What LIHTC Developers Should Know About Form 8609

Form 8609 is the IRS document that credit allocating agencies give to property owners as evidence that the owner is eligible to claim low-income housing tax credits (LIHTCs). Developers should understand how to complete Form 8609 and its various elections because an improperly completed form can result in the loss of credits on a building-by-building basis. Michael Novogradac, CPA, and Craig Staswick, CPA, provide an overview of Form 8609 and discuss the nuances of particular questions to help developers avoid potentially costly mistakes. As part of the "So You Want to be a LIHTC Developer" series, this episode is a must-listen for all new and experienced LIHTC developers.

Summaries of each topic:

Transcript

Introduction

[00:00:10] **Michael Novogradac, CPA:** Hello, I'm Michael Novogradac, and this is Tax Credit Tuesday. This is the January 17th, 2023, podcast. This week's episode is another installment in our ongoing, "So You Want to be a LIHTC Developer" series. We launched this series to help real estate developers get a better understanding as to how the low-income housing tax credit is used to finance the acquisition, development and renovation of affordable rental housing.

Today's topic is an important one for all low-income housing tax credit developers, both new and experienced. We're talking about today, IRS Form 8609. What is IRS Form 8609, you may be asking. Form 8609 is the IRS document that credit allocating agencies give to property owners, evidence that the owner is eligible to claim low-income housing tax credits.

Credit allocating agencies accomplish this by completing and signing part one of the Form 8609. Developers, in turn, must complete part two of the form and then submit the completed form to the IRS. And there's a form for each building that is part of the low-income housing tax credit financed development.

And you might be thinking to yourself, "I'm a developer. I build housing. Why in the world do I need to listen to this podcast about a tax form? Can't my tax accountant prepare the form for me?" Well, the answer is yes. You definitely should have an experienced accountant reviewing your forms. But for you as the developer, it is very important that you understand that you are responsible for completion of the form.

It's important that you understand the implications of the form. Now, you might also be thinking if you're an experienced developer, I've built and placed in service many credit developments already. I know how Form 8609 works. What could I possibly learn from this podcast? Well, I would just say if you are an experienced developer, I do urge you to keep listening because I'm sure there'll be one or two tips that you learned today that could save you thousands or even millions of dollars.

And I say thousands or maybe millions of dollars because if the Form 8609 is not completed properly, then you as the property owner may need to apply to the IRS via private letter ruling to correct the error or errors in the form or forms. This process alone could cost over $10,000 in IRS user fees, as well as an additional 10 to $20,000 or more in professional fees for assisting in preparing their private letter ruling request.

Hence, thousands of dollars of additional costs. Now I say maybe even millions of dollars. Because an improperly completed form can result in the loss of credits on a building-by-building basis. Now, let me also note, if you're not low-income housing tax credit developers, but if you work with an investor or a syndicator, then this podcast will also be useful as part of your investment due diligence. You want to be sure to be reviewing the Forms 8609 to ensure they're completed correctly and that they're consistent with your tax credit delivery expectations.

Now in today's podcast, we're going to start by providing an overview of Form 8609, the information requests on the for, and who's responsible for providing that information.

More importantly, we'll talk about specific questions that are on the form that you'll want to pay particular attention to, to avoid potentially costly errors. We are very fortunate in joining us today for today's discussion, my partner Craig Staswick from Novogradac's Long Beach, California, office. Craig has worked with many developer clients on preparing and reviewing their Forms 8609. He also led a deep dive webinar on Form 8609 back in 2021, and that training was so popular that he came back for a repeat performance and hosted another webinar on the topic last month. If you didn't get a chance to attend last month's webinar, I highly encourage you to watch the webinar recording.

You can purchase the recording on our website at www.novoco.com/training. Navigate to the on-demand training courses page. I'll also link to the webinar in today's show notes. Without further ado, I'm excited to have Craig share his insights with us today. So, if you're ready, let's get started.

[00:04:44] **Michael Novogradac, CPA:** Craig, welcome back to Tax Credit Tuesday. You were on the podcast a couple of years ago when we talked about cost segregations. I can't believe it's been that long ago. We're happy to have you back on the show.

[00:04:55] **Craig Staswick, CPA:** It's great to be back.

Form 8609 Basics

[00:04:58] **Michael Novogradac, CPA:** So, let's start off with the basics of Form 8609. I described it pretty broadly in my introduction, but please, I'd like for you to tell our listeners a little more about the purpose of Form 8609 and how it's used in the low-income housing tax credit transaction.

[00:05:14] **Craig Staswick, CPA:** Sure. Right. So, the purpose of the is really two-fold, the first purpose being it's the state housing agencies document that they populate to allow the building owner to start taking low-income housing tax credits. So that's the first purpose. It communicates that the state housing agencies review the project and allocates them to credits.

The second purpose is really developer-driven and that is to allow the developer the mechanism to make certain certifications and elections that they were required to make under Section 42 in the regs.

