

2009 Legislative Priorities for Reactivating Private Investment in the Low-Income Housing Tax Credit

Background

The Low-Income Housing Tax Credit (LIHTC) is the nation's largest and most successful affordable rental housing production program, financing more than two million homes since 1987 and about 120,000 annually in recent years. According to the National Council of State Housing Agencies, approximately 90 percent of all affordable rental housing is financed through the LIHTC. According to the National Association of Homebuilders, until recently the program supported 180,000 jobs annually.

The LIHTC program brings affordable rental housing to a wide variety of communities—from inner cities to rapidly growing suburbs to rural towns. It builds new affordable rental housing and saves valuable at-risk existing affordable housing. It provides affordable homes to working families and vulnerable populations with special needs—the elderly, people with disabilities, and people who are homeless. It addresses the housing needs of special communities, such as farmworkers and Native Americans, as well as represents the key housing resource for transformative community redevelopment and revitalization efforts nationwide.

The LIHTC has been so successful over its history as a result of strong and effective public-private partnerships between the state housing agencies, nonprofit and profit-motivated developers, sophisticated financial institution investors, and LIHTC syndicators, who help to bring all of these program participants together. These successful partnerships have not only built quality affordable rental homes throughout the country, but have done so also at a relatively low annualized foreclosure rate — less than 0.1 percent, according to Ernst & Young — as a result of quality financial management and oversight executed by these partnerships.

Initially LIHTC investors were from a variety of industries. Over the years, non-financial investors left the market as the price per credit rose and the investments became less attractive financially. In recent years, financial institutions, Fannie Mae and Freddie Mac typically provided the vast majority of LIHTC investments, a result of their real estate financing expertise and regulatory mandates to address low-income needs. However, the financial crisis has drastically reduced financial institution investment in the LIHTC program, preventing the production of desperately needed affordable rental housing and costing tens of thousands of construction jobs. Investment in the LIHTC has fallen from about \$9 billion in 2007 to about \$4 to \$5 billion in 2008, and could well drop even further in 2009. The substantial losses that many financial institutions have incurred has put them in a negative or uncertain tax position and eliminated or reduced their appetite for tax credits. Since these credits are payable over a ten-year period, and the future tax liability of financial institutions—and other potential investors as well— has become much more uncertain in the current economic environment, the risk that the investment will not be profitable because the tax credits cannot be claimed represents a significant obstacle to bring back LIHTC investment to historic levels. Moreover, current investors that cannot claim the LIHTC are strongly motivated to sell their portfolios, and the mere prospect of such divestment is further destabilizing an already weak investment market.

While financial institutions remain active LIHTC investors, in order to stimulate the new additional investments that will be required in order to build and preserve LIHTC housing over the next several years, it is critical that other corporate investors join with financial institutions to provide this capital so that the program is not dependent on only one sector of the overall economy.

The recently enacted American Recovery and Reinvestment Act provides temporary grant funds to jump-start stalled projects but does nothing to reactivate the investment market. We believe that the proposals outlined below will help accomplish this goal.

The Solution

Part A. Permit taxpayers to carryback for up to five years unused Low-Income Housing Tax Credits from the returns they file in 2009, 2010 and 2011, but only to the extent they make new LIHTC investments.

This proposal is designed to immediately increase investments in low-income housing. Current investors would be permitted to carryback for up to five years LIHTCs from the returns they file with respect to tax years 2008, 2009 and 2010 (including LIHTCs which were carried forward from prior years), but only to the extent they make new LIHTC investments by the end of the year in which the returns for such tax years are due to be filed. (Under current law, credits may be carried back for one year.) For this purpose, new LIHTC investments would be evidenced by a binding commitment to invest in a building for which LIHTCs are first claimed after 2008. For example, a taxpayer that makes a binding commitment to make new LIHTC investments of \$10 million in 2009 would be permitted to carryback for up to five years up to \$10 million of accumulated LIHTCs from its taxable year 2008 return, which the taxpayer would usually file in the fall of 2009.

In passing the Housing and Economic Recovery Act of 2008 (HERA), Congress recognized that in order for the LIHTC to successfully stimulate investment in this housing, it was necessary for it to be usable against the Alternative Minimum Tax (AMT) and accordingly, Congress provided AMT relief with respect to LIHTC properties placed in service after 2007. In order to be fully effective in stimulating additional investment, the LIHTCs which would be carried back under Part A should be usable against AMT liability and therefore, the AMT relief provided under HERA should be expanded in this manner.

Part B. Permit taxpayers to carryback credits generated by new LIHTC investments up to five years as they arise during the ten year credit period.

This proposal will increase the attractiveness of the LIHTC program for investors concerned about their continuing ability to utilize the tax credits over a ten year horizon. Given current economic uncertainties, it is more difficult to find investors willing to invest in a program that requires an investor to have ten straight years of positive taxable income to realize expected returns. The provision would apply only to investments in buildings for which credits are first claimed after 2008.

With respect to Part A and Part B, a revised ordering rule would apply to treat LIHTCs as the last general business credits utilized in the current taxable year. For example, assume that a calendar-year taxpayer in 2009 generates \$10 million in LIHTCs and \$10 million in other general business credits, and has \$10 million in income tax liability against which these credits may be applied. In this event, the ordering rule would treat all of the LIHTCs as eligible for the five-year carryback (assuming the new re-investment requirement is met with respect to the first proposal above).

Supporters
(List In Formation)

Affordable Housing Tax Credit Coalition
Affordable Housing Investors Council
Enterprise Community Partners, Inc.
Housing Advisory Group
Local Initiatives Support Corporation
National Affordable Housing Trust
National Leased Housing Association
Stewards of Affordable Housing for the Future

The organizations listed above feel strongly that further legislative action is required to encourage a return of private equity investment in the Housing Credit program. Other organizations wishing to be listed as supporters of the carryback proposals are asked to contact Victoria Spielman at (202) 282-5349 or victoria.spielman@taxcreditcoalition.org.