February 11, 2021

Mr. James Holmes
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: 4% LIHTC minimum rate established in the Consolidated Appropriations Act of 2021

Dear Mr. Holmes:

We are writing this letter on behalf of the LIHTC Working Group. The members of the Working Group are low-income housing tax credit (LIHTC) professionals who work together to help resolve technical LIHTC program issues and provide recommendations to make the program even more efficient in delivering benefits to help build affordable rental housing. Our group includes nonprofit and for-profit developers, syndicators, investors, accountants and lawyers.

Introduction

With this letter, the Working Group is asking the Internal Revenue Service (IRS) to provide guidance on the 4% LIHTC minimum rate established in the Consolidated Appropriations Act of 2021 (Act). The minimum rate is available to buildings placed in service after December 31, 2020 that also satisfy one of the following two effective date requirements provided for in Act Section 201(b):

> (1) any building which receives an allocation of housing credit dollar amount after December 31, 2020, and
>
> (2) in the case of any building any portion of which is financed with an obligation described in section 42(h)(4)(A), any such building if any such obligation which so finances such building is issued after December 31, 2020.

The first clause applies to buildings that receive an allocation of tax credits under Section 42(h)(1)(A) from a Credit Allocating Agency from that agency's annual allocation of LIHTC.

The second effective date clause applies to buildings that do not receive an allocation under Section 42(h)(1)(A), but are eligible for tax credits under Section 42(h)(4). The operation of this clause is not entirely clear. The clause provides that if "any portion" of a building is financed by bonds issued after 2020, then it is entitled to the minimum rate. The Act has no materiality threshold or other expectation for the amount. Therefore, buildings financed by bonds issued in both 2020 and 2021 seem to be eligible, regardless of the relative amounts of each.

The area that lacks clarity is when bonds are considered "issued" after December 31, 2020 for purposes of the Act.

For purposes of Section 42, the IRS has long recognized the reality of more than one bond issuance event for a given building. Treas. Reg. § 1.42-8(b)(2) explains how to elect the LIHTC percentage month when bonds are issued on multiple dates:

> If a [building] is financed with tax-exempt bonds issued in more than one month, the taxpayer may elect the appropriate percentage for any month in which the bonds are issued. Once the election is made, the appropriate percentage elected applies for the building even if all bonds are not issued in that month.

We note that an analogous situation occurred during implementation of the Tax Credit Assistance Program (TCAP) created under the American Recovery and Reinvestment Act of 2009 (ARRA). The law limited eligible properties to those with LIHTCs from certain calendar years.

The significance of the determination as to when bonds are considered "issued" presents itself in two ways:

1. buildings benefiting from an allocation of bond volume authority to an issuer in 2020, where the issuer issues at least some of the bonds in 2021, or later years (draw-down bonds), and

2. buildings benefiting from bonds allocated and issued in 2020 as well as bonds allocated and issued in 2021, or later years.

Draw-down Bonds

With draw-down bonds an issuer only issues a portion of the bonds in 2020, and issues the balance in 2021 or later. The borrower only receives the proceeds of the bonds as the bonds are issued.

Under IRS Notice 2010-81, each draw is treated as a separate issue:

> In the particular case of a "draw-down" loan under § 1.150-1(c)(4)(i) or a commercial paper program under § 1.150-1(c)(4)(ii), in which a bond is issued as a draw or as commercial paper at different times and interest begins to accrue on each draw or commercial paper when it is funded, each draw or commercial paper constitutes a separate bond that is issued on the issue date of that draw or commercial paper when the issuer receives the purchase price, and interest begins to accrue, on that draw or commercial paper for Federal income tax purposes.

We are requesting guidance that the interpretation of "issued" above also applies to draw-down bonds with draws occurring after 2020.

Subsequent Allocations

Some housing developments receive tax-exempt bond volume in more than one calendar year. When this happens there are multiple allocations and issuance events.

Presumably Congress was aware of this provision when drafting the effective date language and did not include any restrictions on properties with issuance events in both 2020 and 2021. In our opinion, the reference in Section 201(b)(2) to "any such obligation which so finances such building after December 31, 2020 supports this interpretation. (emphasis added)

Like with tax-exempt bonds, properties can be allocated LIHTC more than once. In this instance, the federal government provided guidance for properties that received an allocation in the year before and

after those designated in ARRA: agencies could deliberately create TCAP eligibility by allocating a "nominal amount" from the required year (see "TCAP Question and Answer" #1; May 4, 2009).

Not only was the property qualified for TCAP due to a very small second LIHTC allocation, the agency could act with the specific intent of providing the assistance. Federal administrators never defined "nominal," but the term still served as a check on agencies' and owners' decisions.

Nevertheless, LIHTC professionals are concerned about an IRS auditor determining that a subsequent issuance in 2021 would not qualify a building for the minimum rate. We are requesting guidance affirming the IRS understands that a nominal allocation is sufficient.

Consequence

Many developments with tax-exempt bond financing and LIHTCs are underway despite facing serious challenges from the pandemic. These challenges include construction stoppages, material and labor shortages, and lease-up delays, which cause increases in costs and reductions in sources. Qualifying for the 4% minimum rate generates more LIHTCs, which leads to more tax credit equity. The resulting additional equity can make a substantial difference in a development's feasibility.

We note that under Section 42(m)(2)(D), a project is only entitled to LIHTCs to extent needed for financial feasibility. As such, a building is only entitled to LIHTCs to extent the governmental unit which issued the bonds, or, often, the LIHTC agency, approves the LIHTCs as necessary for financial feasibility of the property.

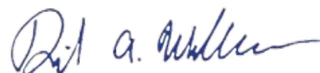
Conclusion

We understand there are different perspectives on legislative intent. However what Congress meant to do is a consideration only when those responsible for interpretations are unable to discern the law's meaning. In the matter at hand, the IRS can interpret the Act to provide crucial certainty to the LIHTC community.

Thank you in advance for your time and careful consideration of these issues. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

THE LIHTC WORKING GROUP

Very truly yours,
NOVOGRADAC & COMPANY LLP



by: Michael J. Novogradac, Managing Partner   Dirk A. Wallace, Partner

CC: Dillon Taylor