[00:05:52] **Michael Novogradac, CPA:** So thank you for that overview. So now maybe you could discuss the timing of Form 8609.

When would a developer receive the form? I mean, a developer obviously at the very beginning part of the process, if they're going for 9% credits, will apply for the credits. If they're going the tax-exempt bond financed tax credit route, then they'll be seeking tax-exempt bond financing. Either way, before they start the development or the renovation, they're in the process of lining up the credits, then they apply. Then they get award letters, but they're not actually get the 8609 then. When did they get the 8609?

[00:06:27] **Craig Staswick, CPA:** Right, so they actually get the 8609, no later than, no earlier than place in service, but to provide even more detail about kind of to fine tune that date if you will. The typical fact pattern is the project is placed in service and has X amount of months to turn in a placed-in-service package to the state housing agency. The state housing agency then reviews that placed-in-service package and, if all things go well, it will then issue the 8609. Timing by state is a little different. Some states require the placed-in-service package to be submitted within one year of placed in service. And then, you can generally assume they're going to take six months or so once they receive the placed-in-service package. So, developers need to think. Keep that timeline in mind and they're really motivated to, after placed in service, hustle, if you will, to turn in the placed-in-service package to speed that process up.

[00:07:30] **Michael Novogradac, CPA:** So one of the reasons why the 8069 comes after the placed-in-service date is all the costs have to be pulled together on a per building basis, so you can allocate out the eligible basis and all the rest. And also the states have to do a financial feasibility determination and they generally will want the permanent loan to be in place at the time of that determination.

And since once you place the building in service, you've got to lease it up. You've got to get the stabilized occupancy, then you have to have the permanent loan fund. That can all take sort of a number of months, but you do get to start your eligible claiming credits once you place the building in service, and are leasing it up, however, you may not get the form for 12 to 18 months later, which means the tax return's already been filed. So what are our clients doing in order to claim credits before they've received the 8609?

[00:08:20] **Craig Staswick, CPA:** Right. So that does create conundrum. You want to take the credits, but you don't have the 8609 in hand. What do you do? Well, the good news is there is IRS guidance out there that allows for a developer to take credits without the 8609 in hand. It's commonly referred to as the reasonable cause approach. That approach is it's facts and circumstance driven. So that plays a large role in a developer's ability to take that position and take credits without 8609 but it's very common because of the reasons you just mentioned of this timing challenge that these projects have.

[00:08:59] **Michael Novogradac, CPA:** So thank you for that. And I would just, expand on that a bit by saying there is a process that the broader low-income housing tax credit community has gotten comfortable with in terms of how to document reasonable cause and the various steps you have to do.

And you want to make sure that you're traveling within the herd and that from that respect and not straying from the herd so that you have a greater likelihood of maintaining your credits. Now, another thing before we talk a little more details about the form itself, way back in the day, you used to file the form with your tax return, but you don't do that now. W here do you file the form?

[00:09:32] **Craig Staswick, CPA:** You file the form. it's a one-time submission now to the IRS LIHTC unit. So the specific unit and you need to send the original, wet signature, the developer's wet signature and the housing agency's wet signature to the IRS LIHTC unit.

Two Parts of Form 8609

[00:09:47] **Michael Novogradac, CPA:** Thank you for that. It definitely makes the tax returns themselves that you file a little bit thinner now because as I mentioned earlier, as you have a separate for every building in a development and if you do an acq-rehab, you have a separate 8609 for the acquisition cost. And a separate one for the development costs. For the renovation costs. So you have two forms for buildings. So you get into a 40-50 building project and you can have 80, 100 forms or more depending upon how, like I say, how many buildings you have. So it could be a bit voluminous, but it's now nice that you submit it once to the IRS unit.

So now let's talk about the timing and significance of the form itself. You know, in the introduction I talked about, part one is filled out by the credit agency and part two is filled out by the property owner. Maybe you could describe for our listeners in a little bit more detail what the two parts entail.

[00:10:45] **Craig Staswick, CPA:** So it's a one-page form and it's kind of split in half horizontally. So on the first top half, it's what is referred to as part one, and that part one is filled out by the allocating agency and it has key data points of the project. It's very useful to good snapshot of the building, how many credits are on the building, what the eligible maximum qualified basis is and some other key data points and the key being that is filled out by the allocated agency. The bottom half is the part two, and that is the area of the form that the developer would fill out. It's going to be making various certifications and elections that are required under the code and the regulations.

[00:11:27] **Michael Novogradac, CPA:** I think I want to ask you that and get some more detail there. But before I ask you that question, let me back up a second and say, in the intro I talked about developers being responsible for the forms and they should work with an experienced tax accountant to review the form. What are some of the services that you provide to clients in assisting them in preparing part two? Obviously, you're not assisting in part one because that's what the state agency prepares, but some of the services you provide in assisting with the preparation of part two of Form 8609.

