

NEW MARKETS TAX CREDIT COALITION

January 15, 2010

The Honorable Michael Mundaca
Acting Assistant Secretary for Tax Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Secretary Mundaca:

I am writing on behalf of the New Markets Tax Credit Coalition to make the Department aware of concerns we have regarding efforts to codify the economic substance doctrine and how such legislation would impact the New Markets Tax Credit (NMTC).

The Coalition has been assured by some Congressional staff that the codification of the economic substance doctrine is not intended to, and therefore would not, have any adverse impact on NMTC transactions and yet tax attorneys and accountants who work with members of the NMTC Coalition do not share that view. They are advising NMTC investors as well as community development entities (CDEs) that unless the legislation codifying economic substance includes language stating that NMTC investments, as authorized by Code Section 45D, are not subject to the economic substance test, they cannot give a tax opinion making that conclusion.

We have been engaged in an effort to clarify the impact of the economic substance doctrine on the NMTC since the NMTC was first authorized in 2000 and in 2004 then-Ranking Member of the Finance Committee, Senator Max Baucus, and Senator Jay Rockefeller engaged in a colloquy on the Senate floor related to the economic substance language included in the Jobs Act (S. 1637) being considered by the 108th Congress. In the colloquy, Senator Baucus stated that the intent of the economic substance provision:

“is clearly to uphold and protect congressionally mandated tax benefits while curtailing unintended abuses of the tax code. I assure the Senator that the new markets tax credit would not be adversely affected by this provision”.

While we point to this colloquy and technical explanations provided by the Joint Committee on Taxation (including JCX-83-03 and JCX-113-07) to clarify the intent of the economic substance provision, we believe legislative language clearly stating the intent is necessary, given the inability to obtain a clear legal opinions without it.

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Therefore we ask that the Department support us by insisting that the following language be included in any legislation that would codify the economic substance doctrine:

If the tax benefits are clearly contemplated and expected by the language and purpose of relevant authority, e.g., Code Section 45D, it is not intended that such tax benefits be disallowed if the only reason for such disallowance is that the transaction fails the economic substance doctrine as defined in this provision.

I appreciate your attention to this matter and hope that the Department can support the Coalition in its effort to clarify the intent of economic substance as legislation moves through Congress to codify the doctrine.

Sincerely,



Robert A. Rapoza

cc: Michael Barr, Assistant Secretary for Financial Institutions