June 3, 2022

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2022-21)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Notice 2022-21, 2022-2023 Public Comment Invited on Recommendations for 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 2022-21, requesting suggestions for items to include on the Internal Revenue Service's (Service or IRS) 2022 – 2023 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.

On behalf of the members of the LIHTC Working Group, we would like to recommend the following issues in priority order for addition to the Priority Guidance Plan for 2022-2023:

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 comment letter submitted December 2020 (attached) 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:

   - Concerns relating to interpretation of the Minimum Set-Aside election;
   - Unit Designation changes; and,
   - 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. We ask that the IRS prioritize the provision of further clarification of the Guidance.

2. Form 8609 – Claiming LIHTCs. In the attached January 2021 comment letter, 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.

3. COVID-19 Relief. Since the onset of the COVID-19 pandemic, the LIHTC Working Group has engaged both the IRS and Treasury on the need for relief from certain deadlines for LIHTC properties. The challenges for real estate development and operations resulting from the COVID-19 pandemic are well documented and these circumstances are particularly problematic for LIHTC developments. On Jan. 11, the IRS issued Notice 2022-05 providing new and extended relief for various LIHTC requirements addressed in Notice 2021-12. Like the previous guidance, this iteration is a mix of

helpful allowances and provisions and the extensions granted under the notice undoubtedly helped many LIHTC property owners and agencies through the difficult times they faced as a result of the pandemic. Still, since the most recent notice was released earlier this year, the near historic increases in inflation seen in the past few months, continued pandemic-related supply chain issues and other factors threaten to delay project completions making it difficult to for projects to meet 10% Test deadlines and placement in service deadlines. The LIHTC Working Group will continue to monitor these issues to determine whether additional COVID-19-related relief is necessary and what form that relief will take. We ask that the IRS continue to include COVID-19-related relief as a priority.

4. Casualty Loss Deadlines. We are requesting guidance regarding LIHTC properties that suffer a casualty loss in an area that is not a federally declared disaster area. Chief Counsel Advice 200912012 provides that if a building is damaged by a casualty loss and fully restored and rented to low-income tenants within the same taxable year, then there is no recapture and no loss of tax credits. However, if the building is not restored by the end of the taxable year, no credit would be allowed for the entire taxable year, even if the reasonable restoration period of 24 months (as defined in Revenue Procedure 2007-54) extends into the next taxable year. We recommend that casualty loss relief for a LIHTC property not located in a federally declared disaster area be applied in a manner similar to the relief offered by Revenue Procedure 2007-54, which allows for a LIHTC property in a federally declared disaster area to continue claiming tax credits, even if its units are not suitable for occupancy as long as the units are restored within a "reasonable period of time," which is defined as a period of time that cannot exceed 24 months. We request formal guidance on this matter.

   For further discussion, we reference our comments submitted to the IRS on March 28, 2014 with respect to the draft "Audit Technique Guide Section 42, Low-Income Housing Credit," attached to this letter.

5. Relocation Costs, Audit Technique Guide. The LIHTC Working Group previously requested clarification in a 2015 comment letter around the treatment of relocation costs in the Audit Technique Guide, Section 42, Low-Income Housing Credit. Since that time, the IRS finalized the Audit Technique Guide in 2015, providing guidance that the cost of relocating tenants in properties not demolished is expensed as ordinary business income and thus deductible. There were, and remain, however, contradictory language in the Internal Revenue Code (IRC). Under Section 280B of the IRC, the costs of relocating tenants out of an acquired building that will be demolished may be associated with the demolition and, if so, are capitalized to the land. Such IRS guidance corresponds to Revenue Ruling 70-473, which states that relocation allowances required to be paid to the owner-occupants and tenants of the dwellings to be razed in connection with an urban renewal program were considered additional costs of the land that are to be capitalized and are not deductible as ordinary and necessary business expenses under IRC section 162(a).

   The Affordable Housing Credit Improvement Act, S.1136/H.R.2573, which is comprehensive legislation that would make numerous modifications to the Housing Credit program, includes clarifying language in Section 303 that would allow relocation costs to be treated like similar costs. Tenant relocation costs incurred in connection with the rehabilitation of a building would be allowed to be capitalized as part of the cost of the rehabilitation.

   The LIHTC Working Group is requesting the IRS examine the contradictory treatment of relocation costs and allow costs to relocate tenants from a building incurred solely by reason to rehabilitate the building should be capitalized as an indirect cost to the building under IRC section 263A, and thus be includible in eligible basis under IRC section 42.

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

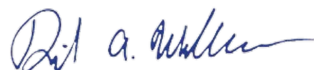
clarification and lessening the risks in the LIHTC program compliance.

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, Partner

Attachments – LIHTC Working Group Comment Letters:

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

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

Request for Relief from Various Low-Income Housing Tax Credit (LIHTC) Requirements due to the COVID-19 Pandemic, May 2020

Audit Technique Guide, Section 42, Low-Income Housing Credit – Relocation Costs, February 2015

Audit Technique Guide, Section 42, Low-Income Housing Credit, March 2014 (exhibits can be viewed online https://www.novoco.com/resource-centers/affordable-housing-resource-center/working-group/lihtc-working-group/lihtc-working-group-letter-internal-revenue-service-section-42-audit-technique-guide-march-28-2014)

January 25, 2021

Kinna Brewington
Internal Revenue Service
Room 6526
1111 Constitution Avenue, NW
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

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.

III. Mitigation

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.

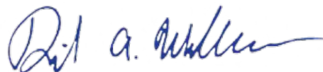
IV. Conclusion

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

May 5, 2020

Ms. Nicole Cimino
Branch Chief
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Michael Novey
Associate Tax Legislative Counsel
Office of Tax Policy
U.S. Department of the Treasury
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Washington, DC 20220

Re: Request for Relief from Various Low-Income Housing Tax Credit (LIHTC) Requirements due to the COVID-19 Pandemic

Dear Ms. Cimino and Mr. Novey:

We are writing this letter on behalf of the LIHTC Working Group. The members of the working group are participants in the low-income housing tax credit (LIHTC) industry 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.

The challenges for real estate development and operations resulting from the COVID-19 pandemic are well documented. These circumstances are particularly problematic for LIHTC developments. Therefore, the working group urges the Internal Revenue Service (IRS) and the U. S. Department of the Treasury (Treasury) to issue guidance providing the relief enumerated below as soon as possible.