[00:11:59] **Craig Staswick, CPA:** Right. So, it's very common for myself and our partners, Mike, to get engaged to prepare part two. I mean, the form is a tax form, so it aligns perfectly with what we do on a day-to-day basis, which is prepare tax forms, so we get engaged in part two. It's very common as part of that process, as a value-add service, we review part one because we have seen errors, human errors made in part one, and this is the time and opportunity to get those things fixed now as opposed to before they're sent off to the IRS.

Focus on Specific Questions

[00:12:36] **Michael Novogradac, CPA:** And that part one being, prepare part one, you review part one to see if the state may be made an error, the allocating agency made an error in preparing part one and then to try to get it corrected. And then you assist in the preparation though of part two, which is the part that the taxpayer's responsible for.

So you gave an overview of part one and part two. In general, maybe you could be a little bit more specific and talk about some of the areas in part one and part two that a developer or property owner should be paying particularly close attention to. And go at a really high level here. Because then we can dig back down to subsequent questions on the details of each one.

[00:13:15] **Craig Staswick, CPA:** So, yeah, where I focus on and where I think developers should focus on, I'll separate it by the parts. So for part one it would be line 1a, the data of allocation, line 1b, the amount of credits. Some might say that's probably the most important line. Line 3b, the 130% boost under the DDA/QCT provisions. And line five, the placed-in-service date.

For part two, there's the areas I mainly focus on, although all of them are important, is line 7 eligible basis, line 8a, the original qualified basis of the building at the close of the first year. Line 8B is the multiple building election. That is an area where we spend a lot of time on, 10a, which is the election to, to begin the credit period or to defer to the next year. And line 10c the minimum set aside election.

[00:14:10] **Michael Novogradac, CPA:** So, great. Thank you for that, overview. So let's start with the four lines of part one that you mentioned, the part that the credit the agency completes. First up there with those four lines you mentioned was line 1a, which identifies the date of the allocation. What are the keys to getting that date right? So if it was off, what concerns might a developer have?

[00:14:34] **Craig Staswick, CPA:** And so the reason why I look at that and we look at that is there is, for 9% deals, there's a timely placed in service requirement. And as part of that math, if you will, it really is comparing the date of allocation to the placed-in-service date, both of those data points are on the form in part one, and so I want to make sure the date of allocation compared to the placed in service date, it is not only accurate, but it's meeting the test.

And I have seen situations where the date of allocation, through human error, is noted as a year earlier, so same day and month, but a year earlier. And the story that tells is that the project was not timely placed in service. So I look at that to make sure that is accurate.

[00:15:23] **Michael Novogradac, CPA:** And are there any particular aspects of that date with respect to a bond-financed transaction versus a 9% transaction?

[00:15:30] **Craig Staswick, CPA:** No, there is not.

[00:15:32] **Michael Novogradac, CPA:** OK. So the second line you mentioned was line 1b, which is the maximum housing credit dollar Aside from the obvious, making sure that, the credits you were expecting to get is on that line. Is there anything else to pay attention to?

[00:15:47] **Craig Staswick, CPA:** Surprisingly, no, but, because I'm doing a podcast on the form, I struggled with, well, how do I not talk about the amount of credits that line? So, no, I've never seen an error. I've never seen something wrong or a pitfall. I think that developers would catch that on their own. It just, you're making sure it's the amount that you were expecting.

[00:16:08] **Michael Novogradac, CPA:** So the third line you mentioned was line 3b, which relates to the high cost area provisions of Section 42. What'd you want to highlight about that?

[00:16:17] **Craig Staswick, CPA:** Right. So what I wanted to highlight about that is if you, if the project does qualify for the 130% boost high cost provision, DDA/QCT boost, make sure that the box is checked and it shows a 130%. I have seen situations where on a 9% deal that has excess eligible basis and mathematically doesn't need the 130% boost to generate their reservation amount of credits. I've seen in that situation, not common, but I've seen it, the box wasn't checked and it just showed a 100% instead of 130%. And I look at that and I go, well, first off, it's not accurate. And second off, the developer would be motivated to get to show the boost, because it almost provides some level of audit assurance, if you will, in future years because you have more excess basis, in years where if you have a down unit or an over-income unit, that can help mitigate potential recapture.

So that's why I look at that and to make sure if you have it, make sure it's presented, correctly.

[00:17:24] **Michael Novogradac, CPA:** No, that's, an important, factor. I've seen that as well, where the, it's not needed, so they think, well, why bother? And you want to bother because it can help avoid losing some credits in the situations that you mentioned as well as others.

So last, but certainly not least, of the part one lines that you mentioned was line 5, which identifies the date the building was placed in service. What did you want to highlight about that line?

[00:17:51] **Craig Staswick, CPA:** So, yeah, a couple things. So I've seen situations where that date is using the certificate of occupancy date rather than the temporary certificate of occupancy date. And so generally speaking, probably in all cases really, , the developer would be motivated to use the TCO. Not only is it accurate, that's what you're supposed to use if the building is ready for its intended use. But you know, you can there's other reasons for that, such as, having a TCO dated December 1st and a C of O dated December 5th means you can take credits for December because you have that TCO dated December 1st, which is required. You have to have one full month before you can start credits. And so you don't want to turn in, you want to be able to take advantage of that so you can make sure you can start the credits where they should be started.

