LIHTC
WORKING GROUP™
hosted by Novogradac

May 28, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-28)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Notice 2021-28 Public Comment Invited on Recommendations for 2021-2022 Priority Guidance Plan

Dear Ladies and Gentlemen:

On behalf of the members of the Novogradac Low-Income Housing Tax Credit Working Group (the LIHTC Working Group), we submit the following suggestions in response to Notice 2021-28, requesting suggestions for items to include on the Internal Revenue Service's (Service or IRS) 2021 – 2022 Priority Guidance Plan. The LIHTC Working Group was established to provide a platform for low-income housing tax credit (LIHTC) industry participants to work together to resolve technical and administrative LIHTC program issues.

In order of priority, the LIHTC Working Group would like to recommend the following issues for inclusion in the Priority Guidance Plan for 2021-2022. Additional details are provided in the attached comment letters that were recently submitted by the LIHTC Working Group:

1. LIHTC Average Income Test Regulations. The IRS published a notice of proposed rulemaking in the October 30, 2020 Federal Register on Section 42, Low-Income Housing Credit Average Income Test Regulations (Guidance). In both a previously submitted comment letter and during the March 2021 average income test hearing hosted by the IRS, the LIHTC Working Group identified three critical areas where additional guidance was requested and recommendations were provided: 1) Concerns relating to interpretation of the Minimum Set-Aside election; 2) Unit Designation changes; and, 3) Grace period for correcting non-compliance. Our comments on the Guidance addressed how these regulations, as currently drafted, would interact/conflict with other federal housing programs. We also took the opportunity to alert the IRS to potential consequences it may not have foreseen.

2. 4% LIHTC Minimum Rate. Additional clarity is requested around the effective date of the 4% LIHTC minimum rate established in the Consolidated Appropriations Act of 2021 (Act). The minimum rate is available to buildings placed in service after December 31, 2020 that also satisfy one of two effective date requirements provided for in Act Section 201(b). Guidance is requested as to when bonds are considered "issued" as it pertains to the effective date clause that applies to buildings that do not receive an allocation under Section 42(h)(1)(A), but are eligible for tax credits under Section 42(h)(4). The ways in

which the IRS interprets the Act can provide crucial certainty to the LIHTC community and the attached comment letter outlines the Working Group's interpretations and recommendations.

3. 30-Year Alternative Depreciation System (ADS). Also included in the Consolidated Appropriations Act of 2021 was a provision that provides that real property trades or businesses that elect out of interest limitation should use a 30-year Alternative Depreciation System (ADS) for residential rental property placed in service before Jan. 1, 2018 rather than 40-year ADS. Similar to when legislation was passed changing the depreciation life for qualified improvement property, we request that guidance be issued on implementing the change from 40-year to 30-year ADS for entities that made the election above.

4. Form 8609 – Claiming LIHTCs. The LIHTC Working Group provided a recommendation that would accurately align the instructions of Forms 8609 and 8609-A and the IRS Section 42 Audit Technique Guide, as well as allow affordable housing partnerships to timely claim LIHTCs in line with congressional intent. We ask that the instructions to Form 8609-A be updated to allow for taxpayers to claim LIHTC due to reasonable cause, and answering "no" to question C on Form 8609-A should not prohibit a taxpayer from completing the remainder of the form.

We appreciate the opportunity to comment on the 2021-2022 Priority Guidance Plan. The furtherance of these issues will help the LIHTC program better provide affordable housing in our communities by providing clarification and lessening the risks in the LIHTC program compliance.

Thank you in advance for your time and careful consideration of these issues. Please do not hesitate to contact us at dirk.wallace@novoco.com or (330) 365-5364 if you have any questions regarding our comments or if we can be of further assistance.