1. Provide a 12-month extension of the 10% Test deadline for carryover allocations as required by Internal Revenue Code (IRC) Section 42(h)(1)(E)(ii) and IRS regulation 1.42-6.

2. Provide a nationwide 12-month extension to the normal 24-month period to meet the minimum rehabilitation expenditure deadline required by IRC Section 42(e)(3) and IRC Section 42(e)(4) for rehabilitation expenditures placed in service in taxable years ending in 2020-2022.

3. Provide a 12-month extension of the placed in service deadline as required in IRC Section 42(h)(1)(E)(i).

4. Provide at minimum, a 12-month extension of the 25-month rehabilitation period currently allowed under IRS Revenue Procedures 2014-49 and 2014-50 to properties that suffered a casualty loss due to a presidentially declared major disaster in the 25-month period prior to the onset of COVID-19.

5. Provide a 12-month extension of the year-end deadline for property restoration for any property that suffers a casualty loss, regardless of the cause.

6. Provide a 12-month moratorium on both physical inspections and tenant file reviews as required by IRS regulation 1.42-5. LIHTC allocating agencies (Agencies) should continue to monitor emergency work orders during this time, and should be allowed to continue or resume inspections depending on their assessment of the situation in their state and their ability to do so, but there should be no penalty for states or owners if inspections are not completed during this time.

7. Provide a 12-month moratorium on tenant income recertification requirements. Agencies should be allowed to continue or resume requiring property managers to conduct recertifications, depending on their assessment of the situation in their state and their ability to do so.

8. Provide a 12-month extension for all open noncompliance corrective action periods.

9. Suspend the implementation of IRS regulation 1.42-5, which will increase the number of required compliance monitoring physical inspections even further than required under current regulations and exacerbate the inspection backlog.

10. Provide guidance clarifying that the temporary closure of property amenities and common space facilities during the duration of the crisis (with the exception of laundry facilities) will not negatively impact a property's eligible basis and result in loss of LIHTCs.

11. Amend the instructions to Form 8609-A to allow taxpayers to claim LIHTCs without a Form 8096-A executed by an Agency if due to reasonable cause and not due to willful neglect. The problem addressed by this action predated the declaration, but the COVID-19 emergency has made it substantially worse.

Conclusion

We acknowledge that some of what we are requesting may be available to certain properties under Revenue Procedures 2014-49 and 2014-50. However, we also believe that these procedures are inadequate to fully address the situation at hand. Additionally, the relief requires action by Agencies. Although these entities have been impressively responsive, they are overtaxed.

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

NOVOGRADAC & COMPANY LLP
CERTIFIED PUBLIC ACCOUNTANTS

February 6, 2015

Paul F. Handleman, Esq.
Chief, Branch 5, CC: PSI
IRS Office of Chief Counsel
1111Constitution Ave. NW
Rom 5111
Washington, DC 20224

RE: Audit Technique Guide, Section 42, Low-Income Housing Credit – Relocation Costs

Dear Mr. Handleman:

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. On behalf of the members of the LIHTC Working Group, we are requesting further guidance on tenant relocation costs as discussed in Appendix C of the Audit Technique Guide, Section 42, Low-Income Housing Credit (the "Guide") released in September 2014.

In general, eligible basis for LIHTC projects is the cost of new construction, acquisition of existing property and the costs of any improvements to that property.[1] In determining costs, eligible basis generally equals the adjusted basis of the property, with some exceptions.[2] In many rehabilitation projects, where an occupied building is being acquired and rehabilitated under the LIHTC program, all or a portion of the units need to be vacated in order to complete the rehabilitation of the building. The project owner may be required to pay existing tenants a to-be-determined sum as compensation for their forced relocations and/or incur third-party costs and fees to relocate tenants during the rehabilitation of the building. This raises the issue of how relocation costs should be treated for eligible basis purposes.

The Guide's current position on tenant relocation costs when a structure is demolished is as follows:

> *IRC §280B states that in the case of the demolition of any structure, no deduction is allowed to the owner or lessee of such structure for any amount expended for the demolition, or any loss sustained on account of the demolition. The costs should be added to the capital account for the land on which the demolished structure was located. Therefore, these costs are excluded from eligible basis. The <u>costs of relocating tenants</u>*

[1] Joint Committee Report on the LIHTC, page 157

[2] IRC Section 42(d)(1) and 42(2)(A)(i)

> *out of an acquired building that will be demolished may be associated with the demolition and, if so, are capitalized to the land.*[3]

IRS guidance corresponds to the position taken in the Guide, which states in Revenue Ruling 70-473, relocation allowances required to be paid to the owner-occupants and tenants of the dwellings to be razed in connection with an urban renewal program were considered additional costs of the land that are to be capitalized and are not deductible as ordinary and necessary business expenses under section 162(a) of the Internal Revenue Code Section ("IRC").[4]

Furthermore, the Guide's current position on tenant relocation costs when a structure is not demolished is as follows:

> ***Cost Incurred to Permanently Relocate Nonqualifying Tenants:*** *A determination may be made that an existing tenant is not a qualified low-income household. In which case, the taxpayer may decide to move the tenant out of the unit permanently. In some cases, the taxpayer may rehabilitate the vacant unit. The costs attributable to moving out the tenant permanently (e.g.; legal costs, tenant moving expenses, and compensation paid to the tenant) are expensed as an ordinary and necessary business expense under IRC §162, even if the vacated unit is rehabilitated.*
>
> ***Costs Incurred to Temporarily Relocate Qualifying Tenants During the Rehabilitation:*** *A determination may be made that an existing tenant is a qualified low-income household. In which case, the taxpayer will move the tenant and provide temporary housing while the tenant's unit is being rehabilitated. The temporary housing may be another unit within the project or off-site. The tenant is expected to occupy the rehabilitated unit after the rehabilitation is completed. The costs attributable to moving the tenant and providing temporary housing for the tenant during the rehabilitation (e.g.; legal costs, tenant moving expenses, costs for temporarily storing a tenant's property, and temporary housing costs) are expensed as ordinary and necessary business expenses under IRC §162.*[5]