And that's the main thing I wanted to emphasize there is where I see this some developers will turn in their placed in service package, the C of O instead of the TCO if they received a TCO and the state doesn't know that there was a TCO. And so that's how that number or line five can get populated incorrectly.

[00:19:02] **Michael Novogradac, CPA:** That's a good point about the TCO date versus the final certificate of occupancy. Because obviously you want to claim the start, claim the credits, generally speaking as soon as you can. So the TCO would be the earlier date and the TCO is commonly used. The temporary certificate of occupancy is commonly used as demonstrating the date where the property's ready for its intended purpose. That's when depreciation starts and as a consequence that becomes the placed-in-service date for LIHTC purposes. I would note though that you have to be careful. This really isn't about the 8609, but as but just for the benefit of our listeners, I have seen certificate of temporary certificates of occupancy that were limiting occupancy such that it didn't meet the test for tax purposes of being the placed in service date. So it's something that you want to make sure it's not, you don't just look at it. This is for the developers. I know you know this Craig, right? But for our developers listening and others, you want to make sure you read if there's any conditions to the certificate, occupancy, the temp, the temporary C of O, such that you do meet the requirements of tax law for it to be the bright line, if you will, or the evidence date of placed in service, right?

So now let's move on to part two of the form. And that's the area where the developer has to populate various entries, numerical entries, as well as check boxes to determine what elections they do or don't want to make. And then first up in your list was line seven, which asked for the eligible basis of a building. Eligible basis is generally speaking, depreciable basis of a building. How complicated can that be?

[00:20:46] **Craig Staswick, CPA:** It can be very complicated, what eligible basis is. The good news is the eligible basis by the time the developer receives 8609 to populate the part two, you've already had audited final cost certification, which will have your eligible basis. Where I see errors in populating, line 7, eligible basis of part two, is not showing the excess, the excess eligible basis. I've seen that happen and it, it follows along the thought I was mentioning earlier with the d A, if you got it, show it. And so show the excess, show and when the definition of eligible basis is. It also includes the DDA and QCT, so that is baked into the definition, so it's accurate to include that in addition to any excess eligible basis you have. So I just wanted to make that point there. That's what I see. Sometimes it's shorting it because it, for the similar reasons, but it, you shouldn't, do that.

[00:21:43] **Michael Novogradac, CPA:** And one of the things that we won't get into in the podcast, but it kind of ties in also to reviewing part one, because part one as you noted has the tax credits per building and then part two you're reporting your eligible basis per building. And it's all that's not done just based upon the number of buildings.

If you had a million dollars of allocation in 10 buildings, you wouldn't just have necessarily have a hundred thousand across all the buildings because some buildings could have more units than others. So you do have to end up looking at the allocation of the credits among the buildings and then the eligible basis among the buildings.

[00:22:22] **Michael Novogradac, CPA:** Like I said, that's probably closer to the cost segregation podcast that you were on before.

[00:22:25] **Craig Staswick, CPA:** , No, that's a fair point. All of the costs certs that I've audited really just does it, audits it as a whole, and so it doesn't show it if it's a multiple building project, how to slice up the eligible basis between the projects. So that is another exercise. You're right. During the part two preparing that needs to be completed as well is how to allocate the eligible basis between the various 8609s.

[00:22:48] **Michael Novogradac, CPA:** So the second line that you listed was 8a, which asked for the original qualified basis of the building at the close of the first year of the credit period.

So maybe here you can talk about the, how qualified basis is different than eligible basis. And why it's focused on qualified basis at the close of the first year of the credit period.

[00:23:11] **Craig Staswick, CPA:** Right. So the qualified basis, although similar, it's, it uses eligible basis as part of its computation and it'll, it'll multiply.

It'll include whether or not the project is 100% affordable. If it's something less, it'll use that percentage, that, that is not affordable as well into that computation. So your qualified basis in theory could be less than your eligible basis if you're not a 100% affordable. But I don't see any errors there. The point I wanted to highlight for the new developers in the industry is that it's measured at the end of the first year of the credit period. So there's just that little nuance there that it's measured, December 31st of your calendar year taxpayer. And so that's the only kind of nuance there. I'll also point out there is some COVID relief relating to units leased up in the second year. And its role in whether or not there's recapture or not, which we have in other webinars. Yeah. The COVID relief dealing with the measuring your qualified basis at the end of the first year of the credit period definitely, is a bit involved.

