April 6, 2009

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Mr. Paul F. Handleman
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RE: Income and Rent Limits Under Internal Revenue Code (IRC) §142 and IRC§42

Dear Ms. Young and Mr. Handleman:

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, along with the National Association of Home Builders and the National Affordable Housing Management Association, we request clarification on income and rent limits relating to the Housing and Economic Recovery Act of 2008 ("HERA"). We are requesting that you issue guidance to clarify these income and rent issues. These issues need to be quickly resolved so that low-income housing projects can determine their limits for 2009.

Issue 1) The definition of "project" for area median gross income ("AMGI") as it pertains to the new hold harmless provision for all projects.

Section 3009(a) of HERA established a hold harmless policy for tax credit and tax-exempt bond projects by amending IRC§142(d)(2)(E)(i) to read as follows:

> "Any determination of area median gross income under subparagraph (B) with respect to any project for any calendar year after 2008 shall not be less than the area median gross income determined under such subparagraph with respect to such project for the calendar year preceding the calendar year for which such determination is made."

It appears that the hold harmless policy should apply on a county basis for all projects. IRC§142(d)(2)(E)(i) does not explicitly state that the project had to be eligible in a prior year for tax credits or tax-exempt bonds, but does explicitly state that the income shall be determined under Subparagraph B. IRC§142(d)(2)(B) states that "area median gross income shall be determined by the Secretary in a manner consistent with determinations of lower income families and area median gross income under section 8." According to HUD's income limit briefing material, section 8 income limits are always determined on a county basis. Under IRC§142(d)(2)(B), the income limit for a project in the previous year is based on the property's county in the previous year, whether or not that project was placed in service in the previous year. IRC§142(d)(2)(B) income determinations are always on a county basis; to apply income limits on a project-by-project basis would not be consistent with the requirement that income limits be calculated in a manner consistent with the section 8 program.

If the provision applies on a project-by-project basis, an unintended consequence of HERA is that different projects located in the same county would have different rent and income limits. Please see the examples below which illustrate the difference between the hold harmless provision on a project-by-project basis and a county basis.

Example 1 – Hold Harmless Applied on a Project-By-Project Basis

	Applicable Income Limit				
	2008	2009	2010	2011	2012
HUD very low-income limit[1] ("VLI")	$30,000	$32,000	$29,000	$26,000	$27,000
Project 1 (Income determined in 2008)	$30,000	$32,000	$32,000	$32,000	$32,000
Project 2 (Income determined in 2009)	N/A	$32,000	$32,000	$32,000	$32,000
Project 3 (Income determined in 2010)	N/A	N/A	$29,000	$29,000	$29,000
Project 4 (Income determined in 2011)	N/A	N/A	N/A	$26,000	$27,000

In periods of falling VLI, projects placed in service in later years will be at a financial disadvantage to projects that were placed in service in earlier years in both the amount of rent they can charge and in the number of tenants that can qualify to live in the project. Furthermore, this will create an administrative burden on tax credit participants such as the IRS, state agencies, developers, investors, and property management companies that are responsible for tracking the rent and income limits. In addition, HUD will have the burden of tracking these limits. Defining the hold harmless policy on a county basis would solve many of these problems. Please see the example below which shows the hold harmless provision on a county basis:

[1] HUD has indicated that since tax credits and tax-exempt bonds now have a hold harmless policy in place, they will not use the historical exemption for section 8 income limit determinations on all counties as they have done in the past, which will result in more areas having decreasing income limits.

Example 2 – Hold Harmless Applied on a County Basis

	Applicable Income Limit				
	2008	2009	2010	2011	2012
HUD very low-income limit	$30,000	$32,000	$29,000	$26,000	$27,000
Project 1 (Income determined in 2008)	$30,000	$32,000	$32,000	$32,000	$32,000
Project 2 (Income determined in 2009)	N/A	$32,000	$32,000	$32,000	$32,000
Project 3 (Income determined in 2010)	N/A	N/A	$32,000	$32,000	$32,000
Project 4 (Income determined in 2011)	N/A	N/A	N/A	$32,000	$32,000

Adopting a hold harmless policy that applies on a project-by-project basis creates anomalies amongst projects located within the same area and creates uncertainty for industry stakeholders who are trying to determine the feasibility of future projects.

Issue 2) The definition of "determined" for AMGI minimum purposes as it pertains to the new HUD HERA Special hold harmless provision for 2007 and 2008 projects.

Section 3009(a) of HERA amends Internal Revenue Code Section 142(d)(2) to include subsection (E)(iv), which reads, "HUD hold harmless impacted project". The term "HUD hold harmless impacted project" means any project with respect to which AMGI was determined under subparagraph (B) for calendar year 2007 or 2008 if such determination would have been less but for the HUD hold harmless policy. Similar to Issue 1, income determinations under IRC§142(d)(2)(B) should be on a county basis. IRC§142(d)(2)(E)(ii)(II), does not explicitly state that the project needed to be eligible for the income limits in 2007 or 2008, but rather that the area median income determined under IRC§142(d)(2)(B) for 2007 or 2008 be determined under the HUD hold harmless policy.

Issue 3) The applicability of the hold harmless provision as it pertains to the rural projects using the national non-metro median income.

Section 3004 of HERA created IRC§42(i)(8) that allows rural tax credit projects to use the greater of AMGI or the national non-metro median income for purposes of determining the applicable rent and income limit.

IRC§42(i)(8) reads as follows:

> "For purposes of this section, in the case of any project for residential rental property located in a rural area (as defined in section 520 of the Housing Act of 1949), any income limitation measured by reference to area median gross income shall be measured by reference to the greater of area median gross income or national non-metropolitan median income."

As discussed above, Section 3009(a) of HERA established a hold harmless policy for tax credit and tax-exempt bond projects. IRC§42(g)(4) makes IRC§142(d)(2)(E)(i) applicable to tax credit projects when determining income limits. IRC§142(d)(2)(E)(i) states that the hold harmless provision applies to "determination of area median gross income under subparagraph (B)" of IRC§142(d)(2). Subparagraph (B) of IRC§142(d)(2) indicates that "area median gross income shall be determined by the Secretary in a manner consistent with determinations of lower income families and area median gross income under section 8." The hold harmless policy applies to the national non-metro since IRC§42(i)(8) states "any income limitation measured by reference to area median gross income shall be measured by reference to the greater of area median gross income or national non-metropolitan median income," and therefore any income limitation determined under IRC§42(g)(4) would use the greater of AMGI or the national non-metro median income for purposes of determining the applicable rent and income limit.

Thank you for your consideration of these matters. We look forward to your timely response. If there is any way we can be of assistance, please feel free to contact Michael Novogradac (415) 356-8000 or Jim Kroger (415) 356-8016.

Yours very truly,

THE LIHTC WORKING GROUP

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THE NATIONAL ASSOCIATION OF HOME BUILDERS

NATIONAL AFFORDABLE HOUSING MANAGEMENT ASSOCIATION

cc: Lynn Rodgers, Deputy Director of the Economic Market Analysis Division, US Department of Housing and Urban Development