THE LIHTC WORKING GROUP
Very truly yours,
NOVOGRADAC & COMPANY LLP

by Dirk A. Wallace

Dirk A. Wallace, Partner

Attachments – LIHTC Working Group Comment Letters:

Low-Income Housing Credit Average Income Test Regulations Proposed Treasury Regulation Section 1.42-19, December 2020

4% LIHTC minimum rate established in the Consolidated Appropriations Act of 2021, February 2021

Proposed Collection; Comment Request for Forms 8609 and 8609A – Notice 85 FR 75046, January 2021

December 29, 2020

Dillon Taylor
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: REG-104591-18, Section 42, Low-Income Housing Credit Average Income Test Regulations
Proposed Treasury Regulation Section 1.42-19 (Guidance)

Dear Mr. Taylor:

We are writing this letter on behalf of the LIHTC Working Group. The members of the Working Group are low-income housing tax credit (LIHTC) professionals who work together to help resolve technical LIHTC program issues and provide recommendations to make the program even more efficient in delivering benefits to help build affordable housing. Our group includes nonprofit and for-profit developers, syndicators, investors, accountants and lawyers.

We appreciate this opportunity to respond to the proposed Treasury regulations and how these regulations, as currently drafted, would interact/conflict with other federal housing programs. We also are alerting the Internal Revenue Service (IRS) to potential consequences it may not foresee.

I. Not Allowing Designation Changes

Agencies and Owners

Other than being done by the taxpayer, Internal Revenue Code (IRC) Section 42 is silent on designations. Therefore, since Congress enacted the average-income set-aside 34 months ago, LIHTC allocating agencies have adopted logical interpretations for their jurisdictions. The approaches are tailored to their specific circumstances, including decades of experience underwriting and monitoring units targeted to multiple area median gross income (AMGI) levels (from qualified allocation plan criteria).

Owners relied on these policies, most of which allow designation changes in various circumstances. The ability to do so was a crucial aspect of the decision to elect average income.

The Guidance imposition of a permanent prohibition on all flexibility is not in keeping with long-standing practices of:

- federal and state partnership in administering the LIHTC, and
- no ex post facto limitations on taxpayers' reasonable actions.

Legal Impossibilities

The rigidity of the Guidance causes the owner to choose between following the average income guidance or possibly violating other federal housing program laws. For example, assume fair housing mandates allow a 68% AMGI household to move from a third-floor unit to the first floor due to a mobility impairment, yet the only units available are designated at 60% or less. There are many other similarly impossible scenarios.

Conflicts between authorities occur. However, knowingly creating a conflict with other federal housing programs should be avoided, especially when a reasonable alternative exists. The IRS can avoid such an outcome by authorizing agencies to determine when a designation change is appropriate, as is the existing practice.

Conflicts with Other Federal Housing Programs
The proposed rule will create significant challenges for properties that are financed with other federal subsidies. Nearly every other major federal housing program has statutory or programmatic rules that require the floating of unit designations to some degree, including Section 8, the HOME Investment Partnerships (HOME) program, the National Housing Trust Fund, Rural Development, and tax-exempt bonds. Fixing the designations would not work with these programs. According to National Council of State Housing Finance Agencies 2019 Factbook, only 12.8% of LIHTC units financed did not also have federal funding sources. This percentage is relatively consistent year over year. Federal guidance should reduce barriers to affordable housing.

Conflict with Existing LIHTC Guidance
Under Treasury Regulation (Treas. Reg.) Section 1.42-15(d), when a current resident moves to a different unit within the building, the newly occupied unit adopts the status of the vacated unit. A similar rule applies under Revenue Ruling 2004-82, when a household whose income is no greater that 140% of the applicable AMGI limitation transfers to a different unit with in the same project. The prohibition against changing a unit's designation would eliminate the taxpayer's ability to operate in a manner consistent with the existing minimum set-asides.

II. Average Income Minimum Set-Aside

Section 42
To qualify as a LIHTC project, an owner must provide a minimum number of low-income units. Effectively, the minimum set-aside is a threshold test. If an owner fails to provide at least the required number of *low-income* units, the project does not qualify under the IRC.