[00:24:13] **Michael Novogradac, CPA:** I would just note to our developers that if you're not, if you're 100% low-income development, you're not a 100% leased by the end of the first year that you placed the building in service or by the end of the year after you've placed the building in service, you should be looking into this COVID relief to see if for purposes of making this calculation, you get to count units that released after the end of the first year of your credit period. And even what I just said there has a lot of complexities to it, but I think it was accurate. It's just the key there being that if you're not a 100%, if you're 100, if you're intending to be a 100% affordable and you don't reach that a 100% occupancy affordability occupancy by the end of the first year of your credit period, you do run the risk of not getting all your credits over 10 years. They'll really spill over to 11 and you run the risk of claiming credits over a longer period of time, 15 years, which your investor's not expecting is going to lead to tax credit adjusters a whole host of bad things can happen. But that's a lot of the planning you'll be doing with your tax accountant as you're approaching the end of the first year, of the credit period.

And also when I think of qualified basis, eligible basis, I think of eligible basis as being in short the depreciable basis of each building and the qualified basis of the building is that portion of the building, the basis, the depreciable basis, if you will, that's associated with low income units. And obviously if you're a 100% low income, then they're the same. But if you're not a 100% low-income, if you're a mixed-income development, then it's going to be some percentage, your low-income occupancy percentage of your eligible basis. And then of course you have to layer in the 30% boost, if you're eligible for that.

But let's move on to the to the third line that you wanted to highlight, which was 8b and that's the election and something that we get lots of questions from clients about and you have to decide if you're treating the building as part of a multiple building project or not for purposes of Section 42, which kind of ties into, I think, one of the challenges, if you actually read Section 42. the code itself. There are times where it talks about "building" times when it talks about "project" and there can be complexities and differing interpretations there, depending upon if you're applying something at the building-by-building level or a project level.

But this is a more tailored focus question where they're asking, are you treating the building as part of a multi-building project? So it can be a potential pitfall how you answer it. So I was thinking, Craig, you could share the significance of that question and maybe any common errors you see.

[00:26:52] **Craig Staswick, CPA:** Right. So, the significance is it plays a large part in how the property is operated, because you can group buildings into projects and those projects have to be operated together as an aggregate in certain ways and or you can choose not to group them, various buildings into a project and they can be kind of looked at separately.

And there's pros and cons. You know, we have various webinars and handbooks about making that decision. Generally speaking, the kind of rule of thumb is if there's multiple buildings and it's a 100% affordable project, you're more than likely going to be making the multiple building election.

If you're mixed income, you may not be, for instance, one scenario would be in a multi-building project mixed-use, but maybe some of the buildings are 100% affordable. You might be the developer might be inclined to group the 100% affordable buildings together in one group to take advantage of some of the pros of making the decision. And that way, you can take advantage of some of the pros, whereas you maybe won't be able to if you do that.

[00:28:02] **Michael Novogradac, CPA:** If you check yes to the question, are there any attachments that you have to provide?

[00:28:06] **Craig Staswick, CPA:** Yes. And this is, I'm glad you asked that because of all of the part two certifications in elections this line 8b the multiple building election is the area where we see the most errors and the most grief, if you will. And one of the errors is when you read the instructions, it clearly says if you want to make this election, you have to attach a statement. If you don't attach the statement, it says even if you checked yes on the form but didn't attach a statement, it’s as if you checked no.

And that can be really detrimental if you continue to operate as if you checked yes. And you're making all these kind of tenant transfers that they're not swaps, they're now treated as new move-ins and a whole host of other issues. And so the point I really want to make here with this line is make sure the election is done correctly, which is to include the statement. We've seen that many times.

[00:29:08] **Michael Novogradac, CPA:** So maybe just to summarize, generally speaking, clients will treat the developments as one overall project. All the buildings in a single project, they'll answer yes and then attach a statement listing all the buildings as part of a single project. But there can be more nuances, but you want to make sure that you understand the implications of doing something different and we have lots of resources to help evaluate that.

[00:29:39] **Craig Staswick, CPA:** Right. And the other thing I'll just add to is whatever you end up filing to the IRS, make sure the property management company, because sometimes those are third parties, are aware of what was elected so that they can make sure they are operating the project in the way that makes sense with the elections.

[00:29:58] **Michael Novogradac, CPA:** I'm glad that you mentioned that because that's one of the challenges as we keep talking about filling out the form, we keep going in these old tangents, is you can't emphasize enough that whatever is being done with respect to filling out the Form 8609, making the various elections and all the rest, there are implications as to how the property's managed.

And you've got to make sure that everyone within your organization that needs to know how to manage the property, knows how to manage the property. And they know what elections have been made. So obviously a property management company should be reaching out and saying, "I need this information."

They should know enough to know they need it. But similarly, rather than relying on that, you need to make sure that you're giving it to them and confirming with them that they're operating the property in a fashion that's consistent with the elections made on the Form 8609. So let's, I think there are two others, if I'm remembering here correctly, that you wanted to make sure that we talked about and in both parts of line 10, and they're both irrevocable elections.

So let's look first at, there's 10a and 10c. Let's talk about 10a, which asks the developer who wants to elect to begin the credit period the first year after the building is placed in service. Let me say that again because it's not worded so great on the form. It asks whether the developer wants to elect to begin the credit period the first year after the building is placed in service. And it's a yes or no question. And what should developers be thinking about in how to evaluate answering that? Yes or no.