However, in accordance with Revenue Procedure 95-27, if a modification to an existing building leaves 75% or more of the existing external walls in place as external or internal walls, 75% or more of the existing structural framework is retained in place, and 75% or more of the existing internal structural framework of the building is retained in place, then such a modification would not be treated as a demolition for the purposes of IRC 280B. Since the IRS has ruled that government-mandated payments made to occupants of a to-be-demolished building as compensation for their relocations should be capitalized (albeit in the particular ruling to the basis of the land), it is probable that all or part of the relocation payments would have been

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[3] Audit Technique Guide, Section 42, Low-Income Housing Credit, Appendix C, page C-4 (released September 2014)

[4] Revenue Ruling 70-473

[5] Audit Technique Guide, Section 42, Low-Income Housing Credit, Appendix C, page C-10 (released September 2014)

allocated to a depreciable building rather than to non-depreciable land if the cited ruling had related to a rehabilitation meeting the requirements under the revenue procedure rather than demolition.

In addition, under IRC 263A taxpayers must capitalize all direct and certain indirect costs properly allocable to real property and tangible personal property produced by the taxpayer.[6] Indirect costs are properly allocable to property produced when the costs directly benefit or are incurred by reason of the performance of production.[7] Thus, costs to relocate tenants from a building incurred solely by reason to rehabilitate the building should be capitalized as an indirect cost to the building under IRC 263A.

We request that the IRS re-evaluate the guidance in the Guide addressing the treatment of relocation costs incurred for the rehabilitation of a building under the LIHTC program as various sections in the Guide seem contradictory with one another. Based on the aforementioned, the costs to relocate tenants from a building incurred solely by reason to rehabilitate the building should be capitalized as an indirect cost to the building under IRC 263A, and thus be includible in eligible basis under IRC 42.

We appreciate the opportunity to comment on this issue. The furtherance of this issue will help the LIHTC program better provide affordable housing and help increase the number of jobs 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 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.

THE LIHTC WORKING GROUP

Very truly yours,

NOVOGRADAC & COMPANY LLP

by
Michael J. Novogradac

NOVOGRADAC & COMPANY LLP

by
Stacey Stewart

[6] Regulation Section 1.263A-1(a)(3)(ii)
[7] Regulation Section 1.263A-1(e)(3)(i)(A)

NOVOGRADAC
& COMPANY LLP
CERTIFIED PUBLIC ACCOUNTANTS

March 28, 2014

Internal Revenue Service
Attn: Grace F. Robertson, C2-422
5000 Ellin Road
Lanham, MD 20706

RE: Audit Technique Guide, Section 42, Low-Income Housing Credit

Dear Ms. Robertson:

The LIHTC Working Group was established to provide a platform for low-income housing tax credit ("LIHTC") industry participants from a wide variety of organizations—for-profit and nonprofit developers, investors, syndicators, and other LIHTC professionals—to work together to resolve technical and administrative LIHTC program issues. On behalf of the members of the LIHTC Working Group, we are responding to the draft Audit Technique Guide, Section 42, Low-Income Housing Credit (the "Guide") released on December 19, 2013 with comments due March 28, 2014. Please find below our comments regarding issues in the draft Guide on which we wish to receive clarification or with which we have concerns.

Chapter 4, Page 4-6 – Reasonable Cause

Issue: There are certain instances in which taxpayers receive Forms 8609 after the extended due date of the tax return for the first year of the tax credit period. Taxpayers in this situation who want to claim credits without Forms 8609 should follow the guidance in Chief Counsel Advice ("CCA") Memorandum 200137044 and should also have reasonable cause for the delay.

One of the factors on page 4-6 in the Audit Guide for establishing reasonable cause for delayed Forms 8609 says "How did the taxpayer answer question C on Form 8609-A filed with the tax returns?" This implies that IRS Forms 8609-A should be filed prior to receiving IRS Forms 8609. However, filing Forms 8609-A prior to receiving Forms 8609 would not provide much information to the Service to evaluate the taxpayer's filing position under CCA 200137044 as only the partnership name and employer identification number ("EIN") and building identification number ("BIN") is required when the taxpayer answers "No" to question C about receiving Forms 8609.

Solution: We recommend that in lieu of filing Forms 8609-A prior to Forms 8609 being available, the Service should require a statement by a taxpayer providing information such as why the Forms 8609 are delayed, when the taxpayer expects to receive the Forms 8609, and has the taxpayer:

1. received a binding reservation from the state housing agency,
2. followed IRS guidelines in placing the property in service, and

3. satisfied the state housing agency requirements to receive Forms 8609.

In addition, the taxpayer should provide a tax credit schedule in lieu of Forms 8609 with the following information for each building.

- BIN
- Placed in service date
- Eligible basis per building
- Adjusted eligible basis per building for qualified census tract ("QCT") and difficult development area ("DDA") or state agency adjustment
- Application fraction
- Credit percentage
- Tax credits
- Application fraction at close of first year of credit period
- Qualified basis at close of first year of credit period
- Elect 40/60 or 20/50 or 25/60 for minimum set-aside
- Yes, No, or N/A for the following:
    - Are you treating this building as part of a multiple building project for purposes of Internal Revenue Code ("IRC") Section 42?
    - Elect to reduce eligible basis under IRC Section 42(i)(2)(B)?
    - Elect to reduce eligible basis by disproportionate costs of non-low-income units?
    - Elect to begin credit period the first year after the building is placed in service?
    - Elect not to treat large partnership as taxpayer?
    - Elect deep-rent-skewed project?

Chapter 5, Page 5-2 – Tenant Protections and Exceptions

Issue: IRC Section 42 "good cause" eviction requirements do not address conflicts with requirements of other affordable housing governmental assistance programs. For example, certain property tax abatement programs are more restrictive than IRC Section 42 and might have no provision for over-income tenants. If a tenant's income rises above 80 percent of area median gross income ("AMGI") as defined by the U.S. Department of Housing and Urban Development ("HUD") then the tenant must be evicted if the project is to continue to receive the tax abatement. However, under the tax credit rules, as long as the tenant is still under 84 percent AMGI (140 percent of the 60 percent income limit), he or she is still considered a low-income tenant if he or she initially qualified the unit. Even if the tenant's income rises above 140 percent of the income limit, IRC Section 42(g)(2)(D)(ii) does not list this, nor tax abatement, as "good cause" for eviction. Therefore, if the property manager or owner evicts the tenant for being over-income due to tax abatement, this might violate the good cause eviction provisions of IRC Section 42.

