
May 18, 2010

Internal Revenue Service
CC:PA:LPD:PR
Courier's Desk
1111 Constitution Avenue, NW
Ben Franklin Station
Washington, D.C. 20224

Re: New Markets Tax Credit Treasury Regulations Project

Dear Ladies and Gentlemen:

As participants in the New Markets Tax Credit ("NMTC") Working Group, we, the undersigned, have joined together to provide input on an issue of importance to the NMTC industry. In the wake of the continuing economic downturn, the ability to claim NMTCs in a situation where the investor's basis in its investment in a community development entity ("CDE") has been reduced to zero, or reduced to a level below the amount of the remaining NMTCs is an issue that CDEs and investors are now facing and about which they are becoming increasingly concerned. This letter reflects our views and suggested approaches for addressing this situation. In short, as more fully explained below, credits should continue to be allowed to be claimed by the taxpayer even if sufficient basis in their investment doesn't exist. Any excess basis reduction should be a suspended, non-deductible loss.

Recognition of Loss and Basis Reduction

The issue involved here primarily arises where a CDE structured as a partnership for tax purposes suffers a transaction loss on a qualified low-income community investment ("QLICI"), or holds a QLICI that has become worthless during the taxable year. In this situation, the CDE will recognize a tax loss under either Sections 165 or 166. Under the rules of Subchapter K of the Internal Revenue Code of 1986 (the "Code"), these losses are allocated to the owner of the qualified equity investment ("QEI") at the end of the taxable year of the CDE. Under Section 705, such loss will reduce the owner's basis in the QEI as of the close of such taxable year. Similarly, if a QEI becomes worthless during a taxable year, the holder of the QEI may be required under Section 165 to recognize a tax loss equal to the remaining basis in the QEI.

It is important to recognize that none of these consequences is elective. Although CDEs may have some flexibility in timing a workout or the disposition of a QLICI to control the timing of any deduction, that flexibility is not complete. Often, other economic considerations may exist that require the CDE to act to protect its interest by pursuing remedies that lead to a realization of the loss. Similarly, the approval of a bankruptcy plan for the qualified active low-income community business ("QALICB") may force a realization of the loss with no action on the part of the CDE.

If a settlement, foreclosure or bankruptcy results in a close-out of a QLICI and triggers the realization of a tax loss, the CDE *must* take that loss. If a QLICI becomes worthless during the taxable year, the CDE *must* take the loss. In either case, not reporting the loss would reflect an incorrect reporting of the CDE's true taxable income, not an election to change the amount or timing of its taxable income. Also, in either case, the owner's basis in the CDE interest *must* be reduced. There is no election allowed under Subchapter K to forego a loss in order to retain basis in a partnership interest.

It is important to note that the economic circumstances which give rise to a loss on the QLICI are largely outside of the control of both the CDE and the taxpayer claiming the NMTCs. In the typical NMTC investment, the CDE is either a lender and/or minority investor in the QALICB. The CDE typically does not control the management of the QALICB and the taxpayer claiming the NMTCs is generally a limited partner or non-managing member in the CDE (and in fact, NMTC program requirements both discourage investments in QALICBs that are controlled by the CDE and significantly limit the amount of control that investors can exercise over CDEs). Thus, due to the mandatory operation of the tax accounting rules, economic circumstances largely outside of the taxpayer's control could result in the elimination of its basis in a QEI prior to the completion of the NMTC credit period.

Finally, the Treasury Regulations under Section 45D require that the Section 45D basis reduction be taken over time as the credits are taken. This approach leaves no room for the taxpayer to vary the timing of the basis reduction arising from the credits relative to other events, such as losses on the underlying QLICIs that can also affect basis.

Language of Section 45D, Legislative History and Applicable Regulations

The language of Section 45D does not support a position that a taxpayer is disallowed the ability to claim credits under Section 45D due to insufficient basis in the QEI giving rise to the credits. Section 38(a) allows a tax credit in any tax year for an amount that includes "the current year business credit". Section 38(b) defines the current year business credit as the sum of a long list of credits, including "the new markets tax credit determined under Section 45D(a)."

