

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201103038**
Release Date: 1/21/2011

Third Party Communication: None
Date of Communication: Not Applicable

Index Number: 146.00-00, 146.07-00,
9100.00-00

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:FIP:B05
PLR-136841-10

Date:
September 27, 2010

Legend:

Agency=

State=

\$a=

\$b=

\$c=

\$d=

\$e

\$f

Date 1=

Year 1=

Year 2=

Dear :

This is in response to your request for an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to file amended Forms 8328

(Carryforward Election of Unused Private Activity Bond Volume Cap) for Agency to make carryforward elections under § 146(f) of the Internal Revenue Code (the Code).

Facts and Representations:

Agency is an agency of State authorized to borrow money through the issuance of bonds to provide financing for housing. In Year 1, State received an allocation of \$a of the State's Housing Act Volume Cap (as defined below) under §146(d)(5) of the Code. State statutes allocated the State Housing Act Volume Cap as follows: \$b to Agency, \$c to a housing pool reserved for housing uses and the balance to specified local issuers. The State department charged with administering volume cap incorrectly transferred the \$c in State Housing Act Volume Cap originally allocated to the housing pool to a unified pool that was available for other uses. The State Department did not segregate the \$c in State Housing Act Volume Cap in the unified pool. When the unused amount of the State's Housing Act Volume Cap was reallocated to Agency later in Year 1 it was incorrectly aggregated with the regular volume cap.

On Date 1 Agency duly and timely filed separate Forms 8328, one for the regular volume cap and one for the Housing Act Volume Cap as required under Notice 2008-79 (described below). Subsequently, Agency filed an amended Form 8328 for the regular volume cap, reducing the amount of the carryforward to correct a separate miscalculation of the amount available. The amended Form 8328 for the regular volume cap is referred in this ruling as Form 8328 and the Form 8328 for the Housing Act Volume cap is referred to as the Housing Act Form 8328. The total amount of volume cap carried forward was correct on Form 8328. However, as a result of the incorrect reallocation, Agency overstated the amount of regular volume cap available for regular carryforward on Form 8328. Agency understated, by the same amount, the amount of Housing Act Volume Cap on its Housing Act Form 8328. Form 8328 filed by Agency for Year 1 showed \$d of regular carryforward (which amount included \$c of unused State Housing Act Volume Cap which was reallocated to the Agency). The Housing Act Form 8328 showed \$b for the State's Housing Act Volume Cap carryforward. The correct amount of the State's Housing Act Volume Cap carryforward is \$e and the correct regular carryforward amount is \$f.

The error was discovered by the Agency's Finance Counsel when counsel was determining the amount of Agency's available volume cap for use in Year 2. Agency promptly notified the IRS of the error and subsequently submitted this ruling request for an extension of time to file an amended Form 8328 to reflect the correct amount of regular volume cap and an amended Housing Act Form 8328 to reflect the correct amount of Housing Act Volume Cap. Prior to this submission, the Internal Revenue Service had not discovered the Agency's error in either of the forms. Agency represents that it will use the State's Housing Act Volume Cap carryforward for qualified mortgage bonds that also qualify as "qualified housing issues" for purposes of

§ 146(d)(5)(B)(ii), so amending the Form 8328 and the Housing Act Form 8328 will not change the purposes of the carryforward.

Law and Analysis:

Section 146 generally provides a unified annual state tax-exempt private activity bond volume cap for most private activity bonds.

Section 146(d)(1) provides that the State ceiling applicable to any State or any calendar year is the greater of: (A) an amount equal to \$75 multiplied by the State population, or (B) \$225,000,000. Pursuant to § 103(c)(2), the term "State" includes the District of Columbia and any possession of the United States.

For purposes of this ruling, the general bond volume cap or State ceiling provided to States for private activity bonds under § 146(d)(1) is referred to as the "regular volume cap" to distinguish it from the Housing Act Volume Cap as defined below.

Section 146(f)(1) provides that if an issuing authority's volume cap for any calendar year after 1985 exceeds the aggregate amount of tax-exempt private activity bonds issued during the calendar year (by the authority), the authority may elect to treat all (or any portion) of the excess as a carryforward for one or more carryforward purposes.