Solution: As reaffirmed in the LIHTC Working Group letter dated February 27, 2013[1], we recommend that rental properties subject to the program requirements of IRC Section 42 should be held harmless when complying with program requirements of other affordable housing governmental assistance programs that do not violate IRC Section 42 initial occupancy requirements, or rent requirements (except for Section 8 or comparable rental assistance programs).

The U.S. Tax Court ruled in favor of the taxpayer who had evicted IRC Section 42 tenants exceeding the 80 percent AMGI limit required for a property tax abatement, stating that the project in question had been following regulations concerning the determination of low-income individuals, and had in good faith denied renewal of leases to tenants who did not meet these specific qualifications.[2]

In order to fulfill the primary goal of IRC Section 42, namely, the service of the lowest income tenants for the longest period of time, projects must maintain economic feasibility, often through the use of subsidies intended to lessen the economic burden of low-income housing projects. Should projects be forced to sacrifice compliance with the requirements of said subsidies in favor of those outlined in IRC Section 42, they could be subject to lost grants, financial subsidies, deferred payment loans, and additional expenses, which cannot be recoverable from increased rental revenue. Therefore, framed by the requirements of the state property tax abatement, a project's election not to renew leases belonging to over-income tenants in order to maintain compliance with the 80 percent AMGI threshold should constitute "good cause" and is, therefore, not in conflict with IRC Section 42 requirements.

Moreover, permitting a project the choice not to renew leases of over-income individuals is an action consistent with similar federal rules and housing policies as well as the primary goal of IRC Section 42. For example, under HUD's Section 8 program, an owner can evict a tenant if there is "good cause", such as a business or economic reason (e.g., choosing to lease to an individual that is not over-income), as long as there is a 90-day notice provided to the tenant. Furthermore, the U.S. Department of Agriculture's ("USDA") Section 515 rural rental housing program requires that tenants that no longer comply with the income requirements of the program must be notified about vacating a property within 30 days or at the end of their lease, whichever is longer.

We request that the Service issue guidance allowing a project to be held harmless from IRC Section 42 credit recapture for not renewing leases of over-income tenants by virtue of its adherence to the requirements of other affordable housing assistance programs, the requirements of which may be more restrictive and may be in conflict with IRC Section 42's requirements, if such programs provide financial assistance to the project, enabling it to be operationally feasible.

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[1] LIHTC Working Group. Letter to Internal Revenue Service. "Notice 2012-25, Guidance Priority List – Conflicting Affordable Housing Program Requirements." 27 February, 2013. See Exhibit B.

[2] United States Tax Court: El Patio Community Housing Partners, El Patio Gardens Development Company, Tax Matters Partner, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Chapter 6, Page 6-5 – Audit Adjustments

Issue: Neither the statute, regulations, nor legislative history to IRC Section 42 provide the treatment for a failure to maintain the involvement of a qualified nonprofit organization in a project throughout the compliance period under IRC Section 42(h)(5)(B). There is no evidence of Congressional intent to extend negative tax consequences to the taxpayer if there is failure to maintain involvement of a qualified nonprofit organization under IRC Section 45(h)(5)(B). Therefore, there is no basis to disallow credits for a tax year if a taxpayer is found to be out of compliance with the requirements of IRC Section 42(h)(5)(B).

Solution: Until Congressional intent is established for a negative tax consequence related to noncompliance under IRC Section 42(h)(5)(B), we recommend that it is the responsibility of state housing credit agencies to address noncompliance remedies, not the responsibility of the Service. It should be up to the state housing credit agency to enforce the terms of the LIHTC allocation or to seek some other remedial relief for a breach of the terms of the contractual arrangement represented by the allocating document. There should be no disallowance of credits for the tax year if a taxpayer is found to be out of compliance with the requirements of IRC Section 42(h)(5)(B).

Chapter 8, Page 8-19 – Reasonable Developer Fee

Issue: The Service is not compelled to accept a developer fee amount allowed by a state agency, which may raise issues involving the reasonableness of the fee amount.

Solution: We recommend that the Guide clarify that the developer fee limits imposed by state agencies should be considered reasonable, assuming no unusual facts or circumstances. The state agencies review the tax credit applications for financial viability, thus it is reasonable to conclude that the state agencies had diligently looked at the developer fee for reasonableness.

Chapter 8, Page 8-19 – Intent to Pay Deferred Developer Fee

Issue: If a deferred developer fee ("DDF") balance does not bear interest, its payment is subordinate to other debt, or if the general partner is obligated to make a capital contribution to pay the DDF, the Guide considers these terms/conditions may imply that the DDF is not bona fide debt. This conclusion then leads the Service to exclude the deferred portion of the developer fee from IRC Section 42 eligible basis.

Solution: We recommend that the DDF should not be required to bear interest as a prerequisite to ensure its inclusion in IRC Section 42 eligible basis. There is no legislative basis to assert that this fee for services has to bear interest to be an arm's length transaction. IRC Section 483, regarding interest on certain deferred contracts, and IRC Section 1274, regarding the determination of the issue price of certain debt instruments issued for property, do not apply to DDF because these code sections apply to the sales or exchanges of property. DDFs are fees

incurred for services rendered, and are not fees charged for property. Furthermore, IRC Section 467, regarding certain payments for the use of property and services, addresses transactions with deferred or stepped payments of rents, but specifically provides that the Service can issue Treasury Regulations to require that interest be imputed with respect to payments for services. To date, the Service has not issued such regulations, and thus the absence of interest on a DDF does not preclude it from being true debt of a taxpayer. Instead, the emphasis should be on whether a taxpayer has sufficient funds for the unconditional repayment of the DDF, and that the DDF eventually gets paid.