Section 45D(a)(1) provides:

For purposes of Section 38, in the case of a taxpayer who holds a qualified equity investment on a credit allowance date of such investment which occurs during the taxable year, the new markets tax credit determined under this section for such taxable year is an amount equal to the applicable percentage of the amount paid to the qualified community development entity for such investment at its original issue.

Section 45D(h) provides:

The basis of any qualified equity investment shall be reduced by the amount of any credit determined under this section with respect to such investment. This subsection shall not apply for purposes of sections 1202, 1400B and 1400F.

There is nothing in the statute that takes into account, in determining the amount of the tax credit allowable under Subsection (a), the amount of basis available for the reduction required by Subsection (h). These are two separately operating provisions. The amount of the NMTC is determined under Section 45D(a). Once determined, that amount is allowed as a credit pursuant to Section 38. The determined amount must also be applied to reduce basis under Section 45D(h). There is no provision of Section 45D indicating that the tax credit should be re-determined in the event there is insufficient basis for reduction under Section 45D(h). The only statutory basis on which NMTCs may be lost or revoked is contained in the recapture provisions in Section 45D(g).

The regulations under Section 45D essentially reiterate the statutory language, but add the following sentence: “A basis reduction occurs on each credit allowance date under paragraph (b)(2) of this section.”

The committee report on Section 45D states only that “The taxpayer’s basis in the investment is reduced by the amount of the credit (other than for purposes of calculating the capital gain exclusion under sections 1202, 1400B and 1400F.”¹ There is no discussion of either the timing of the reduction or the consequences of the taxpayer having insufficient basis. Thus, there is no support in the language of Section 45D or Section 38, or in the legislative history or applicable regulations, for a disallowance of a tax credit amount determined under Section 45D(a) merely because other tax events have eliminated the basis that would otherwise be required to be reduced under Section 45(h).

Limiting Credit to Basis is Contrary to Intent of Statute

The NMTC provisions were meant to encourage investments in low-income community businesses that otherwise lacked adequate access to capital. An important element in doing so is the concept that the credit is allowable even if the underlying investment is not returned. This is recognized in the rules of Regulations Section 1.45D-1(d)(2), which treat unreturned investments as continually invested. It is also recognized explicitly in Treasury Regulations Section 1.45D-1(e)(4), which provides that “Bankruptcy of the CDE is not a recapture event.” In that respect, the NMTC is very different from the investment tax credit or low-income housing tax credit, where the credits are subject to recapture in the event that the property owned and operated by the entity entitled to the credit is lost in foreclosure or fails in operation during the applicable compliance period.

The effect of both: (1) delaying basis reductions until the applicable credit dates, and (2) limiting credits to available basis, would put taxpayers in a situation where the intent of the above provisions is defeated. If the taxpayer’s ability to claim the credits were to depend on the taxpayer having sufficient basis to claim the credit, the taxpayer would lose the benefit that encouraged the taxpayer’s investment in a low-income community business. Put differently, a taxpayer making an investment that Congress recognized would likely be riskier than average, and expecting to be allowed the NMTCs created to encourage such investment, would be forced to accept a mere tax loss instead – the same tax loss it could have obtained without the NMTC program.

Limiting the amount of credits taken by the holder of the QEI to its available basis in its investment is inconsistent with the purpose behind treating the unreturned investment as continually invested, thereby allowing the CDE to retain its status and the credit to be determined. Similarly, it is inconsistent with the purpose behind saying that bankruptcy is not a recapture event to have a side effect of bankruptcy be the loss of subsequent credits.

We recognize that it may be possible for a taxpayer that has lost its basis in its investment to engage in tax planning that increases its basis sufficiently to take the credit. For example, it might be able to make non-QEI contributions to the CDE or it could possibly engage in intercompany sale transactions that increase basis. However, such approaches are artificial and might even be subject to attack by the IRS. We do not believe that the taxpayer should have to engage in such non-economic maneuvering to fulfill the intent and language of the statute.

¹ Committee Report on P.L. 106-554 (Community Renewal Tax Relief Act of 2000), Section 121(a).