[00:31:35] **Craig Staswick, CPA:** So the developer is, in almost all cases, very motivated to start the credits as soon as possible. And so, by default they're almost always going to want to check " "No, don't want to defer the credits. I want to start it now." But what you need to think about is there is a cliff test and there's, as we all know, there's various cliff tests in Section 42 projects. One of the cliff tests is the minimum set aside tests. And that needs to be met annually, but especially at the end of the first year of the credit period. If you're checking no to not deferring, you're starting the credits in the current year that it was placed in service, you need to make sure that the project is meeting the minimum set aside test. The other thing to consider is, if not fully leased up by December 31st, if you're a calendar-year taxpayer, you're going to be debating ignoring COVID relief. You're going to be debating whether or not to start the credits or defer them. And I think that is a mathematical, exercise where, you know, what's the impact in equity both ways, right? So if you start the credits but not fully leased up, what does that mean for equity and credit delivery stream?

Because remember, ignoring COVID relief, any units that become qualified units after Year 1 are subject to the two-thirds credits, what's commonly referred to as the 15-year credit stream. So that's going to have generally speaking, a negative impact on your on your equity and you have to weigh that versus delaying the whole to checking yes, to defer. So you just, to me it seems like it's more of a mathematical calculation of where am I better off as a developer relating to tax credit equity?

[00:33:16] **Michael Novogradac, CPA:** Now that makes that perfect sense and I, when I see it, it tends not to be so much the minimum set aside issue because properties generate a 100% or 80%. If you're 20% or 40%, then that's going to be affordable. Then it can become more of a cliff effect type of issue. It's generally more the, do I have enough basis to claim credits over 10 years and I say 10 years, but it's really 10 years and spill over an 11, or am I going to claim credits over 15 years?

Which could have a dramatically adverse effect on your net equity and could lead to a big adjuster calculation. So the other irrevocable election that you mentioned was 10c. We talked about 10a and 10b and 10c. So it makes me wonder, maybe we should tell the listeners what 10b is. So if you wanted to, mention what, 10b is, then we can jump to 10c.

[00:34:07] **Craig Staswick, CPA:** Yeah, sure. 10b is elect not to treat large partnership as taxpayer and it's worded almost as, fun as the defer the credit period question. And it's not a yes or no, it's just a yes option. I've never, it's very uncommon.

[00:34:24] **Michael Novogradac, CPA:** Well first of all, you don't have large partnerships, but that's just one where if you ended up with a large partnership, which I remember correctly, is a hundred partners, right? Then you can actually, your recapture rules change. There's a whole host of implications to who has recapture risks and the rest.

But everything that we're dealing with are small partnerships. So it's a somewhat irrelevant question and I must say, I don't know that I've ever worked on a partnership where we were making that election. But I may not be remembering quite right. So the other irrevocable election that we mentioned was 10c, which asked what minimum set aside is being elected.

And this is probably when I think about getting private letter ruling requests to correct elections. This is probably the one that I see the most often and it's something where we get brought in a few years later where the developer was a local developer using a local accountant or something, and they weren't fully aware as to what this meant.

And they made an election that was the improper election. So maybe you can unpack the significance of this minimum set aside election, because there's four choices. Maybe you can talk about the four choices and which ones you generally see.

[00:35:33] **Craig Staswick, CPA:** Right? Yeah. So there are four choices. It's the 20 at 50 minimum set aside, the 40 at 60. The third one is a new one. It's the new average income election and the fourth one is the 25 at 60, which is for New York City-only projects. Generally speaking, for a 100% affordable projects, it's been at 40 at 60 has kind of been the default for decades. What I wanted to talk about with this line is--

[00:35:59] **Michael Novogradac, CPA:** Let me actually just interrupt you there just to unpack the 20-50, 40-60. The 20-50, for the listeners that aren't as experienced, means you're, you have to, there's a the minimum set-aside test is all about setting aside a minimum number of units for low-income occupancy and they'd be rent restricted and the rest. And it's a vestige or they took it from the private activity bond finance rules were to be, for your bonds to be tax exempt. And they're, and when they're used to finance residential rental housing, you have this minimum set aside test and minimum of units are set aside for low-income occupancy, and it's either 20% of the units at 50% or 40% of the units on a minimum basis being set aside to rent to tenants with income levels at 60% or below. So 20% of the units at income levels 50% or below, 40% of the units at income levels of 60% or below. And when I've seen an error, it's been the prior accountant checks the 20-50 thinking it's fewer units, even though the income level is a bit lower.

Whereas the problem with that, of course, is your rents for the entire project are based upon that minimum set aside election. It's subject to other limitations that could be on the property at the state level, at the federal level, but you know the consequence being that you are agreeing at the 20-50 election that all your tenants will be income levels at 50% or below and your rents will be based upon that 50% level versus your rents being based on the 60% level. And if you're going to be 100% affordable, then you're usually going to pass the 40% test. So you want to have the higher rent floor and the higher level of qualifying tenants for income at that 60% level. And once again, subject to other requirements that you, and other commitments you made to the state when you applied and received your credit allocation. So sorry for that transgression, or that aside, that wasn't really a transgression for that further ...