Furthermore, it should be noted that the lack of an interest charge on a loan is not uncommon in the LIHTC industry, particularly with loans that are offered by a municipality (e.g., a city or state government agency) and that are repayable from available project cash flow or as a balloon payment at maturity. Frequently, these types of loans will bear interest at below market rates, or possibly not bear interest at all. Regardless, these loans are still considered arm's length transactions. Transactions exempt from IRC Section 7872 are listed under Treasury Regulation Section 1.7872-5T(b)(5) and include loans subsidized by federal, state, or municipal governments which are made available under a program of general application to the public. The rationale is that these governments are not providing loans at below market rate interest for purposes of tax avoidance. They are providing these loans to serve a public purpose. Treasury Regulation Section 1.7872-5T(a)(2) states that the exceptions to IRC 7872 will not apply if one of the principal purposes of the transaction is the avoidance of federal tax. The intent of charging little to no interest is to provide affordable debt financing in order to make LIHTC projects financially feasible. DDF due to a developer willing to accept a lower interest rate, or no interest rate at all, is operating under the Congressional intent of the LIHTC program: to make financing affordable in order to further the financial feasibility of a LIHTC project.

In LIHTC transactions in which there are multiple layers of debt from conventional bank lenders, HUD, or and/or state and local lenders, it is unlikely that these lenders would allow DDF to be in a senior priority position to such lenders' mortgages. For example, some HUD programs only permit governmental soft loans to be junior. We recommend that the DDF should not be required to be in a seniority priority position as a prerequisite to be included in IRC Section 42 eligible basis.

Lastly, the Guide cites TAM 200044004 in order to conclude that an obligation to make a capital contribution to repay the DDF is evidence that the taxpayer does not intend to pay the DDF. This is in direct conflict with the conclusion that is drawn in TAM 200044004, which uses an example of a general partner of a taxpayer that was obligated to make an additional capital contribution to repay the DDF at its maturity. The Service viewed this fact pattern as a positive indicator the DDF was not contingent. We recommend that the deferred portion of the developer fee not be excluded from IRC Section 42 eligible basis if it can be demonstrated that the DDF will reasonably be expected to be paid from cash flow under reasonable circumstances and assumptions. Furthermore, if unforeseen circumstances do arise that make payment of the DDF from cash flow prohibitive, then the payment of the DDF from a capital contribution made by a general partner should still not preclude the DDF from IRC Section 42 eligible basis as evidenced in the fact pattern presented in TAM 200044004.

Chapter 8, Page 8-27 – Costs of Issuing Tax-Exempt Bonds

Issue: The Guide cites TAM 200043015 to support its conclusion that the costs associated with issuing tax-exempt bonds ("Bond Issuance Costs") cannot be included in eligible basis, even if the same costs can be capitalized under IRC Section 263A. The Guide states that TAM 200043015 provides Congress with the rationale that Bond Issuance Costs are not costs sufficiently associated with providing residential rental housing to satisfy the exempt purpose of the bond offering per IRC Section 142. The Guide concludes that permitting any portion of Bond Issuance Costs under IRC Section 263A for the purposes of inclusion in IRC Section 42 eligible basis would contradict the meaning of residential rental property for the purposes of IRC Section 142, thereby contradicting the statutory and legislative history governing IRC Section 42 that requires that residential rental property have the same meaning for the purposes of both IRC Sections 42 and 142.

Solution: We recommend that the Guide include the amortization deductions of the Bond Issuance Costs during the production period of a residential rental property in eligible basis for the purposes of IRC Section 42. The amortization deductions of Bond Issuance Costs taken under IRC Section 167 are required by IRC Section 263A to be capitalized to the basis of IRC Section 168 property during its production period. CCA 201136022 states that in the case of the construction of a building, a commitment fee, such as bond issuance fees, is incurred for the purpose of ensuring access to the debt proceeds during the production period of the building. The CCA concludes that the amount incurred for a commitment fee creates an asset, the adjusted basis of which is required to be included in production expenditures under Treasury Regulation 1.263A-11. Furthermore, Treasury Regulation 1.42-18 states that the costs that are included in the adjusted basis of depreciable property that is subject to IRC Section 168 are includable in the eligible basis of a low-income housing building under IRC Section 42(d), which is also considered a residential rental property for the purposes of IRC Section 142(d) and Treasury Regulation 1.103-8(b).

The Guide cites the exclusion of Bond Issuance Costs from the "95% Test" as another reason for which Bond Issuance Costs should not be included in IRC Section 42 eligible basis. However, we believe that the role of the 95% Test is being taken out of context. The 95% Test's role is to place restrictions on costs incurred in connection with the issuance of tax-exempt bonds in order to limit the cost of borrowing. This limitation is intended to further the purpose of the tax-exempt bond proceeds, which is to make the development of affordable residential rental property financially feasible. This does not necessarily mean that the Bond Issuance Costs are not directly related to the development of a qualified residential rental property. Furthermore, IRC Section 147(g)(1) specifically states that up to 2% of private activity bond proceeds can be used to pay Bond Issuance Costs, while anything in excess of this ceiling must be paid from other sources, such as equity, and that if such costs were paid this way, they would not be subject to the limitations in IRC Section 142(a) and can be included in IRC Section 42 eligible basis. This conclusion results in a disparate treatment of the Bond Issuance Costs, which is dependent upon the financing source used to pay for the costs. This contradicts the Guide and TAM 200043015's conclusion that all Bond Issuance Costs are ineligible to be paid from bond proceeds and, therefore, should be excluded from IRC Section 42 eligible basis.

Both IRC Sections 42(g)(1) and 142(d)(1) define a project as a residential rental property if at all times during its qualified project period such a project meets the requirements of one of the following elections made by the project owner: 1) if 20% or more of the residential units in such a project are both rent-restricted and occupied by individuals whose income is 50% or less of the area median gross income; or 2) if 40% or more of the residential units in such a project are both rent restricted and occupied by individuals whose income is 60% or less of the area median gross income. The capitalization of Bond Issuance Costs as allowed by IRC Section 263A to the adjusted basis of IRC Section 168 property does not contradict the above definition of a residential rental property in IRC Section 42 or IRC Section 142, as the definition in the IRC emphasizes the required minimum set-aside of low-income units for low-income tenants. IRC Sections 42 and 142 do not refer to the costs included in LIHTC eligible basis as a foundation for the definition of a residential rental property. The exclusion of Bond Issuance Cost amortization during the production period from eligible basis would contradict the definition of eligible basis, which is the cost of residential rental property as defined in IRC Section 103 that is depreciable property under IRC Section 168.

