

March 16, 2009

Michael F. Mundaca
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Ave., NW
Room 3120
Washington, DC 20220

RE: The American Recovery and Reinvestment Act of 2009

Dear Mr. Mundaca:

The LIHTC Working Group was established to provide a platform for low-income housing tax credit (“LIHTC”) industry participants to work together to resolve technical and administrative LIHTC program issues. On behalf of the members of the LIHTC Working Group, we are requesting guidance on questions stemming from two sections of the American Recovery and Reinvestment Act of 2009 (the “Act”) that affect the LIHTC industry. We request that you add these issues to the list of IRS regulation projects and issue an IRS Notice outlining the guidance that the regulations will provide. We appreciate your timely response, as many ready projects have been put on hold to see how the provisions of the Act are going to be administered.

How and when will grants issued per Division B, Section 1602 of the Act be issued to the States?

Division B, Section 1602 of the Act authorizes grants to States for low-income housing projects in lieu of LIHTC allocations for 2009 customarily allocated under Internal Revenue Code Section 42. The Act requires States that choose to receive a grant in lieu of tax credits to make an election. In turn, the Treasury is to then make a grant to the electing State’s credit allocating agency in an amount equal to the election. In addition, Division B, Section 1602 details the maximum amount a State may elect to receive as a grant, but it does not specify how and when the grant will be issued to the States.

Traditionally, construction lenders to LIHTC projects want a substantial amount of equity in projects before they will start releasing construction loan proceeds. Since the grant will fund projects in lieu of equity, it is important that this money get to the State credit allocating agencies as soon as possible after an election is made so that they can quickly make awards to projects to begin construction. Any delays in receiving grants will at best delay projects if not jeopardize them as the State waits for the proceeds from the federal government. We believe that the grants should be funded to the credit allocating agency the moment the State elects to receive them.

In addition to receiving a grant as soon as an election is made, States should be allowed to make multiple elections throughout the year as needed. These “rolling” elections will help keep the funds flowing to the State so that it can continually fund ready projects. The need for a rolling election stems from the fact that the calculation in Division B, Section 1602, which outlines the maximum election a State can make, contains four parts that are determined at different times and multiple times during the fiscal year. The four parts to the calculation consist of the following:

1. 100% of the unused allocation from the previous year,¹
2. 100% of the returned allocation in the current year,²
3. 40% of the amount of credits allocated to the State for 2009,³ and
4. 40% of the credits allocated to the State from the national pool.⁴

For example, the third part of the formula can be determined at the beginning of the fiscal year. Whereas, the second part of the formula could theoretically happen every day of the year. If a State had to wait until the end of the fiscal year to make an election, that requirement would hold up all projects until the end of the year. Therefore, we believe rolling elections should be implemented so that a State can elect to receive a grant at any time and as many times as it needs to during a fiscal year, and consequently, we request that you adopt this policy.

Are the subawards issued by the States from grants received under the provisions of Division B, Section 1602 of the Act taxable to the taxpayers receiving the subawards?

Division B, Section 1602 of the Act does not indicate whether or not, when a State issues a subaward in the form of a grant to a project, the grant is taxable for federal income tax purposes. The Joint Explanatory Statement of the Committee of Conference on the Act (the “Joint Statement”) stated that this provision was to follow the original House bill. The Joint Statement also reported that under the House bill, grants under this provision were not to be taxable income to the recipients. Furthermore, if a grant was taxable to the recipient, the net cash to help develop the project could end up being less than what a developer could obtain in the current market. Thus, making the grants taxable would lower the effectiveness of the program and the impact it will have on housing. Therefore, we believe it was the intent of Congress to make the grants non-taxable, and we request that you confirm this position.

Do the subawards under Division B, Section 1602 reduce eligible or depreciable basis?

Division B, Section 1602 of the Act does not mention whether or not the subawards reduce depreciable basis or eligible basis⁵ of the funded project. Normally, federally funded grant proceeds reduce eligible basis.⁶ A reduction in eligible basis typically lowers the amount of

¹ Internal Revenue Code Section 42(h)(3)(C)(i)

² Internal Revenue Code Section 42(h)(3)(C)(iii)

³ Internal Revenue Code Section 42(h)(3)(C)(ii)

⁴ Internal Revenue Code Section 42(h)(3)(C)(iv)

⁵ Internal Revenue Code Section 42(d)

⁶ Internal Revenue Code Section 42(d)(5)(A)


Michael F. Mundaca
American Recovery and Reinvestment Act of 2009
March 16, 2009
Page 3

credits a State gives to a project and in turn, it results in a reduction in funding. Just like the taxable income issue above, a reduction in funding will lower the effectiveness and impact of the Act on the housing industry. However, under Division B, Section 1404, it states that the "basis" of a qualified low-income building shall not be reduced by the amount of any grant issued under Division B, Section 1602 of the Act. We believe it is reasonable to assume that "basis" means both eligible basis and depreciable basis, but we are requesting your explicit guidance on this issue.


As mentioned before, many projects are waylaid awaiting your response to these issues. Thus, we look forward to your reply. We appreciate your time and are available if there is any way we can be of assistance. Please feel free to contact Michael Novogradac (415) 356-8000 or Michael Morrison (415) 356-8025.

THE LIHTC WORKING GROUP

Best regards,
Novogradac & Company LLP


Michael J. Novogradac

Novogradac & Company LLP


Michael G. Morrison

cc: Paul F. Handleman