Analogous Provisions

Although a number of other provisions of the Code require basis reductions, we have found only two provisions that do not provide a specific method or procedure for such basis reductions in the event that there is insufficient basis to reduce: (1) the investment tax credit rules under Section 50 which require that the basis of property be reduced by the amount of the credit, and (2) the cancellation of debt (“COD”) rules under Section 108 which exclude from income the cancellation of debt recognized while the taxpayer is insolvent or in bankruptcy.

Section 50 - Investment Tax Credit Rules

Section 50(c) requires that the basis of property giving rise to the investment tax credit (such as historic rehabilitation credits and energy credits) be reduced by the amount of investment credit determined (50% of the credit amount in the case of energy credits). There is no provision in Section 50 or any related provision that provides for what happens if there is insufficient basis for the reduction. However, the basis reduction occurs at the time the property is placed in service. Since the property’s basis itself gives rise to the investment tax credit and the tax credit is calculated as a percentage of the basis, it is unlikely that there would ever be a circumstance where there is not sufficient basis for the reduction. We believe this is probably the reason that there is no authority addressing a potential lack of basis problem.

Section 108 - Cancellation of Debt Income: Bankruptcy and Insolvency

Section 108(a)(1) provides that “[g]ross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) of indebtedness of the taxpayer if . . . (A) the discharge occurs in a title 11 case, [or] (B) the discharge occurs when the taxpayer is insolvent...”

Section 108(b)(1) provides that “the amount excluded under subparagraph (A), (B) or (C) of subsection (a)(1) shall be applied to reduce the tax attributes of the taxpayer as provided in paragraph (2).” Paragraph (2) lists the tax attributes that must be reduced, and their order of reduction, including: net operating loss carryovers, general business credit carryovers, minimum tax credit carryovers, capital loss carryovers, basis, passive activity carryovers and foreign tax credit carryovers.

No provision of Section 108 addresses the taxpayer’s treatment if the amount of the COD income exclusion exceeds the taxpayer’s remaining tax attributes that would otherwise be required to be reduced, including basis. However, the committee report on the provision expresses the view that the income would be excluded anyway. It is well established that the COD exclusion under Section 108(a)(1)(B) is not limited by the ability to reduce attributes pursuant to the requirements of Section 108(b). As is the case under Section 45D, the allowance to the taxpayer of the exclusion of COD income is not specifically conditioned on satisfying the tax attribute reduction requirement.

Section 108 - Cancellation of Debt Income: Qualified Real Property Business Indebtedness

The language and effect of Section 108(a)(1)(B) can be contrasted with the language of Section 108(a)(1)(D), which allows for the exclusion of income from the discharge of “qualified real property business indebtedness,” but which specifically limits the exclusion based on the available basis reduction. Specifically, Section 108(c)(1) requires a basis reduction in depreciable real property held by the taxpayer

for the amount of income excluded under Section 108(a)(1)(D), but not below the amount of any remaining debt to which the property is subject. However, Section 108(c)(2) also provides:

The amount excluded under subparagraph (D) of subsection (a)(1) shall not exceed the aggregate adjusted bases of depreciable real property (determined after any reductions under subsections (b) and (g)) held by the taxpayer immediately before the discharge (other than depreciable real property acquired in contemplation of such discharge).

Thus, the statute imposes an overall limitation on the income exclusion that is equal to the taxpayer's basis available for reduction, specifically tying the availability of the exclusion to the basis reduction. This is in contrast to Section 45D, which reflects no similar limitation on claiming the credit.

Other Provisions Specifically Addressing Inadequate Basis

Certain other provisions of the Code require basis reduction, but specifically address the consequences of inadequate basis, including:

- Partnership rules – losses suspended when basis is reduced to zero.²
- S Corporation rules – losses suspended when basis is reduced to zero.³
- Consolidated return regulations – excess reductions cause an “excess loss account” (essentially, a negative basis).⁴