The crucial question is how this test works in the average-income context. A first step is to understand Congress redefined low-income to range from 20% to 80% of AMGI (not coincidentally, the Department of Housing and Urban Development uses the term "low-income" for 80%).

IRC Section 42(g)(1)(C)(i) is clear. Just like with the other two minimum set-aside tests, at least a certain percent of a project's residential units must qualify. The difference among the three are the AMGI levels which count as low-income. For example, if an owner elects 20% at 50%, a household at 55% AMGI is over income.

With average income, 40% of units must be

> both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer *with respect to the respective unit*.

(emphasis added) The AMGI necessary to qualify is each of the units' designations within the range from 20% to 80%.

In other words, so long as four out of 10 units comply with their designations, whatever they may be, the project complies with the minimum set-aside. In this way, average income operates the same as the other two tests: a certain percent of units must qualify at particular AMGI levels.

IRC Section 42(g)(1)(C)(ii) does not stand apart, creating its own distinct requirements. Rather it is "For the purpose of clause (i)." Each statement applies in discrete ways:

- (I) says the taxpayer designates the imputed limitation of each unit;
- under (II), "the average of the income limitations *designated under (I)* shall not exceed" 60% (emphasis added).

Clause (ii)(II) expressly and specifically governs (ii)(I), nothing else. No words apply it in other ways. The average is only of the designations themselves. The IRC does not anticipate, let alone require, ever recomputing the average. Furthermore, nothing in (g)(1)(C) contemplates a unit losing its designation for any reason.

Noncompliance is relevant when claiming LIHTCs and assessing whether at least 40% of a project's units are qualified as low-income, just as happens with the other two minimum set-asides. After excluding any noncompliant units, if 40% are qualified, the minimum set-aside test has been satisfied.

Incorrect Interpretation in the Guidance

The preamble is correct that the IRC does not indicate any intent to create "a stark disparity between the average income set-aside and the existing 20–50 and 40–60 set asides." Despite this understanding, the Guidance being proposed would create that exact outcome.

The problems start with not following the IRC with regard to the required average:

- "the income limitations designated under (I) shall not exceed" versus
- "the imputed income limitations of the low-income units in the project does not exceed."

The former is from IRC Section 42(g)(1)(C)(ii)(II), whereas the latter is in Treas. Reg. 1.42.19(a)(3).

By altering the statutory clause from which the concept originates, and ignoring its surrounding context, the Guidance is proposing to add another test not contemplated or created by Congress. In effect the mandate would be 100% compliance to meet the minimum set-aside, when only 40% is necessary.

Although unstated in the Guidance, presumably units' designations *do count* toward the average before being initially qualified (necessary to conduct lease-up). Yet the designations supposedly *do not count* after a unit stops being "low-income" because of noncompliance. The proposed interpretation seems internally inconsistent.

Practical Realities and Legal Consequences

A fundamental premise of the Guidance is finding noncompliance within 60 days. Indeed, it's how the IRS attempts to resolve the clear relative disadvantages faced by average income under their approach (noted in the preamble).

The unfortunate reality is discovery of an error often occurs more than a year later. In the case of the original two minimum set-asides, this prospect creates a project-wide concern only if the noncompliance is very widespread. By contrast, under the proposed regulation, a single unit being out of compliance could prevent the taxpayer from claiming any LIHTCs.

Even extending the period to mitigate is not a solution in all cases. As such, the preamble's notion of resolving the disparity will not happen.

In the meantime, equity providers are insisting on the designations averaging less than 60% as a buffer against failing the minimum set-aside. The result is projects being less financially feasible than if the taxpayer had elected 40% at 60% AMGI instead. This difference between the two elections is yet another demonstration of how the Guidance cannot reflect Congressional intent.

The key to avoiding such disproportionate penalties and effects is adopting the interpretation in this letter. Another benefit is avoiding the need for complex schemes like removed units. Most importantly, it follows the Code.

