines these issues in detail. To read this article, and other selected content from the February issue of the Novogradac Journal of Tax Credits, simply go to [www.novoco.com](http://www.novoco.com) slash journal.

As an aside, and as a bit of IRS tax trivia, do you know how private letter rulings get their numbers? The first part of the number is probably no surprise, it is the year the ruling is released. So these rulings are in 2010, so the first four numbers are 2010. The next two numbers are the week the rulings are issued. These ruling were issued in the 4<sup>th</sup> week of 2010, so they are 04. The last three numbers are the order in which they are released during the week. One of these rulings was 8<sup>th</sup> released the other ruling was released 21<sup>st</sup>. As such you have 2010 for the year, 04 for the fourth week, and 008 for the 8<sup>th</sup> ruling released that week. The other is 2010 – 04 - 021. And you now know what those sets of numbers relate to.

**Novogradac Report on Tax Credits**  
**Transcript: February 16, 2010**

**Now, let's check in on the status of tax extender and jobs legislation being developed in Congress.**

On February 11<sup>th</sup>, Senate Finance Committee Chairman Max Baucus and Ranking Member Chuck Grassley released a draft bill dubbed the Hiring Incentives to Restore Employment and if you can think what Hiring Incentives to Restore Employment would be as an acronym you'll know where they came up with the HIRE Act.

Senators Baucus and Grassley said the draft bill contains proposals they would expect to be included in an initial bill. They described their draft as the first step in the Senate process for consideration of time-sensitive proposals

In a statement released with the draft, the senators said that action on the expired tax provisions is long overdue and they urged timely action on incentives for economic activity and job creation.

The bill's job creation provisions include a jobs payroll tax exemption, an extension of expensing thresholds under Section 179, extension for funding for programs under the Highway Trust Fund, and an election to convert tax credit bonds to Build America Bonds.

But more significantly for our listeners, Senators Baucus and Grassley propose extensions of several tax provisions that expired at the end of 2009, including the Section 1602 low-income housing tax credit cash grant exchange program that was created by the Recovery Act; extension the new markets tax credit; and extension of certain Gulf Opportunity Zone or GO Zone provisions.

The tax extenders are estimated to cost about \$31 billion over the course of 10 years. Senators Baucus and Grassley list three

**Novogradac Report on Tax Credits**  
**Transcript: February 16, 2010**

offsets for the cost of the HIRE Act, including codification of the economic substance doctrine. The provision included in the Baucus and Grassley draft would clarify the application of the economic substance doctrine that has been used by courts to deny tax benefits for transactions lacking economic substance. The provision would also impose a 40 percent strict liability penalty on underpayments attributable to a transaction lacking economic substance, unless the transaction was disclosed, in which case the penalty is 20 percent. It is estimated that the proposal would raise \$5 billion over 10 years.

However, on the same day that Senators Baucus and Grassley released their bipartisan HIRE proposal, Senate Majority Leader Harry Reid announced his opposition to this bipartisan effort and said he would push a pared-down jobs package that omits most of these provisions.

Senator Reid said the smaller package is the first of several job creation bills that will be advanced as part of a larger jobs agenda. Reid's bill, like the Senate Finance version, includes the jobs payroll tax exemption, an extension of expensing thresholds under Section 179, extension for funding for programs under the Highway Trust Fund, and an election to convert tax credit bonds to Build America Bonds.

A spokesman for Senator Grassley told BNA that Senator Grassley will attempt to move tax extenders in a Republican alternative to the Reid jobs bill and/or as amendments to the Reid jobs bill.

**Novogradac Report on Tax Credits**  
**Transcript: February 16, 2010**

If Senator Grassley's efforts fail, then Senator Reid's decision means that Senators Baucus and Grassley will have to look to subsequent bills for the tax extenders and other measures. In addition to the Senate Finance proposal, a number of other job-creating provisions have been proposed in recent weeks. For example, Energy and Natural Resources Committee Chairman Jeff Bingaman has proposed the expansion of the Section 48 cap C tax credit program for manufacturing clean energy equipment. We are starting to see more syndication activity involving the Section 48 cap C tax credit. If you are interested in learning more about this credit, I encourage you to contact my partner, Tony Grappone, in our Boston office.

At the time of this recording, a procedural vote on Senator Reid's bill is scheduled for February 22<sup>nd</sup> after the Senate returns from their Presidents Day recess.

**On the new products front, I am excited to announce that Novogradac and Company LLP is now publishing two tax credit basics booklets. One on the new markets tax credit and one on the low-income housing tax credit.**

The booklets can be ordered on our website at [www.novoco.com](http://www.novoco.com). However, the first 10 listeners to this podcast can receive one free booklet. Just send an e-mail to [cpas@novoco.com](mailto:cpas@novoco.com). Type free booklet in the subject matter line, and in the body of the e-mail let us know which one you'd like, new markets tax credits or low-income housing tax credits. The free offer is available to the first 10 e-

**Novogradac Report on Tax Credits**  
**Transcript: February 16, 2010**

mail requests, so I encourage you to send the e-mail request for a free booklet right now.

**Before I close, I want to share with you some good news regarding the secondary tax credit market.** Novogradac and Company is continuing to see growing secondary market interest in existing new markets tax credit and low-income housing tax credit portfolios. This growing interest has many tax credit syndicators and advisers optimistic about 2010 tax credit pricing. For more information about the secondary market, and the services we provide to both sellers and buyers, I urge you to contact Dan Smith in our Dover Ohio office.

**Well, that brings me to the end of this week's report.**

Please send me an e-mail with topic, ideas and suggestions for future Tax Credit Tuesday podcasts. My e-mail address is [michael.novogradac@novoco.com](mailto:michael.novogradac@novoco.com).

And please join me again next week for more breaking news.

This is Michael Novogradac and I'll be back next week, for another edition of Tax Credit Tuesday. Thanks for listening.

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