NMTC Allowable Even if Taxpayer has Insufficient Basis

For the reasons outlined above, we believe that under the law as written, the NMTC is allowable to a taxpayer even if the taxpayer has insufficient basis in its QEI to satisfy the basis reduction requirement. We believe that any excess basis reduction should be treated as a suspended, non-deductible loss. We acknowledge the fact that a taxpayer could claim the credit and suspend the basis reduction, thereby reducing or eliminating the "taxable" nature of the credit. However, we think that this is not a provision subject to abuse and no cure is needed. Should the Internal Revenue Service believe a proposal is needed to address this issue, such a proposal should start with the recognition that the problem, to the

² See Code § 704(d), which provides that a partner's distributive share of partnership loss, without distinction between deductible and non-deductible losses, shall be allowed only to the extent of the adjusted basis of such partner's interest in the partnership at the end of the partnership year in which such loss occurred, and that any excess of such loss shall be allowed as a deduction at the end of the partnership year in which such excess is repaid to the partnership.

³ See Code § 1366(d), which provides that the aggregate amount of losses and deductions that a shareholder may take into account cannot exceed the sum of the adjusted basis of the shareholder's stock in the S corporation and the corporation's debt to the shareholder, and that any excess of such losses shall be carried over to subsequent taxable years.

⁴ See Regulations § 1.1502-19, which provides for the creation of excess loss accounts to the extent there are negative adjustments in a consolidated group member stock that exceed stock basis, and require the recognition of income related to such excess loss account upon the occurrence of certain triggering events.

extent there is a problem, is the loss of the tax consequences of taking the credit, not the availability of the credit.

The solution should be as simple as possible while carrying out the purposes of the statute. It should also preserve the intent of the statute to allow the NMTC to be taken despite the loss of the investment, while achieving the effect of a loss of basis to the taxpayer as a cost of taking the tax credits.

Our preferred view is that there is really no problem worth the effort of finding a solution. It is true that, under certain circumstances, a taxpayer entitled to NMTCs might obtain a better after-tax result if it has no basis to reduce by the time that some of the NMTCs are taken. However, such a situation should really only occur in the situation where there has been a loss of most or all of the value of the QLICI.

This situation should not only be unusual, but also largely outside of the control of the taxpayer. It is not something that the taxpayer would generally be able to plan into in order to obtain an unintended benefit. The provisions of Section 45D triggering a recapture on a return of capital that is not reinvested, or in the event of a redemption of a QEI, should prevent the type of artificial transactions that might allow a taxpayer to intentionally use up its basis prior to taking the NMTCs.

To address the situation where there might be subsequent investments in the same CDE, or some other event by which the taxpayer again finds itself with basis in the CDE investment, the basis reduction might be treated as suspended and applied at such later time. However, this would be a very unusual situation.

As the discussion below indicates, any of the potential solutions to the issue created by the loss of basis in a QEI have a level of complexity or difficulty that is probably not warranted by the scope of the problem. Nevertheless, in the interest of fully examining the alternatives, we discuss below the possible ways we see of dealing with this situation and the issues these approaches could raise.