<u>III. Mitigation</u>

Concerns with Proposed Action

As stated above, so long 40% of the units in the project are low-income, in no case should the minimum set-aside be considered failed. While the idea of mitigating action appears reasonable in theory, it would be impractical in practice

The following example demonstrates why. At the close of the first year of the compliance period, the owner designations units in the manner below, creating a project average of 58%.

A- 70%	F- 30%
B- 60%	G- 50%
C- 70%	H- 60%
D- 80%	I- 60%
E- 30%	J- 70%

In year 5 the agency discovers that the income for the household in unit E, who moved into the project in the first year, was miscalculated and the household was not income eligible at the 30% designation.

A- 70%	F- 30%
B- 60%	G- 50%
C- 70%	H- 60%
D- 80%	I- 60%
~~E- 30%~~	J- 70%

Without the 30% designation associated with unit E, the project average is 61.11% and project fails to be a qualified low-income housing project.

The proposed regulations provide for mitigating actions; in this example, Unit J is removed and the project average is now 60%. Unit E remains designated at 40% and unit J remains designated at 70%.

Yet by removing unit E from the project average (under the guidance), the project fails first-year minimum set-aside requirement at the close of the first taxable year. The noncompliance cannot be corrected and the owner is prohibited from ever claiming LIHTCs.

Based on the preamble, the mitigating action is provided for *because there is no indication that the statute intended such a stark disparity between the average-income set-aside and the existing 20-50 and 40-60 set asides*. However, neither the existing 20-50 and 40-60 set asides have this type of stark consequence to noncompliance.

Relying on Unit Designations

In the absence of egregious noncompliance, the taxpayer should be able to reply on the unit's designations. The guidance could define egregious noncompliance as violation of the vacant unit rule under Treas. Reg. Section 1.42-5(c)(1)(ix) or not available to the general public under Treas. Reg. Section 1.42-9.

The ability of the IRS to reasonably rely on a taxpayer's due diligence exists in the application of the available-unit rule as it relates to 100% LIHTC projects. If a unit in a 100% LIHTC project is leased to a nonqualified household, the unit ceases to be a low-income unit and does not qualify for credit. But, for purposes of the available-unit rule, all other households are treated as initially income qualified households, as long as the taxpayer can demonstrate due diligence when completing the initial income certification. In other words, unit noncompliance alone is not a violation of the available-unit rule as the presumption is that the noncompliance was not egregious in nature.

With regard to recalculating the average of designations, the final guidance could distinguish between violating the vacant unit rule or general public use and other forms of noncompliance.

Alternative Mitigating Action

1. Allow the taxpayer to redesignate the imputed income limitation of a low-income unit to restore the 60% project average. In the example above where unit E is occupied by a household with an income greater that 30% but less than 40%, the taxpayer could redesignate unit E to a 40% unit, resulting in a 59% project average, thus meeting the requirement.

2. Until such time that an event of noncompliance is identified, the taxpayer must be able to rely on the unit's designation as compliant. For the taxable year in which the event is known, the taxpayer can take the mitigating action.

   In the above example, the event became known in Year 5. The date of noncompliance is in Year 1, when the household moved into the project. Assuming the event is corrected in Year 6, unit E would be subject to recapture for all accelerated credits since Year 1 and disallowance of annual credit in Year 5. Unit J would be removed for purposes of meeting the project average in Year 5, resulting in its disallowance of the LIHC in Year 5. Because of not being egregious noncompliance (vacant unit rule or general public use), the taxpayer can rely on the unit's designations to evidence that the project average was satisfied in Years 1, 2, 3 and 4; no further mitigating action is required.

Either approach would both allow the minimum set-aside to function as the current 20-50 or 40-60 tests, while accommodating for the effect of unit noncompliance on the project average.

