NMTC WORKING GROUP™
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via electronic mail

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Re: Request to Provide Guidance and Postpone Certain Deadlines for the New Markets Tax Credit Program due to the COVID-19 Pandemic

Dear Director Harris, Deputy Director Nolan, and Program Manager McInnis:

On behalf of the members of the New Markets Tax Credit (NMTC) Working Group, we are submitting the following comments and recommendations that we believe would be helpful to the CDFI Fund in delivering timely messaging and guidance regarding a COVID-19 response. The members of the NMTC Working Group are participants in the NMTC industry who work together to help resolve technical issues and provide recommendations to make the program even more efficient in delivering benefits to qualified businesses located in low-income communities around the country. Our group includes more than 60 organizations that are Allocatees, nonprofit and for-profit CDEs, consultants, investors, accountants and lawyers. The recommendations included for your consideration below are based upon comments received from these members.

Ability to Comply with Allocation Agreement

A CDE's failure to comply with its Allocation Agreement puts a CDE's prospects of getting any future allocations in serious jeopardy, so the prospect of being unable to comply represents a serious concern for CDEs. There are a number of sections within the Allocation Agreement where a CDE's ability to comply could be impaired by the effects of the pandemic, including, but not limited to the following:

- Eligible Activities;
- Flexible Products;
- Non-Metropolitan Counties;
- Targeted Distressed Communities;
- Innovative Investments; and
- Consistency with the business strategies in the Allocation Application.

We applaud Director Harris's messages on March 17 and April 1, 2020 that emphasized the importance of submitting inquiries to the CDFI Fund staff through an AMIS Service Request, by email to the CDFI Fund Help Desk, or leaving a voicemail at the CDFI Fund Help Desk to handle requests on a case-by-case basis.

However, we believe a more targeted message is needed in the form of a published notice to all NMTC Allocatees conveying that the CDFI Fund will not treat them as having failed to comply with provisions of their Allocation Agreements if they can reasonably demonstrate that their inability to comply was due to the pandemic or the economic or market conditions arising from the pandemic. We believe this assurance from the CDFI Fund will help CDEs pursue their efforts to make the best investments they can and allay CDEs' fears that they will be penalized for compliance failures that are beyond their control.

In addition to the request above, we ask that you consider the more specific challenges that CDEs face and the guidance that we have requested below. CDE members of the NMTC Working Group have expressed concern with each of the challenges and the additional delay that may be caused if timely guidance isn't provided by the CDFI Fund.

Change in Strategies

Issue:

As a result of the ongoing and future economic disruption from the COVID-19 pandemic, many qualified businesses in low-income communities need access to patient and flexible capital now more than ever. CDEs can help address these needs by making QLICIs to businesses and projects that need this type of capital to survive today's economic crisis. However, CDE's are hesitating to make these investments because of the uncertainty around whether they can pivot and make investments in response to the COVID-19 pandemic if those investments are not generally consistent with the strategies set forth in their Allocation Application.

Recommendation:

We request the CDFI Fund publish a notice that provides guidance that existing Allocatees who alter their business strategy to finance businesses affected by the crisis will not be penalized if the businesses financed are not consistent with the business strategy in their applications in accordance with Section 3.3(i) of their Allocation Agreement. If the CDFI Fund is unwilling to provide this guidance as requested, we recommend that the CDFI Fund consider creating a list of the types of businesses or other parameters that will automatically qualify as meeting the generally consistent requirements in Section 3.3(i) and will not require an Allocatee to obtain an amendment to their allocation agreement.

We believe the preceding parameters, combined with the NMTC anti-abuse rules that state “If a principal purpose of a transaction, or a series of transactions, is to achieve a result that is inconsistent with the purpose of IRC §45D and the regulations thereunder, the Commissioner may treat the transaction or series of transactions as causing a recapture event”, are sufficient guidance to enable CDEs the flexibility necessary to respond aggressively to the current public health and economic crisis.

If Allocatees are required to submit Service Requests to amend their Allocation Agreements in order to accommodate this change, we request that the CDFI Fund revise FAQ #64 in the March 2019 Certification, Compliance Monitoring and Evaluation Frequently Asked Questions document to provide a fourth justification for approving an amendment change that includes requests that are in direct response to the COVID-19 pandemic or the economic conditions created by that pandemic.

Similarly, we request the CDFI Fund revise FAQ #40 regarding Material Events from the March 2019 Certification, Compliance Monitoring and Evaluation Frequently Asked Questions document to provide an exception to (f) to the extent it’s in direct response to the COVID-19 pandemic or the economic conditions created by that pandemic.

Reporting Requirements

Issue:

CDEs need additional time to meet their reporting requirements as a result of the ongoing and future impacts of the COVID-19 pandemic. CDEs have expressed it may be difficult to receive impact data from QALICBs as many may not have the staffing levels to ensure information is provided timely to Allocatees in order to meet their reporting deadlines. CDEs are currently working on approvals of request from QALICBs for 90-day delays for payments and reporting from their clients as a result of the pandemic.

Recommendation:

We request the CDFI Fund publish a notice that extends the deadline for any reporting. A 90 day grace period for this particular reporting requirement may help to ease some of the pressure on small businesses and thinly run nonprofit organizations right now. Because of the widespread impact of the pandemic on QALICBs and CDEs, we believe such guidance would be more helpful than guidance to submit service requests to the CDFI Fund on a case-by-case basis.