[00:37:55] **Craig Staswick, CPA:** No, it's good. That was good. Especially for, developers. You definitely need that context, And the other thing too, Mike, that I was going to, discuss is, or just bring awareness really is, it used to be three options on this line, 10c and a couple, a few years ago it added a fourth with a fourth being the average income election.

It, there's still, we received industry, received final regulations late last year. There's still some emerging kind of issues that need to be kind of worked through in the industry. But some of the chatter within the industry is maybe one day when some of those issues are resolved, the average income election is going to be kind of the default and replace what is now the default being the 40 at 60. So that, that's pretty interesting. I just wanted to bring awareness to the developers. There's that issue out there that, you know, yeah.

[00:38:48] **Michael Novogradac, CPA:** No, I definitely think that's a good point because as you noted in the past, there's the 25%, at 60 for New York City, but if you're not in New York City, you really had the 40-60 or the 20-50, and clients pretty universally elected the 40-60, even if all their units were going to be rented to tenants at 50% or less. And we don't need to go into all the reasons why, but 40-60 was pretty universally elected and I do believe that going forward, once we get guidance from individual credit agencies guidance, that I think is needed just to close any particular risks that most developers will be electing the average income. And I say that from a federal statutory construction perspective, that most developers will be electing average income at that point, and it could happen within 12 months. But I say from the federal perspective, because I have spoken in front of groups before, I'm sure you have as well, where I've made similar observations and then developers will say, but I don't, they'll say, "I don't agree," and I'll kind of go through all the reasons why at the federal level that's the overlay. And then I'll point out that some states might say, in order to elect this, you have to agree to certain other things. And that's kind of the assumption when I make that general default comment is some states might say you can only elect average income if you agree to do certain other things.

And some developers may not be able be in a position to do those other things, so they won't elect average income. So, but for the state restricting your ability to elect and I think there's a lot of compelling reasons why average income provides more insurance against future loss of credits than the 40-60 does.

Let's, move on from that. I appreciate you going through and highlighting the key parts of part one and part two, that developers have paid particularly close attention. But obviously there's other parts of the form that need to be attended to as well. But I hope this isn't the case, but I wouldn't be surprised if someone listened to this podcast says to themselves, "That's an interesting point."

And they go back and look at their 8609 and they discovered that they actually made an error on their Form 8609. And I mentioned in the intro about the importance of if you file a, if you find an error, you need to go and approach the IRS and get a private letter ruling request before you're under audit, to see if you can correct the error in the election. So if you could describe why you have to do it before you go under audit for a partnership and maybe describe the process of getting a private letter ruling request to or getting a private letter ruling a.

[00:41:44] **Craig Staswick, CPA:** Right? No, I'm glad we're discussing this because what I don't want is, I don't want developers to identify an error and then they look at the amount it costs to do a private letter ruling and walk away with, well, I'll just do the private letter ruling, you know, when the IRS audits me and when you read the private letter rules, you generally cannot do a private letter ruling once you're audited. So I don't want people to think you can just do it when the IRS, is auditing you. So if –

[00:42:16] **Michael Novogradac, CPA:** And I was just going to say that and it makes sense because the IRS doesn't want that either. The IRS is saying if you made a wrong election and you identified it before we started auditing you and you want to correct it, we've got a process to go through and if you meet the various requirements, you can change an otherwise irrevocable election. But once we start the audit, game over on that front.

[00:42:40] **Craig Staswick, CPA:** Right. So I wanted to emphasize that, and I agree it does make sense. Regarding the process, the, as you mentioned, the amount of professional fees associated with this. It's a very formal process. It's quite lengthy. So I didn't want to get into nuances of the process. It's very formal. The other point I'd like to make is, I also wouldn't think of, it's a given that you'll get the request that the ruling that you want, so facts and circumstances clearly play a large role in the private letter ruling request and how the IRS will respond to that.

[00:43:16] **Michael Novogradac, CPA:** No, I agree with that. And a lot of times the private letter ruling is all about a transaction or something you want to do and you want to get clearance from the IRS as to what the treatment will be when there's an area that you have a particular concern about.

But the private letter rulings where we're dealing with correcting an error of election, there's a pretty high success rate. Yes, it's clear that it was an error because you have so many other documents that document what you intended, that you, there's a very high success rate and we see all the time different private ruling requests.

If you go to our website, you'll see lots of PLRs correcting elections that were made in error. So you can, and there's also a pre-conference process with a private letter and request where you get a good sense as to which direction the IRS is. So I think that you, on the issues that we're talking about here, there'd be a high success rate, but as you point out, not a universal success rate. And it's all about, it's all about preparing it and using experienced professionals so they know the right questions, they understand what the IRS is looking for so you can make it as easy on the IRS as possible.