Income Based Approach

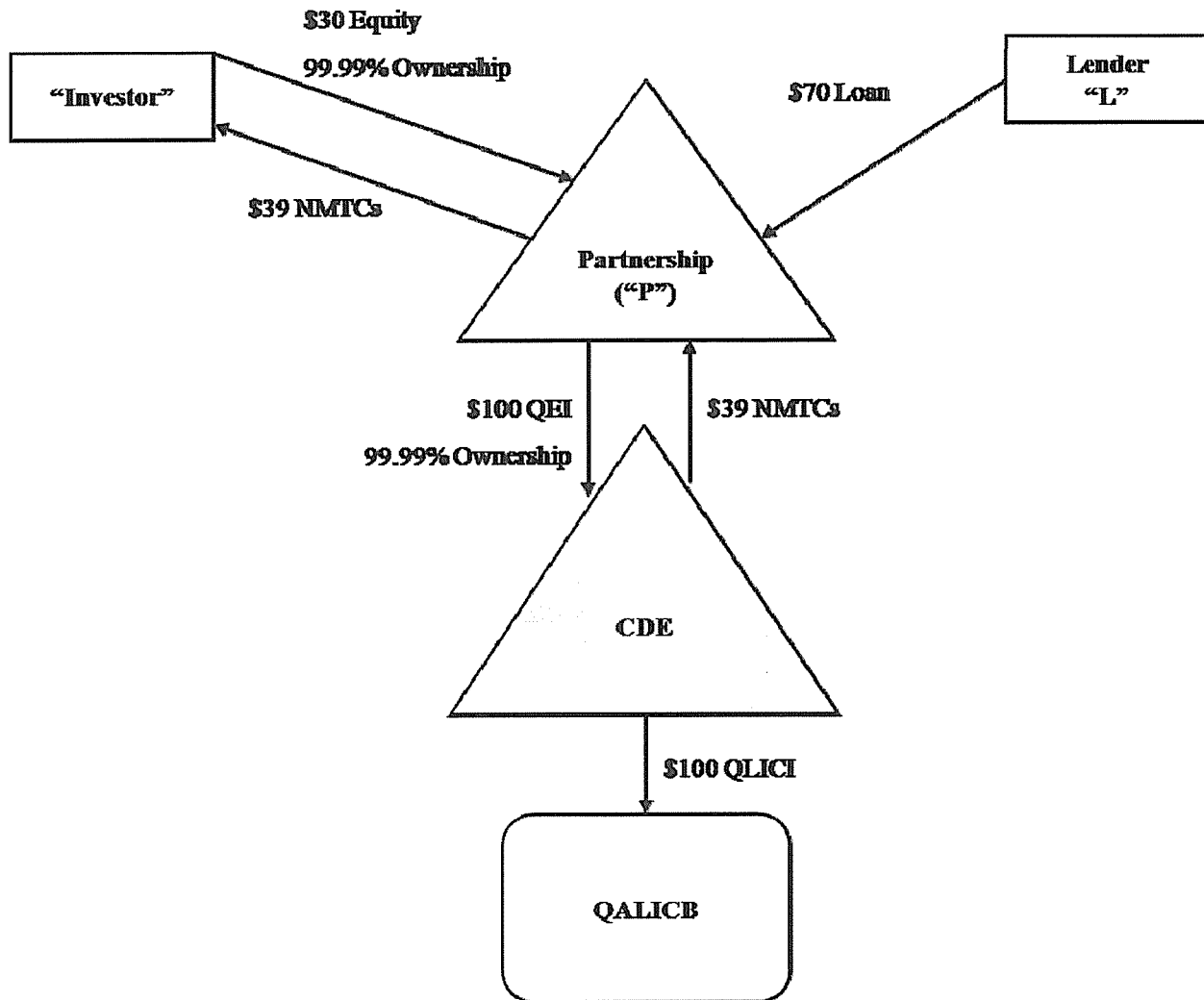
The simplest and most direct approach would be to: (1) keep the basis reduction as per the current regulations, and (2) require the recognition of income to the extent that a required basis reduction in a QEI exceeds the holder's basis in the interest.

This solution has the advantage of providing the correct tax accounting result in all circumstances and of matching the tax effect of the basis reduction to the taxpayer taking the credit (in contrast to the other approaches discussed below). It is also very simple to apply and consistent with the conceptual approach of Subchapter K to a distribution in excess of basis.

Possible Approaches Relating to the Timing of the Basis Adjustment

For the purpose of the discussion below, assume the following typical NMTC structure: (i) the taxpayer interested in the benefit of NMTCs ("Investor") contributes cash of \$30 to a partnership ("P") in exchange for a 99.99% interest in P, (ii) P borrows \$70 from a lender ("L"), (iii) P contributes the combined equity and debt proceeds of \$100 to a CDE taxed as a partnership in exchange for a 99.99% equity interest intended to constitute a QEI, (iv) CDE uses substantially all of the QEI to make a QLICI in a QALICB, and (iv) as a partner in P, Investor is to be allocated 99.99% of the \$39 NMTCs available to P by reason of the QEI in CDE. See Exhibit A.