Opting Out

If the proposed regulations are adopted as is, the final regulation must give taxpayers an opportunity to change what was otherwise an irrevocable election. The allowance would include a transition period to convert units from their existing designations to 60% or 50% AMGI upon turnover. Third-party beneficiary rights to enforce recorded extended-use commitments would be a limiting factor, but those provisions do not carry the threat of ending all LIHTCs.

IV. Conclusion

If at the close of a taxable year of the compliance period, 40% of the units are occupied with households that meet the units' designations, the project meets the minimum set-aside test. The punitive nature of how unit noncompliance can impact the minimum set-aside creates the unintended stark difference between the existing minimum set-asides.

Thank you in advance for your time and careful consideration of these issues. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

THE LIHTC WORKING GROUP

Very truly yours,
NOVOGRADAC & COMPANY LLP

by: Dirk A. Wallace, Partner

by: Mark H. Shelburne

cc: Nicole Cimino, Michael Novey

February 11, 2021

Mr. James Holmes
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: 4% LIHTC minimum rate established in the Consolidated Appropriations Act of 2021

Dear Mr. Holmes:

We are writing this letter on behalf of the LIHTC Working Group. The members of the Working Group are low-income housing tax credit (LIHTC) professionals who work together to help resolve technical LIHTC program issues and provide recommendations to make the program even more efficient in delivering benefits to help build affordable rental housing. Our group includes nonprofit and for-profit developers, syndicators, investors, accountants and lawyers.

Introduction

With this letter, the Working Group is asking the Internal Revenue Service (IRS) to provide guidance on the 4% LIHTC minimum rate established in the Consolidated Appropriations Act of 2021 (Act). The minimum rate is available to buildings placed in service after December 31, 2020 that also satisfy one of the following two effective date requirements provided for in Act Section 201(b):

> (1) any building which receives an allocation of housing credit dollar amount after December 31, 2020, and
>
> (2) in the case of any building any portion of which is financed with an obligation described in section 42(h)(4)(A), any such building if any such obligation which so finances such building is issued after December 31, 2020.

The first clause applies to buildings that receive an allocation of tax credits under Section 42(h)(1)(A) from a Credit Allocating Agency from that agency's annual allocation of LIHTC.

The second effective date clause applies to buildings that do not receive an allocation under Section 42(h)(1)(A), but are eligible for tax credits under Section 42(h)(4). The operation of this clause is not entirely clear. The clause provides that if "any portion" of a building is financed by bonds issued after 2020, then it is entitled to the minimum rate. The Act has no materiality threshold or other expectation for the amount. Therefore, buildings financed by bonds issued in both 2020 and 2021 seem to be eligible, regardless of the relative amounts of each.

The area that lacks clarity is when bonds are considered "issued" after December 31, 2020 for purposes of the Act.

For purposes of Section 42, the IRS has long recognized the reality of more than one bond issuance event for a given building. Treas. Reg. § 1.42-8(b)(2) explains how to elect the LIHTC percentage month when bonds are issued on multiple dates:

> If a [building] is financed with tax-exempt bonds issued in more than one month, the taxpayer may elect the appropriate percentage for any month in which the bonds are issued. Once the election is made, the appropriate percentage elected applies for the building even if all bonds are not issued in that month.

We note that an analogous situation occurred during implementation of the Tax Credit Assistance Program (TCAP) created under the American Recovery and Reinvestment Act of 2009 (ARRA). The law limited eligible properties to those with LIHTCs from certain calendar years.

The significance of the determination as to when bonds are considered "issued" presents itself in two ways:

1. buildings benefiting from an allocation of bond volume authority to an issuer in 2020, where the issuer issues at least some of the bonds in 2021, or later years (draw-down bonds), and

2. buildings benefiting from bonds allocated and issued in 2020 as well as bonds allocated and issued in 2021, or later years.

Draw-down Bonds

With draw-down bonds an issuer only issues a portion of the bonds in 2020, and issues the balance in 2021 or later. The borrower only receives the proceeds of the bonds as the bonds are issued.

