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Edward M. Kennedy
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The Honorable Lawrence H. Summers
Secretary of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Larry:

It was nice talking to you last night. I appreciate your willingness to help.

Enclosed is a short description of the problem. Apparently, the IRS is in the process of issuing technical advice memoranda that may drastically affect the development of affordable housing with low income tax credits. Before the IRS takes action, I'd like to make certain that you and others understand the adverse ramifications and work with affected parties so that we don't undermine our affordable housing efforts. Thank you for your cooperation and assistance.

With warm regards,

Sincerely,

Edward M. Kennedy

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Low Income Housing Tax Credit

Release of New IRS Technical Advice Memoranda Background Virtually all affordable rental housing built in the U.S. today relies on low income housing tax credits, as an essential part of the necessary financing. The low income housing tax credit is based on a percentage of "eligible basis" of a property. There are a number of items that make up the improvements to ndeveloped land that are includable in basis. The IRS, however, has not published regulations to provide guidance in the fourteen years since the enactment of the LIHTC program. Rather than issue guidance in the form of regulations, the IRS has finally decided to use a series of five technical advice memoranda (TAMs), prepared in connection with the audit of a single taxpayer, to define what costs involved in the building of an affordable housing property are includable in eligible basis for the purpose of determining the amount of credits that are available to the property. The TAMs take positions that are far different from rules established by state housing agencies and are contrary to general industry practice. The TAMs are scheduled to be released to the public under the Freedom of Information Act on October 27th.

Issue

Public release of the TAMs will have a massive disruptive effect on existing LIHTC and related tax-exempt bond investments and will have a major chilling effect on new investment. The reason is simply although a TAM is not formal precedent, in absence of other guidance, revenue agents will use the TAMs as guidance for audits and legal counsel will use the TAMs as IRS position in advising clients on potential new investments. Ultimately, existing investors who have bought credits will find that credits will be disallowed and will be reluctant to make new investments. Since many affordable housing properties use both credit and tax-exempt financing, loss of credits will also risk retroactive loss of tax-exempt status for these bonds.

If the TAMs reduce eligible basis on the order of 15 percent, as expected, the attractiveness of investment in LIHTC program will be dramatically reduced. Of course, replacing tax credits with debt financing will result in fewer affordable units built and higher rental rates for low income renters in those units that are built.

Requested Action

- Withdraw the TAMs.
- Publicly announce a new regulation project to determine how eligible basis is to be determined.

This will avoid wholesale disruption of new and existing investment in LIHTC and related tax-exempt bonds in the period before regulations are developed. At the same time, it will not require the revenue agent who has received the TAMs to change his position in the audit of the particular taxpayer under audit.