April 2, 2009

Ken Carfine
Treasury Fiscal Assistant Secretary
Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Eric San Juan
Acting Tax Legislative Counsel
Department of Treasury
1500 Pennsylvania Ave., NW, Room 3120
Washington, DC 20220

Dear Mr. Carfine and Mr. San Juan,

The undersigned organizations are writing to request that the Department of the Treasury publish guidance related to section 1602 of H.R. 1, the *American Recovery and Reinvestment Act of 2009,* which authorizes state housing credit agencies to "exchange" a portion of their Low-Income Housing Tax Credit (LIHTC) allocation authority for a grant from the Department of the Treasury.

Specifically, we are asking that the Department of the Treasury confirm that the requirements for use of the exchange subawards are identical to the rules associated with the LIHTC program, as provided by section 42 of the Internal Revenue Code ("the Code"). Further, we request that the Department of the Treasury clarify that LIHTCs authorized as part of disaster relief legislation and added to a state's housing credit ceiling qualify for the exchange program.

LIHTC Exchange Provision

In the last year, the crisis in the financial markets has spilled over into the affordable housing sector. Investment in the LIHTC has deteriorated precipitously, which has resulted in equity prices declining to levels at which it is extremely difficult to finance new affordable housing properties.

To jump-start these needed developments and provide stimulus to local economies during the ongoing economic crisis, Congress established the LIHTC exchange program, as provided by section 1602 of H.R. 1. The exchange program allows state housing credit agencies to exchange a portion of their allocated or unused LIHTC authority to use as gap financing, in the form of subawards, for LIHTC projects that may not have sufficient equity investment to be placed into service.

Under the "exchange proposal" the Secretary of Treasury shall make a grant to the state housing credit agency of each state in an amount equal to the low-income housing grant election amount. A state receiving a grant under this provision must use the grant amounts to make subawards to finance the construction, or acquisition and rehabilitation, of qualified low-income buildings as defined under the LIHTC program.

Exchange Program Requirements

Paragraph 2 of subsection 1602(c) of H.R. 1 establishes the general principle that the subawards allocated as part of the exchange program shall be subject to the same requirements as the existing LIHTC program. In particular, the statute reads, "Any such subaward…shall be subject to the same limitations (including rent, income, and use restrictions on such building) as an allocation of housing credit dollar amount allocated by such state housing credit agency under section 42 of the Internal Revenue Code of 1986."

With regard to the rules and requirements outlined above, it is clear that Congressional intent was to establish a program that enabled existing tax credit authority to be exchanged for gap financing, which would operate under the same rules and restrictions as the existing LIHTC program, in effect piggybacking on the existing program. Establishment of new rules or requirements for LIHTC projects receiving gap awards would defeat the purpose of the program; namely, to quickly provide financial resources to "shovel-ready" affordable housing projects, generating needed housing, jobs and local economic activity.

Unfortunately, the state housing credit agencies have not yet implemented the LIHTC exchange program, in part due to the uncertainty regarding these rules. Furthermore, developers and LIHTC investors are being advised not to submit applications for subawards until the agencies resolve these uncertainties. The longer the uncertainty remains, the more diluted the stimulative impact of the program will be. And without definitive guidance, the program risks having inconsistent rules and requirements established by the various state credit agencies.

Recommendation: ***The undersigned organizations recommend that the Department of the Treasury promptly publish guidance for the LIHTC stakeholder community confirming that the rules governing subawards made through a state's grant election follow the LIHTC rules under section 42 of the Internal Revenue Code and that no new or additional requirements apply. Doing so will ensure the most rapid implementation of the exchange proposal and maximize the economic impact of the provision.***

Disaster Area LIHTC Allocations

An additional area of uncertainty requiring the publication of guidance concerns LIHTC allocations made to disaster areas. There is uncertainty over whether credits directly authorized outside of section 42 of the Code can be exchanged for direct funding under the exchange provision. In the past several years, states have received special allocations of LIHTCs for areas that experienced natural disasters and were declared federal disaster areas by the federal government. Most notable are those states affected by Hurricane Katrina. However, many states in the Midwest and elsewhere also fall into this category due to floods and other disasters.

The crisis in the financial markets that is so severely affecting overall investment in the LIHTC program is causing many of these special "disaster credits" to go unused as well. In 2008, Indiana allocated tax credits to fifty-six property transactions. Of these projects, thirty-six received disaster credits and twenty received credits through the regular allocation. Although it is unknown how many of these projects have closed to date, the state credit agency estimates that it could be as low as four or five. Without gap financing, most of these shovel ready projects will not move forward.

The key factor as to whether section 1602 of H.R. 1 permits exchange of these credits is whether such credits constitute part of a state's "housing credit ceiling." While these disaster area LIHTCs are not authorized in the confines of section 42 of the Code, we believe a correct interpretation of the law is that such credits are part of a state's LIHTC "housing credit ceiling."

Internal Revenue Code Section 1400N(c) authorizes the allocation of GO-Zone LIHTCs, while the Midwestern disaster area credits are authorized as a non-codified amendment to Code section 1400N(c) by section 702 of H.R. 1424, the *Emergency Economic Stabilization Act of 2008*. These credit allocations are part of the LIHTC program, whose rules are provided by section 42 of the Code. Code section 1400N(c) makes it clear that these credits are part of the state's housing credit ceiling. Subparagraph (A) of paragraph 1400N(c)(1) states:

> "For the purposes of section 42, in the case of calendar years 2006, 2007, and 2008, the State housing credit ceiling of each State, any portion of which is located in the Gulf Opportunity Zone for such calendar year shall be increased…"

Further, paragraph (7) of Code subsection 1400N(c) states:

> "Any term used in this subsection which is also used in section 42 shall have the same meaning when used in such section."

Thus, we believe these credits are part of a state's LIHTC "housing credit ceiling" as defined in Code section 42 and are eligible for the exchange provision enacted as part of H.R. 1.

If Congressional intent was to provide for significant cash resources to be available to state agencies during this period of crisis in the LIHTC program and for unused credits from previous years to be eligible under the exchange, then it is logical that unused or unallocated disaster credits be included in the program. Providing gap financing is critical to any project that is stalled because of the economic crisis. However, it is even more important for areas that have suffered natural disasters and need to replace lost affordable rental housing.

<u>Recommendation:</u>* The undersigned organizations recommend that the Department of the Treasury promptly publish guidance for the LIHTC stakeholder community clarifying that LIHTC allocations authorized as part of disaster relief are eligible for the LIHTC exchange provision. Providing timely clarification will enable resources to those areas where affordable housing needs to be developed due to natural disasters.

Thank you for consideration of our views. If you have any questions about these comments, please contact Camel McGuire, National Association of Home Builders, at 202-266-8207 or via email at cmcguire@nahb.com.

Sincerely,

Council for Affordable and Rural Housing
National Association of Affordable Housing Lenders
National Apartment Association
National Association of Home Builders
National Affordable Housing Management Association
National Leased Housing Association
National Multi-Housing Council

Cc:

Paul Handleman, Office of the Associate Chief Counsel (Passthroughs and Special industries), Internal Revenue Service