Deadlines for Section 3.2 - Authorized Uses of NMTC Allocation

Issue:

CDEs need additional time to meet the requirements under Section 3.2 - Authorized Uses of NMTC Allocation as a result of delays in deploying their NMTC allocation as a result of the COVID-19 pandemic.

Recommendation:

We request the CDFI Fund publish a notice that extends the deadlines included in Section 3.2 – Authorized Uses of NMTC Allocation 12 months. We believe such an extension would apply to the following subsections of Section 3.2:

- 3.2(a) – 85% of QLICIs in the types of activities listed in Schedule 1
- 3.2(b) – 85% of QLICIs in the Service Area(s) listed in Schedule 1
- 3.2(e) – 60% of QEIs issued
- 3.2(f) – Fulfillment of the Flexible Products requirement in Schedule 1
- 3.2(g) –The designated percentage of QLICIs in Non-Metropolitan Counties as required in Schedule 1
- 3.2(h) – 75% of QLICIs in severely distressed census tracts as required in Schedule 1
- 3.2(j) – The designated use percentage of QEIs as required in Schedule 1
- 3.2(k) – 20% affordability requirement as required in Schedule 1
- 3.2(l) - The designated percentage of QLICIs meeting Innovative Investment characteristics as required in Schedule 1

We believe an extension of these deadlines will provide CDEs with the flexibility to meet their Allocation Agreement requirements. Additionally, it will give CDEs the flexibility to invest in QALICBs that may take longer as a result of the current and ongoing future impact of the COVID-19 pandemic but desperately need the patient and flexible capital that NMTC investments provide.

24-Month Look-Back Period in Section 3.3(j)

Issue:

CDEs have begun to experience delays that various shut-downs and stay-at-home orders have on the ability of CDEs to get documentation needed in order to close transactions, such as title, survey and document recording work, all of which are outside the control of the participants in NMTC transactions. These delays directly impact transactions where QLICI proceeds are used, in whole or in part, to repay or refinance expenditures incurred by a debt or equity provider whose capital was used to fund the QEI, or are used to repay or refinance expenditures incurred by any Affiliate of such a debt or equity provider and are relying on the exception that allows a 24-month lookback period to determine the permissible amount of proceeds that can be repaid or refinanced. For transactions in which material amounts of expenditures fall outside of the 24-month lookback period, QALICBs may not be able to secure the necessary amount of leveraged financing to close their NMTC transaction.

Recommendation:

We request the CDFI Fund publish a notice that extends the 24-month look back period to allow QALICBs to include expenditures incurred after December 31, 2017 so that QALICBs can ensure expenditures will still be allowed that may fall outside of the 24-month lookback period because of delays from the COVID-19 pandemic that are outside of their control.

Affordability Requirement for For-Sale Housing

Issue:

CDEs that develop or rehabilitate for-sale housing generally have a requirement in their Allocation Agreements under Section 3.2(k) to ensure at least 20% of the housing units are affordable to Low-Income Persons. FAQ #18 from the March 2019 Certification, Compliance Monitoring and Evaluation Frequently Asked Questions document defines “affordable housing” for the purpose of meeting Section 3.2(k) of the Allocation Agreement.

Meeting the definition of affordability for affordable homeownership projects is more difficult because of COVID-19 hardships. Homeowners’ incomes are decreasing during this crisis, especially those homeowners served by nonprofit affordable homeownership developers, and debts are only compounding. The 38% Debt-To-Income (DTI) Ratio requirement is difficult to meet in normal times because it is lower than most DTI measures used by lenders (i.e. FHA, Freddie and Fannie for example) and uses a back-end formula to calculate debt. Furthermore, if the DTI is not known or is not 38% or below, and if the housing market topples because of COVID-19’s economic fallout, the median purchase price of homes in each county will also decrease, making the second optional prong of the affordability test (95% of the median sale price for the area per HUD) equally challenging to meet.

Recommendation:

We request the CDFI Fund publish a notice that an Allocatee that finances for-sale housing units should be deemed to meet the requirements of Section 3.2(k) if 20 percent or more of the total for-sale housing units financed are purchased and occupied by Low-Income Persons with a 45% (instead of 38%) or less Debt-To-Income Ratio and are owner-occupied by individuals whose household income is 80 percent or less of the area's median family income as determined and adjusted annually by HUD at the time the units are sold to the initial homebuyer. In evaluating the Debt-To-Income Ratio, debt payments include, but are not limited to, mortgage payments made up of principal, interest, taxes and insurance, credit card payments, automobile loan payments, as well as other consumer loan payments.

In the event that an Allocatee cannot document that a buyer meets the stated "45 percent or less Debt-To-Income Ratio" recommended above, the Allocatee must be able to substantiate that the purchase price of the home does not exceed 105% (instead of 95%) of the median purchase price for the area as used in the HOME Investment Partnership Program and as determined by HUD and the applicable participating jurisdiction for the year the home is purchased.

We appreciate the time and effort the CDFI Fund spends on improving the NMTC program, providing additional guidance and clarification, and seeking guidance from NMTC participants. We hope that you find these comments and recommendations helpful. We believe these recommendations will help ensure a consistent real time process for dealing with the COVID 19 Pandemic. Thank you in advance for your time and consideration.

We would also appreciate an opportunity to discuss our comments and recommendations and will follow-up in the very near future to request scheduling a conference call at your earliest convenience. Thank you in advance for your time and consideration.

Yours very truly,
Novogradac & Company LLP

by Brad Elphick

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