

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2019-30)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

June 3, 2022

Re: Notice 2022-21 Recommendations for 2022-2023 Priority Guidance Plan

Ladies and Gentlemen:

We are writing in response to Notice 2022-21, in which the Service invited public comment on items that should be included on the 2022-2023 Priority Guidance Plan (“PGP”). Our comments relate to the right of first refusal in the Low-Income Housing Tax Credit program.

Section 42(i)(7) of the Internal Revenue Code establishes a safe-harbor that permits Low-Income Housing Tax Credit (“Housing Credit”) partnership agreements to provide a below-market right of first refusal (“ROFR”) to a nonprofit organization that may be exercised at the conclusion of the compliance period. The safe harbor provision was enacted to favor enduring nonprofit ownership of the Housing Credit property beyond the mandatory period specified by federal law or state regulatory agreement. This provision has largely worked as intended to enable nonprofit developers to obtain full ownership of the property they originally sponsored as the investor exists the program and preserve the long-term affordability of Housing Credit properties.

However, in recent years, outside entities without any connection to the Housing Credit program have been acquiring control of investor interests, after all credits have been claimed, with the purpose of resisting the expected investor exit in order to leverage cash payments not contemplated in the partnership agreement or payments that would be superseded by the exercise of the ROFR. In the case of nonprofit developments, these interests take the position that the ROFR provided for in section 42(i)(7) is simply a common law ROFR that can only be realized pursuant to requirements in the common law. This situation arises because of ambiguities in federal law that are reflected in unclear partnership agreement language with respect to the requirements and scope of the execution of the ROFR. This had led to scores of legal disputes, and, in many cases, costly litigation which has produced conflicting opinions by state and federal court judges ill-suited to sort through these types of tax issues. There is no consistent court interpretation of what is required by section 42(i)(7) which serves to only accentuate the current legal ambiguities.

This patchwork of decisions strengthens the relative position of large monied interests who have obtained control of Housing Credit limited partnerships at the expense of nonprofit providers of affordable housing. These nonprofits do not have the financial wherewithal to

resist investor demands in court and are forced to acquiesce to unanticipated monetary demands which may undermine the long-term financial viability of the property or force the nonprofit to raise rents, decrease resident services, defer maintenance, or even sell the property to cover the cash pay-off.

This is a situation that cries out for clarification of the law, yet the IRS has never issued guidance on section 42(i)(7). We urge the IRS to address this issue in the 2022-2023 Priority Guidance Plan and provide the following guidance to mitigate these disputes:

- Clarify that unless the partnership agreement provides otherwise, no offer from a third party is required to trigger the ROFR rights of the nonprofit.
- Clarify that the right of first refusal specified in section 42(i)(7) is not a state or common law right of first refusal but a special right of first refusal under federal law which does not require application of state common law principles, including with respect to the definition of what constitutes a bona fide offer.
- Clarify that the term “property” in section 42(i)(7) include all partnership assets, not just the real estate.
- Clarify that unless the partnership agreement specifically provides otherwise, limited partner consent is not required to exercise the ROFR, and that the ROFR may be initiated by an offer from any entity, including a related party.

Thank you for your attention to our request.

Sincerely,

Enterprise Community Partners
Local Initiatives Support Corporation/National Equity Fund
National Association of State and Local Equity Funds
National Housing Trust
National Low-Income Housing Coalition
Stewards of Affordable Housing for the Future