Under IRS Notice 2010-81, each draw is treated as a separate issue:

> In the particular case of a "draw-down" loan under § 1.150-1(c)(4)(i) or a commercial paper program under § 1.150-1(c)(4)(ii), in which a bond is issued as a draw or as commercial paper at different times and interest begins to accrue on each draw or commercial paper when it is funded, each draw or commercial paper constitutes a separate bond that is issued on the issue date of that draw or commercial paper when the issuer receives the purchase price, and interest begins to accrue, on that draw or commercial paper for Federal income tax purposes.

We are requesting guidance that the interpretation of "issued" above also applies to draw-down bonds with draws occurring after 2020.

Subsequent Allocations

Some housing developments receive tax-exempt bond volume in more than one calendar year. When this happens there are multiple allocations and issuance events.

Presumably Congress was aware of this provision when drafting the effective date language and did not include any restrictions on properties with issuance events in both 2020 and 2021. In our opinion, the reference in Section 201(b)(2) to "any such obligation which so finances such building after December 31, 2020 supports this interpretation. (emphasis added)

Like with tax-exempt bonds, properties can be allocated LIHTC more than once. In this instance, the federal government provided guidance for properties that received an allocation in the year before and after those designated in ARRA: agencies could deliberately create TCAP eligibility by allocating a "nominal amount" from the required year (see "TCAP Question and Answer" #1; May 4, 2009).

Not only was the property qualified for TCAP due to a very small second LIHTC allocation, the agency could act with the specific intent of providing the assistance. Federal administrators never defined "nominal," but the term still served as a check on agencies' and owners' decisions.

Nevertheless, LIHTC professionals are concerned about an IRS auditor determining that a subsequent issuance in 2021 would not qualify a building for the minimum rate. We are requesting guidance affirming the IRS understands that a nominal allocation is sufficient.

Consequence

Many developments with tax-exempt bond financing and LIHTCs are underway despite facing serious challenges from the pandemic. These challenges include construction stoppages, material and labor shortages, and lease-up delays, which cause increases in costs and reductions in sources. Qualifying for the 4% minimum rate generates more LIHTCs, which leads to more tax credit equity. The resulting additional equity can make a substantial difference in a development's feasibility.

We note that under Section 42(m)(2)(D), a project is only entitled to LIHTCs to extent needed for financial feasibility. As such, a building is only entitled to LIHTCs to extent the governmental unit which issued the bonds, or, often, the LIHTC agency, approves the LIHTCs as necessary for financial feasibility of the property.

Conclusion

We understand there are different perspectives on legislative intent. However what Congress meant to do is a consideration only when those responsible for interpretations are unable to discern the law's meaning. In the matter at hand, the IRS can interpret the Act to provide crucial certainty to the LIHTC community.

Thank you in advance for your time and careful consideration of these issues. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

THE LIHTC WORKING GROUP

Very truly yours,
NOVOGRADAC & COMPANY LLP

Michael J Novogradac

by: Michael J. Novogradac, Managing Partner

Dirk A. Wallace

Dirk A. Wallace, Partner

CC: Dillon Taylor

January 25, 2021

Kinna Brewington
Internal Revenue Service
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Washington, DC 20224

Re: Proposed Collection; Comment Request for Forms 8609 and 8609A – Notice 85 FR 75046

We are writing this letter on behalf of the LIHTC Working Group. The members of the Working Group are low-income housing tax credit (LIHTC) professionals who work together to help resolve technical LIHTC program issues and provide recommendations to make the program even more efficient in delivering benefits to help build affordable housing. Our group includes nonprofit and for-profit developers, syndicators, investors, accountants and lawyers.

We appreciate this opportunity to respond to the annual request for comments on Forms 8609 and 8609A. The recommendations proposed below, would accurately align the instructions of Forms 8609 and 8609-A and the IRS Section 42 Audit Technique Guide, as well as allow affordable housing partnerships to timely claim LIHTCs in line with congressional intent.