Therefore, to the extent the amortization deductions of the Bond Issuance Costs are allocable under IRC Section 263A to the adjusted basis of IRC Section 168 property that is also a residential rental property, as defined above under both IRC Sections 42(g)(1) and 142(d)(1), the Bond Issuance Cost amortization deductions during the residential rental property's production period would be included in the residential rental property's eligible basis under Section 42(d)(1).

Chapter 9, Page 9-3 – Federally-Assisted or State-Assisted Buildings

Issue: The Guide defines the term "federally-assisted building" as any building substantially assisted, financed or operated under HUD's Section 8 program, Sections 221(d)(3), 221(d)(4), or 236 of the National Housing Act, Section 515 of the Housing Act of 1949, or any other program administered by HUD or by the Rural Housing Service of the Department of Agriculture. The Guide also defines the term "state-assisted building" as any building substantially assisted, financed, or operated under any state law similar in purposes to any of the laws referred to above for federally-assisted buildings. However, the Guide does not clearly define the term "substantially assisted" in either context.

Solution: As reaffirmed in the related LIHTC Working Group letter dated July 14, 2010[3], we recommend that a numerical threshold should be used to determine the definition of substantial. In the IRC, where substantial is referenced, 20% is often used as the threshold, such as in IRC Section 42(e)(3)(A)(ii)(I). Therefore, we recommend that a federally-assisted building should qualify if: i) 20% or more of the building is financed or ii) 20% or more of the units within the building are assisted or operated under HUD's Section 8 program, Sections 221(d)(3), 221(d)(4),

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[3] LIHTC Working Group. Letter to Department of Treasury. "The Housing and Economic Recovery Act of 2008." 14 July, 2010. See Exhibit C.

or 236 of the National Housing Act, Section 515 of the Housing Act of 1949, or any other housing program administered by HUD or by the Rural Housing Service of the Department of Agriculture. Likewise, a state-assisted building should qualify if: i) 20% or more of the building is financed or ii) 20% of the units within the building are assisted or operated under any state law similar in purposes to any of the laws referred to above.

Chapter 12, Page 12-1 to 12-2 - Applicable Fraction Defined

Issue: The applicable fraction is the lesser of the unit fraction or floor space fraction, but floor space isn't clearly defined.

Solution: We recommend that the floor space fraction should be more clearly defined as to whether it includes closets, balconies, storage space, etc.

Chapter 12, Page 12-2 – Special Rule for the First Year of the Credit Period

Issue: The first-year applicable fraction is based on qualified occupancy at the close of each month but the calculation isn't clearly defined as taking the lesser of unit fraction or floor space fraction each month and adding up all those months for the year, or adding up unit fraction and floor space fraction separately for all the months and taking the lesser of the two totals.

Solution: We recommend that the Guide be clearer in stating that in accordance with IRC Section 42(f)(2)(A), the first-year applicable fraction be based on qualified occupancy at the close of each month, and that the calculation for the year should be the sum of the lesser of the monthly unit fractions or the monthly floor space fractions for the entire first year.

Chapter 12, Page 12-3 – Alternative Income Limits

Issue: The Guide states that "rural" is defined in section 520 of the Housing Act of 1949, but does not provide clear guidance on how to implement that definition.

Solution: We recommend the Guide should reference the USDA's definition of rural since it is equivalent to section 520 of the Housing Act of 1949; and provide a link to the USDA web site to assist IRS agents in determining if a property is located in a rural area.

Chapter 12, Page 12-4 – Determining Income Limits After 2008 (NNMI Decrease)

Issue: The Guide does not specify whether a rural low-income housing project that qualifies for national non-metro median income ("NNMI") under IRC Section 42(i)(8) is held harmless when NNMI decreases.

Solution: We recommend the Guide should specify that a rural low-income housing project that qualifies for NNMI under IRC Section 42(i)(8) is held harmless at the highest NNMI that the project achieved. This follows IRC Section 142(d)(2)(E) that provides the general hold harmless rule, which states that the multifamily tax subsidy project ("MTSP") income limit for a tax credit property will never be less than the MTSP income limit that was determined in previous years for that property.

Chapter 12, Page 12-4 – Determining Income Limits After 2008 (Rural Designation Lost)

Issue: The Guide does not specify whether a low-income housing project that has lost its rural designation is held harmless at the highest NNMI that the project achieved for rural projects under IRC Section 42(i)(8).

Solution: As reaffirmed in the related LIHTC Working Group letter dated January 30, 2013[4], we recommend the Guide should specify that a low-income housing project that has lost its rural designation is held harmless at the highest national non-metro median income that the project achieved for rural projects under IRC Section 42(i)(8).

Although IRS LIHTC Newsletter #48 indicates that if a project has lost its rural designation, then it is not held harmless at the NNMI, this position seems in conflict with the intent of the hold harmless rule under IRC Section 142(d)(2)(E) to make qualified projects, both rural and non-rural, economically feasible.

Chapter 12, Page 12-4 – Determining Income Limits After 2008 (45 Day Rule)

Issue: The Guide does not reference the 45-day rule in detail.

Solution: We recommend the Guide can use IRS LIHTC Newsletter #48 and #50 descriptions of 45-day rule to explain the 45-day grace period to implement the new rent and income limits, which means that the old limits can be relied upon for 45 days after the effective date of the new limits. For example, income limits effective 12/04/2012, can be relied on until 1/17/2013.

IRS LIHTC Newsletters #48 and #50 also indicate that if projects are placed in service during the 45-day grace period, the owner may choose the new or the old income limits. For example, if a project was placed in service on 1/8/2013 and the 2012 income limits are higher than the 2013 income limits, an owner may use the higher income limits from 2012 to income qualify tenants and set rents accordingly because the project was placed in service with the 45 day grace period.

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[4] LIHTC Working Group. Letter to Internal Revenue Service. "Notice 2012-25, Guidance Priority List – Hold Harmless Rules for Rural Projects." 30 January, 2013. See Exhibit D.

