

October 27, 2010

Mr. James G. Hartford  
Internal Revenue Service  
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 Low-Income Housing Tax Credits

Dear Mr. Hartford:

The members of the LIHTC Working Group are participants in the Low-Income Housing Tax Credit (“LIHTC”) industry who work together to resolve LIHTC program issues. We request guidance from the Department of the Treasury on an issue of importance in structuring LIHTC 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 344<sup>1</sup> 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 LIHTC community, as well as other tax credit communities, applaud the explanatory guidance provided by this footnote since it recognizes and is consistent with 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

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<sup>1</sup> 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.


deference by a court interpreting the economic substance statute than the JCT explanatory footnote.

In addition, we request that Treasury provide guidance as to applicability of footnote 344 to Section 1602 of the American Recovery and Reinvestment Act of 2009. We believe that transactions using subawards from grants in lieu of LIHTCs should be allowed to rely on footnote 344 as well.


We commend the Department of Treasury and IRS for its continuing efforts to improve and clarify tax guidance for the LIHTC program in order to ensure its continuing success. We believe that further guidance, as requested by this letter, will expand the LIHTC program to better serve its intended purpose, to provide more affordable housing in our communities, by lessening the current risk to investors due to the uncertainties of the LIHTC program. 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.

Very truly yours,  
NOVOGRADAC & COMPANY LLP

by   
Michael J. Novogradac

NOVOGRADAC & COMPANY LLP

by   
Michael G. Morrison

cc: Paul F. Handleman