Form 8609-A

According to Internal Revenue Service instructions to Form 8609-A, owners of affordable housing developments should not report LIHTCs on returns filed with the IRS until they receive IRS Form 8609 Low-Income Housing Credit Allocation and Certification (8609) from the Authorized Housing Credit Agency Official (Agency). As such, a delay in receipt of 8609s from an Agency delays the reporting of LIHTCs on returns filed for the year buildings are completed and occupied by qualified tenants. Due to recent statutory changes which no longer allow partnerships to amend tax returns back to the underlying tax year, the importance of the issue has increased significantly.

Partners in a LIHTC property contribute capital in exchange for the right to receive LIHTC and other tax benefits. The partners negotiate adjustments to capital contributed based on the timing of the tax benefits. A delay in the delivery of the LIHTC is likely to cause a reduction in the total amount of capital that the investor contributes. The adjuster provisions are usually based on a present value or internal rate of return analysis. The shortfall in sources may threaten the development's viability and ultimately impact the number of affordable homes that can be provided to low-income households.

Form 8609-A Annual Statement for Low-Income Housing Credit (8609-A) is filed with the owner's tax return for each year during the 15-year compliance period. This form contains several questions in addition to the calculation of the Housing Credits that can be awarded for the development. Question C asks "Do you have in your records the original Form 8609 (or copy thereof) signed and issued by the housing credit agency for the building in A? If "No" see instructions and stop here – do not go to Part II". The implication is that the owner should not claim Housing Credits. The instructions confirm that these requirements apply to tax exempt bond financed projects. The instructions also state that "any building owner claiming a credit without receiving a completed Form 8609 that is signed and dated by an authorized official of the housing credit agency and submitting the completed Form 8609 (Part I and Part II) to the IRS is subject to having the credit disallowed." This language suggests that Housing Credits are "subject to" disallowance, but does not overtly state the credits "will be" disallowed if an 8609 has not been received at the time the tax return is filed.

The fact that there is not a statement that credits "will" be disallowed likely stems from Section 42(l)(1) which states that if credits are claimed without the taxpayer providing a statement as to date of placement in service, eligible basis and some other items (all of which normally would be on the 8609), then credit will not be allowable unless the failure to provide the required certification is due to reasonable cause rather than willful neglect.

This approach is consistent with the IRS Audit Technique Guide for the Low-Income Housing Credit which provides that "Any building owner claiming a credit without receiving a completed Form 8609 that is signed and dated by an authorized official of the housing credit agency is subject to having the credit disallowed."

In evaluating taxpayer compliance, the audit guide also reviews the terms reasonable cause and willful neglect which is consistent with Section 42(l)(1).

Also worth noting, Chief Counsel Advice 200137044 provides that:

> "Q3. If a taxpayer has claimed IRC §42 credits for any year prior to the issuance of the Form 8609, can all credits claimed prior to the issuance of the Form 8609 be disallowed?"
>
> "A3. Under certain circumstances, if a taxpayer claimed IRC §42 credits for a year prior to issuance of the Form 8609 by the applicable allocating authority, all credits claimed prior to issuance of the Form 8609 can be disallowed."

The implication of this CCA is that credits "can be" disallowed "under certain circumstances", as opposed to "will be" disallowed "under all circumstances". Again, this is consistent with 42(l)(1).

Recommendation

The instructions to Form 8609-A should be updated to allow for taxpayers to claim LIHTC due to reasonable cause and answering "no" to question C on Form 8609-A should not prohibit a taxpayer from completing the remainder of the form.

Thank you in advance for your time and careful consideration of these issues. Please do not hesitate to contact us at Dirk.Wallace@novoco.com or (330) 365-5400, if you have any questions regarding our comments or if we can be of further assistance.

THE LIHTC WORKING GROUP

Very truly yours,
NOVOGRADAC & COMPANY LLP

by: Dirk A. Wallace, Partner