Chapter 12, Page 12-14 - Section 8 or Comparable Rental Assistance

Issue: The sentence that states "the unit continues to be rent restricted if…the sum of the rental assistance payment and the gross rent with respect to such unit does not exceed the sum of the amount of such payment which would be made and the gross rent that would be payable for the unit if the tenants' income did not exceed the income limit and the units were rent restricted" taken from IRC Section 42(g)(2)(E)(ii) is very hard to understand for most industry participants. This could use further explanation, in addition to specifying if it applies to initial certification and/or re-certifications.

Solution: We recommend the Guide's language be revised as follows:

Under IRC Section 42(g)(2)(E), if federal assistance is required to be reduced as the tenant's income increases, so that the amount required to be paid by the tenant exceeds the gross rent limit at move-in or a subsequent year, the unit is considered rent-restricted if:

1. a federal rental assistance payment continues to be made with respect to the unit,
2. the amount of the rental assistance payment and the gross rent with respect to such units are required by section 8 or comparable federal rental assistance program, and
3. tenant's income does not exceed the IRC Section 42 income limit at move-in.

Example: Tenant's Portion of Rent Exceeds Rent Limit

Section 8 household with an annual gross income of $59,000 (within IRC Section 42 income limit) applies for an LIHTC unit for which the rent is restricted to $1,248. The household's Section 8 annual adjusted income is $55,000 and the Section 8 total rent is $1,823 (rental assistance payment plus the tenant paid rent). The applicant's portion will be $1,375 a month (30 percent of the Section 8 annual adjusted income) and assistance will pay $448 a month (Section 8 total rent less applicant's portion). Since the Section 8 will pay $448 and the applicant is required to pay $1,375, there is no noncompliance to accept this applicant.

Chapter 12, Page 12-15 – Utility Allowance

Issue: Treasury Regulation 1.42-10(c)(1) requires taxpayers implement utility allowances within 90 days of a Public Housing Authority ("PHA") updating its utility allowances. The PHA is not required to update utility allowances on a regular, fixed schedule, which permits a PHA to update a utility allowance multiple times throughout any given year. As a result, there is added cost of compliance with IRC Section 42 due to the continuous monitoring of PHA utility allowances on almost a monthly basis to see if utility allowances have changed. Included in the added cost of compliance with IRC Section 42 is the risk of failing to timely identify and implement utility allowance changes, which could potentially lead to recapture if the building owner is unintentionally not in compliance with the utility allowance requirements in Treasury Regulation 1.42-10(c)(1).

Solution: As reaffirmed in the related LIHTC Working Group letter dated November 6, 2013[5], we recommend the Service require an owner to check with its PHA only once a year (the "Utility Allowance Date"), similar to the requirements for the annual review of the basis for which the utility allowance has been established in accordance with Treasury Regulation 1.42-10(c)(2). Further, we recommend that the Utility Allowance Date coincides with the issuance of new area median gross income information by the U.S. Department of Housing and Urban Development. The owner would continue to be required to implement its respective PHA utility allowance within 90 days of the Utility Allowance Date. The proposed alternative above would both reduce the burden of continuous utility allowance monitoring from the LIHTC building owner and decrease the risk of unintentional IRC Section 42 noncompliance.

Chapter 12, Page 12-20 – Casualty Losses

Issue: Regarding a LIHTC building damaged by a casualty loss in an area that is not a federally declared disaster area, the Guide references CCA 200912012 which provides that if a building is damaged by a casualty and fully restored and rented to low-income tenants within the same taxable year, then there is no recapture an no loss of credits. However, if the building is not restored by the end of the taxable year, no credit would be allowed for the entire taxable year even if the reasonable restoration period of 24 months (described below) extends into the next taxable year. This could potentially create two disparate treatments of LIHTC projects damaged by a casualty by merely the timing of the casualty event. For example, if a LIHTC project suffers a casualty event on December 28, the project owner would only have three days to repair the casualty damage and move its low-income tenants back into their respective units; otherwise no tax credit would be allowed for the entire taxable year. However, if the same LIHTC project suffers a casualty loss on January 28, the project owner would instead have over 11 months to repair the casualty damage and move its low-income tenants back into their respective units in order to avoid losing all credits for that taxable year. The only variable in the above example is merely the timing of the casualty event, which is beyond the control of a LIHTC project owner.

Solution: We recommend that casualty loss relief for a LIHTC project not located in a federally declared disaster area be applied in a manner similar to the relief offered by Revenue Procedure 2007-54. This revenue procedure allows for a LIHTC project to continue claiming tax credits even if its units are not suitable for occupancy, due to a casualty loss in a federally declared disaster area, as long as the units are restored within a "reasonable period of time," which is defined as a period that cannot exceed 24 months. We recommend that LIHTC projects not located in a federally declared disaster area be granted similar relief to allow taxpayers to claim tax credits if the units are restored in a period of time that does not exceed 24 months after the end of the calendar year in which the casualty event occurred.

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[5] LIHTC Working Group. Letter to Internal Revenue Service. "OMB Number: 1545-1102; Regulation Projection Number: TD 8520 (Final), TD 9420 (Final) – Carryover Allocations and Utility Allowance Regulations." 6 November, 2013. See Exhibit E.

The only provision of IRC Section 42 that would potentially stop the flow of tax credits to a taxpayer is under IRC Section 42(i)(3)(B)(i), which requires that a low-income unit be suitable for occupancy; however, this provision appears to only address local health and safety codes that may not be applicable to a casualty event. Also, if damage to a low-income unit qualifies as noncompliance under IRC Section 42(i)(3)(B)(i), then such noncompliance is not within the control of a taxpayer, and that taxpayers that own or operate low-income housing projects on which a credit has been claimed are required to correct any noncompliance within a reasonable period after the noncompliance is discovered. Additionally, on Page 6-5 of the Guide, the Service has recognized that responsibility for noncompliance with nonprofit set-aside requirements that rests solely with a qualified nonprofit organization as an instance in which taxpayers should not lose credits for noncompliance that is not within their control, as long as the noncompliance is corrected within a reasonable period (i.e., 24 months). Since noncompliance related to a casualty loss is generally not within the control of the taxpayer, it is reasonable to conclude that the taxpayer should be granted identical relief from the loss of tax credits if the LITHC building is suitable for occupancy within a reasonable period of time.