The election is made by filing Form 8328, Carryforward Election of Unused Private Activity Bond Volume Cap, with the Internal Revenue Service Center, Ogden, UT 84201. Under Notice 89-12, 1989-1 C.B 633, Form 8328 must be filed by the earlier of (1) February 15 of the calendar year following the year in which the excess amount arises, or (2) the date of issue of bonds issued pursuant to the carryforward election. Although Revenue Procedure 2005-30, 2005-1 C.B. 1148, provides for an automatic extension of six months from the due date of the carryforward election to make the carryforward election, it does not apply in this case.

Section 146(f)(2) provides that the election must identify the purpose for which the carryforward is elected, and specify the amount to be carried forward for the purpose. Under § 146(f)(4), carryforward elections (and any identifications or specifications stated therein) are irrevocable.

Section 3021(a)(1) of the Housing Assistance Tax Act of 2008, Division C of Pub. L. No. 110-289 enacted on July 30, 2008 (the 2008 Housing Act) added § 146(d)(5) which authorizes a temporary increase in the annual State private activity bond volume cap for 2008 (the Housing Act Volume Cap) for certain "qualified housing issues" as defined in § 146(d)(5)(B)(ii). Section 146(d)(5)(A) provides that, for calendar year 2008, the State ceiling for each State shall be increased by an amount equal to

\$11,000,000,000 multiplied by a fraction: (i) the numerator of which is the State ceiling for the State for calendar year 2008 (determined without regard to the increase in § 146(d)(5)(A)), and (ii) the denominator of which is the sum of the State ceilings determined under clause (i) for all States.

Section 146(d)(5)(B)(i) provides that the Housing Act Volume Cap may be allocated only to finance “qualified housing issues.” Section 146(d)(5)(B)(ii) defines the term “qualified housing issue” as: (I) an issue for qualified residential rental projects under § 142(a)(7), or (II) a qualified mortgage issue (determined by substituting a 12-month origination period for the 42-month origination period under § 143(a)(2)(D)(i)).

Section 146(f)(6), added by § 3021(a)(2) of the Housing Act, provides that any carryforwards of Housing Act Volume Cap may be used only for qualified housing issues that are issued by the end of calendar year 2010.

Notice 2008-79, 2008-40 I.R.B. 815, provides the allocation of the 2008 Housing Act Volume Cap to the States, procedures for filing the carryforward elections with respect to the volume cap as well as for reporting bonds issued pursuant to the volume cap. Section 3.6 of Notice 2008-79 states that subject to updated IRS information reporting forms and procedures, an issuer that has unused Housing Act Volume Cap at the end of calendar year 2008 should elect the carryforward amount by filing a separate IRS Form 8328. Issuers who have both unused regular volume cap and Housing Act Volume Cap should file separate carryforward elections for each of those carryforwards. A carryforward election for regular volume cap should follow the instructions on Form 8328 and a carryforward election for Housing Act Volume Cap should follow the instructions on Form 8328 with the modifications provided in section 3.6 of Notice 2008-79.

Section 301.9100-1 of the Procedure and Administration Regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections that do not meet the requirements for automatic extensions in § 301.9100-2, such as this request, must be made under the rules of § 301.9100-3. Requests for relief will be granted if the taxpayer provides evidence establishing to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, that the taxpayer is generally deemed to have acted reasonably and in good faith if the taxpayer requests relief under that section before the failure to make the regulatory election is discovered by the IRS.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability than the taxpayer would have had if the election had been timely (taking into account the time value of money).

In this case, Agency duly and timely filed the necessary forms to carryforward its regular volume cap and its Housing Act volume cap. In Year 2, errors were discovered in Form 8328 and the Housing Act Form 8328 and, before the IRS discovered the incorrect allocations, the Agency requested an extension of time to file amended forms. The proposed amendments to the Form 8328 and the Housing Act Form 8328 will not change the aggregate amount carried forward or change the purpose of the carryforward.

Conclusion:

Under the facts and circumstances of this case, we conclude that Agency acted reasonably and in good faith, and that granting an extension of time under § 301.9100-1 to file an amended Form 8328 and an amended Housing Act Form 8328 to carryforward \$f of regular carryforward and \$e of Housing Act Volume Cap and will not prejudice the interests of the government. Therefore, Agency is granted an extension of time of 45 days from the date of this letter ruling to file an amended Form 8328 and an amended Housing Act Form 8328. A copy of this letter should be attached to the amended Form 8328 and the amended Housing Act Form 8328. Two copies are enclosed for that purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

Sincerely,

Associate Chief Counsel
(Financial Institutions & Products)

By: _____
Timothy L. Jones
Senior Counsel
Branch 5