Exhibit A
NMTC Structure



Require Immediate Basis Adjustment

The regulations might be amended to require an immediate basis adjustment on the first credit allowance date for the full amount (\$39 in our example) of the NMTCs allowable over the compliance period. However, there are at least two problems with this approach, which arise in the event that there is a syndication or transfer that occurs after the first credit allowance date:

- Assume that after the first credit allowance date Investor sells a portion of its interest in P. At the time of the sale, P owns the QEI with a basis already reduced to \$61 by the full amount of tax credits allowed by reason of the QEI. Similarly, the basis reduction in the QEI also resulted in a reduction of the taxpayer's basis in its interest in P, from approximately \$100 (including the allocated debt amount) to approximately \$61. Going forward, a portion of the future credits will be taken by the new partner(s), but the affect of the basis reduction at the time the QEI was made is only borne by Investor as the original partner in P. Thus, there is a mismatch between the

taxpayer taking the credits and the taxpayer who bore the burden of the basis reduction.

- Assume in the alternative that P sells the QEI after the first credit allowance date. Again, it will have a reduced basis of \$61, and therefore recognize more gain or less loss on the sale by reason of the basis reduction, despite that it will not have taken all of the tax credits. Thus, there would be a mismatch between the tax accounting and the economic effects of the transaction. This negative impact would be balanced out in the system as a whole by the buyer being allowed to take the remaining credits with no further basis reduction; in other words, there has been a basis reduction equal to the amount of the tax credits taken. However, as between the parties, the wrong taxpayer would have been hit with the full consequences of the reduction.

One might try to solve the second problem by allowing the lost basis to reappear (effective immediately prior to the sale) in the event that P disposes of the QEI. However, such an approach would require that the buyer be required to take the remaining basis reduction. More importantly, if the buyer is only paying the present value for the remaining stream of tax credits since the economic value of the QLICI has already been lost, the buyer might not be paying enough to give sufficient starting basis to take the remaining required basis reduction (see example below).

Preserve Basis in the QEI for Later Reduction

Another potential approach is to require a basis reduction in the QEI at each credit allowance date, as provided in the current regulations, but to provide that a minimum amount of tax basis is treated as already reduced solely for the purpose of applying Sections 705 and 752(d) to the CDE. Under this approach, there could be no loss allocations or distributions from the CDE that reduce the basis below the remaining credit amount. Any losses that would otherwise reduce basis below the remaining credit amount are suspended under Section 752(d), and any distributions that would otherwise be offset by such basis are treated as giving rise to income under Section 731.

This approach, while somewhat complicated, might be sufficient to avoid the “no basis” problem in the situation we’re seeking to address, at least with respect to the initial holder. It is true that basis could also be written off by a worthlessness deduction with respect to the CDE interest itself; however, as long as the CDE is producing a stream of credits, the interest in the CDE is arguably not worthless.

Under this approach, per the existing regulations, the actual basis reduction does not occur until each credit allowance date, so the allocation of that basis reduction to the basis of the interests in “P” (the CDE investor) does not occur until the credits are taken. Thus, the first problem mentioned in the approach discussed immediately above does not arise.

Also, since the basis will only have been reduced by the amount of the credits taken, it would be available to offset the amount realized on a sale of the CDE interest. Thus, if P sells the CDE interest after the first credit allowance date, it would still have the basis attributable to the future credits available to utilize on the sale. This would be true even if a worthlessness deduction had been taken by the CDE, since under this approach, the worthlessness deduction would not be permitted to reduce basis in the QEI below the minimum amount and thus, to that extent, would be trapped in the CDE pursuant to Section 752(d). Thus, the economic and tax effects to the first holder should work out.

To utilize the above example for illustration, on the first credit allowance date P receives \$5 of credits allocable to its partners and reduces its basis in the QEI to \$95. Assume that prior to the second credit allowance date, the CDE is forced to write off the entire QLICI and claims a deduction of \$95 for

the loss on its QLICI. The loss flowing up to P would be limited to \$61 under Section 752(d), because under the approach we're proposing here, P's basis in the QEI cannot be reduced below \$34 (the remaining credit amount). P then sells the QEI to Buyer for \$34 and has no gain or loss. P has received \$5 of credits, \$61 of loss, and a return of its remaining invested capital, which properly reflects the economic outcome on the investment. Buyer, in turn, is required to "preserve" its basis of \$34 for reduction on account of future credits. A similarly favorable result should occur if instead Investor sold its interest in P.