Chapter 12, Page 12-20 – Casualty Losses in Federally Declared Disaster Areas

Issue: At first glance, Revenue Procedure 2007-54 seems to address all buildings earning LIHTCs. However, certain sections, such as Sections 5 and 6, only apply to 70 percent present value credits (also known as "9 percent" credits) as they explain relief procedures for carryover allocations. Carryover allocations are not applicable to buildings earning 30 percent present value or "4 percent" credits. In addition, Treasury Regulations 1.42-14(d)(3), which is referenced in Section 9 as explained above, contains procedures on returning credits that are subject to state housing credit ceilings, under which "4 percent" credits do not fall. Lastly, "4 percent" credits are not explicitly nor implicitly referenced throughout the text of the Revenue Procedure. Therefore, it is unclear if Revenue Procedure 2007-54 is applicable to "4 percent" credits.

Solution: As reaffirmed in the related LIHTC Working Group letter dated March 18, 2014[6], we recommend the Guide should specify that Revenue Procedure 2007-54 applies to buildings earning "4 percent" and "9 percent" credits. Revenue Procedure 2007-54 should be extended to all buildings earning LIHTCs, whether they earn 4 percent or 9 percent credits because both types of projects are at risk of being financially infeasible while out of service, and possibly subject to foreclosure and risk of losing affordable rental housing.

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[6] LIHTC Working Group. Letter to Department of Treasury. "Temporary Relief for Buildings Earning 4% Credits Affected by Presidentially Declared Disasters." 28 March, 2014. See Exhibit F.

Chapter 12, Page 12-39 - First Year of the 10-Year Credit Period: Acquisition/Rehabilitation of an Occupied Building

Issue: Example 5 provides that the building was placed-in-service on May 15, 2008, the acquisition date, and the taxpayer elected to begin the credit period the following year, 2009. However, it does not provide the following:

1) When the rehabilitation was placed in service; and

2) It does not clearly state if a unit that was previously qualified at the beginning of the year, taken off line in the middle of the year for rehabilitation, but back on-line and suitable for occupancy but vacant at the end of the year, is considered qualified.

Solution: We recommend the following:

1) The example in the Guide should indicate when the rehabilitation was placed in service, as the acquisition and rehabilitation credits are earned on the earlier of January 1 of the year in which the rehabilitation is placed-in-service or the acquisition date. If the rehabilitation placed-in-service date was in 2008, the taxpayer can elect to begin the credit period in the following year, 2009. However, if the rehabilitation placed-in-service date was in 2009, the taxpayer is required to begin the credit period in 2009 or the following year; and

2) The Guide should indicate that a unit is considered qualified even though it remains vacant after the completion of rehabilitation, if the unit was previously occupied by qualified tenants prior to the rehabilitation that moved out of the LIHTC project and did not move back into a unit in the LIHTC project once the rehabilitation was completed.

Chapter 12, Page 12-41 – Project Defined

Issue: The Guide explains that "two or more low-income buildings may be included in a multi-buildings project on [sic] if the buildings are located on the same tract of land, unless all the units in all the 'scattered site' buildings to be included in the project are low-income units." Furthermore, the Guide states that the buildings have "similarly constructed housing units." The Guide then references IRC Section 42(g)(7) to support the conclusion that all of the units in all of the "scattered site" buildings must be low-income units. IRC Section 42(g)(7) specifically states that "all of the dwelling units in each of the buildings are rent restricted (within the meaning of IRC Section 42(g)(2)) residential units." Additionally, IRC Section 42(g)(7) is silent to whether the units are "similarly constructed."

Solution: We recommend that the language on page 12-41 of the Guide be revised so that it correctly uses the term "rent restricted" in lieu of "low-income" when referring to dwelling units in a "scattered site" building per IRC Section 42(g)(7), and that "similarly constructed housing units" be removed from the definition of a multi-building project.

Chapter 14, Page 14-6, Applicable Percentage and Chapter 15, Page 15-4, Computing Adjustments to Allowable Annual Credit

Issue: We believe the Guide misinterprets when adjustments to applicable percentages are allowable.

Pages 14-6 and 15-4 of the Guide states the following:

> Based on the examination results, the percentage may be adjusted.
>
> The adjustment will always be based on the applicable percentage for the month the building was placed in service. The taxpayer cannot make an election under IRC Section 42(b)(1)(A)(ii) during an audit.

Solution: We recommend that the above sentences should be updated to read as follows:

> The adjustment will always be based on the applicable percentage for the month the building was placed in service or the effective date of the previously made valid election under IRC Section 42(b)(1)(A)(ii). The taxpayer cannot make an election under IRC Section 42(b)(1)(A)(ii) during an audit.

Chapter 16, Page 16-13, Credit Recapture

Issue: The following example was contained on page 16-13 of the Guide:

> The examiner also determines that the 10-year credit period was 2000 through 2009 and that no credit is allowable in 2010 or 2011. The statute of limitation is closed for the 2010 year, so the IRC Section 42(j) credit recapture provisions are applied. The excess of the allowed over the allowable to be recaptured from 2010, is $130,000 - $0 = $130,000. For 2011, the year under audit, the examiner disallows the entire $130,000 credit claimed. Had the 2010 statute of limitation not been closed, the 2010 tax return should have been audited and the entire credit disallowed.

The example states that the recapture provision under IRC Section 42(j) is being used to recapture the 2010 credits. It appears to us that IRC Section 42(j) only allows recapture of the accelerated portion of the credits not the entire credit.

Solution: We recommend that clarification be provided regarding how the recapture provision applies in the above scenario from the Guide. Furthermore, we recommend clarification regarding the distinction between the recapture of LIHTCs previously claimed in a closed tax year and the disallowance of LIHTCs claimed in an open tax year.

Chapter 18, Page 18-1, Adjustments to Current Year Credit

Issue: We believe there is an error in the second bullet list on page 18-1, adjustments to current year credit, which reads:

The choices are:
- Low-Income Housing Credit in service after 1989 before 2008, or
- Low-Income Housing Credit in service after 2007.

Solution: We recommend that the list reads as follows:
The choices are:
- Buildings placed in service after 1989 and before 2008, or
- Buildings placed in service after 2007.

In addition to the above comments, we have attached Exhibit A listing recommended changes to technical citations used throughout the Guide. We appreciate the opportunity to comment on the draft Guide. Thank you in advance for your time and careful consideration of our comments. 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,

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