So before we close, I can't help but ask just a more general question. What other advice would you share with developers about Form 8609? And this is an opportunity for you to plug the webinar because that's obviously a must-listen.

Other Advice

[00:44:43] **Craig Staswick, CPA:** So definitely the deeper dive webinar, Wayne and I did last month to get just kind of into the weeds and trenches, if you will, of some of these issues.

And then just a recap, mistakes can be very costly. Take your time when you review the form and have multiple parties review the form as well and including your CPA.

[00:45:01] **Michael Novogradac, CPA:** Great point about multiple parties within the client. Definitely.

[00:45:07] **Craig Staswick, CPA:** It's hard to catch your own error.

Yes. And it's also one where we talked earlier about making sure the property management team gets the 8609 after you've made the elections. But really they should be involved in making the elections.

[00:45:20] **Craig Staswick, CPA:** Yes.

Preview of Next Week

[00:45:21] **Michael Novogradac, CPA:** They should be aware of what you're completing on the form, and they should be a group that reviews it before filing them.

So thank you, Craig. As I mentioned, I'll include a link to the webinar recording in today's show notes, and please do stick around Craig, for the Off-Mike section of the podcast, where I'm going to ask you some fun, off-topic questions so you can share some of your words of wisdom or advice.

To our listeners, please be sure to tune into next week's podcast. It's another great topic for affordable housing developers. On the podcast, my partner Rich Larson will be my guest and we're going to talk about the rental assistance demonstration or RAD program. And more specifically, we're going to cover some hot topics. RAD, as you may know, is a HUD program that helps finance the construction, rehabilitation and preservation of affordable rental housing through the conversion of public housing.

RAD's a particularly timely topic and opportunity for developers, and I say that because with higher interest rates, I think that there'll be somewhat less new construction being financed through private-activity bonds, which creates a great opportunity for the RAD program to access private-activity bonds to finance the acquisition and rehabilitation of public housing.

You want to make sure that you don't miss that episode.

Off-Mike

[00:46:52] **Michael Novogradac, CPA:** And now I'm pleased to reach our Off-Mike section. It's a fun way for listeners to get some tips and recommendations from our guests. And I have a couple of questions for you, Craig. The first one is, and it's one that I love asking, and it's timely for the new year, not just for tax accountants heading into a busy season, but also for everyone who has New Year's resolutions.

What's your favorite productivity hack?

[00:47:20] **Craig Staswick, CPA:** That's a good one. So my favorite productivity hack is by far and it's new for me somewhat. I've really just kind of taken it to another level, is there's so much software out there for automating various redundant tasks. And so I won't give the software I use some free publicity, but the one I currently use, I send out certain emails to clients or even internally when certain things happen, like a box is checked or this is checked and it's all automated, so, there's some logic built into that software where if this is checked, send this email, and blah, blah, blah.

[00:47:54] **Michael Novogradac, CPA:** So taking advantage of the software out there toda, has been a huge productivity hack.

No, I, appreciate that. As many listeners know, I do that through Outlook in terms of various incoming emails automatically going different places and the rest. I'm constantly in search of things like that, that you can automate. So, that's a good tip.

So my, other question, is what book you would recommend that listeners add to their reading list? I think I've mentioned in prior podcasts that, the one thing COVID did for me has gotten me back on the reading train and I've really kind of enjoyed that.

So I always like asking guests this question so I know what book they're adding to my reading list, unless I read it already.

[00:48:44] **Craig Staswick, CPA:** Well, I don't know if you'll be adding the books I recommend Mike. So the books that I recommend is geared toward parents of toddlers.

[00:48:56] **Michael Novogradac, CPA:** OK. You're right.

[00:48:57] **Craig Staswick, CPA:** That's those like I've been reading as of late, we've been reading the Berenstain Bear books.

Those have held up, quite well. So we're reading those at story time every night.

[00:49:07] **Michael Novogradac, CPA:** Okay. Berenstain Bears. You are correct. I will not be reading those, but it's not because, I haven't read them. It's because I probably haven't read all of them, but I have read a large number of the books. So, that's a good recommendation. I will also say there's another children's book that I actually has become something that is like a lesson for me, and it's, a book called, "If You Give a Pig a Pancake," and it's all about, you give a pig a pancake and then they want syrup and you give them syrup and then they need a plate. And then it just kind of goes through all the things that happen when you need to start by giving a pig a pancake and there's large part, large things in life where you think about it and you're like, well, if I do this one little thing, think of all these derivative things that are going to happen. So, I'll give you that to read, to add to your reading list.

[00:50:00] **Craig Staswick, CPA:** Thank you. We will, we will put that in the rotation.

[00:50:03] **Michael Novogradac, CPA:** I haven't heard that. Put it in the rotation. So thank you again, Craig, and to our listeners, I'm Mike Novogradac. Thanks for listening.

Additional Resources

Email

Craig Staswick

Webinar

Novogradac Form 8609 Deep Diver Recording (Original air date: Dec. 9, 2022)