But as with the prior example, there are complexities that could be created by the sale. What happens in the above example if Buyer pays only \$25? Since there is no longer a QLICI, but only a stream of future credits, Buyer would generally only be willing to pay the present value of the credit stream, which will necessarily be less than the \$34 of remaining credits. In that event, the Buyer will never have sufficient basis to offset the \$34 of credits, presenting once again the issue of how much of the credits the Buyer should be permitted to claim.

Preserve Basis and Disallow a Portion of Loss on Sale

A variation on the approach immediately above is to utilize the same basis preservation approach, but also to (i) disallow any loss to P on the sale to Buyer that is attributable to a purchase price below the remaining preserved basis and (ii) have the basis attributable to any disallowed loss carryover to Buyer.

Thus, in the above example, if Buyer were to pay \$34 in the sale, P would utilize its entire basis and recognize no gain or loss, as described above. Buyer would have a cost basis of \$34 in the QEI. On the other hand, if Buyer were to pay \$25 for the remaining credits, P would be allowed to utilize only \$25 of its basis and would recognize no loss. The \$9 of unused basis would carryover to Buyer. Thus, Buyer would have a cost basis of \$25, plus a carryover basis of \$9, for a total basis of \$34. It would be required to preserve this amount for reduction based on future credits claimed.

This approach creates a mismatch between the true tax effect of the basis reduction and the tax credits, in that P will have suffered the effect of the lost basis, and Buyer would have gained "free" basis. The parties would work it out between themselves by taking it into account in the purchase price for the QEI. Buyer may be willing to pay a little more knowing that a portion of the credits are effectively non-taxable. However, a mismatch between the tax accounting and the economic effects is created.

Also, there would be additional complexity in the above approach when other possibilities are considered. For example, a sale by Investor of an interest in P in lieu of the sale by P of the QEI interest, especially if Investor sells less than all of its interest in P. Successive sales and/or syndications would complicate matters further.

Conclusions and Recommendations

As the above examples serve to illustrate, approaches that attempt to preserve the taxable nature of the credit by varying the timing of the basis reduction or the ability to claim losses beyond the amount of the credit are fraught with complications and potential distortions of economic and/or tax effects, at least in cases where NMTC investments are syndicated or sold. Syndications and sales of these investments are already occurring on a substantial scale, and as the NMTC industry continues to mature and expand, such transactions will become increasingly common. Uncertainties about the tax results from these transactions will create potential impediments to the growth and efficiency of the industry, not to

mention additional pressure on the IRS to provide further guidance and regulations to address increasingly complex questions and issues.

More importantly, the question of whether investors can claim future credits where CDEs have incurred substantial losses on the underlying QLICs is a fundamental part of the foundation on which NMTC investments are made, namely, that the ability to claim the credit is not subject to the economic risk of loss on the CDE's loans or investments. Taxpayers must be able to claim the credit regardless of the losses CDEs may incur on their QLICs. Any other result would threaten billions of dollars of existing investments and the future viability of the NMTC program.


Moreover, given its importance, if uncertainty over the resolution of this issue continues and grows, that by itself can impede future investments and impair the future growth of the program. We therefore ask that the IRS promptly issue guidance reflecting that losses realized on investments in CDEs and QLICs do not affect the ability to claim the credit.

Should the IRS also determine that an adjustment needs to be done to preserve the taxable nature of the credit under these limited circumstances, we suggest that this should be implemented through the income approach suggested above, and not through a manipulation of the timing of the basis adjustment due to the complexities inherent in such approaches.


We commend the Department of Treasury and IRS for its continuing efforts to improve and clarify tax guidance for the NMTC program in order to ensure its continuing success. We are excited about the positive impact that the NMTC program is having on the nation's low-income communities and low-income persons and the potential the program has to be an economic stimulus in our low-income communities. We appreciate the opportunity to submit our recommendations for these issues regarding this issue. We believe that further guidance on these issues is essential to sustain and increase the impact of the NMTC program on low-income communities. Thank you in advance for your time and consideration.

Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Yours very truly,
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