MEMO

DATE:	January 19, 2021
TO:	Biden-Harris Transition Team
CC:	Don Graves
FROM:	Novogradac LIHTC Working Group
RE:	Regulatory Recommendations to Address the Nation's Affordable Housing Crisis

We appreciate the opportunity to submit this memo on behalf of the Novogradac Low-Income Housing Tax Credit (LIHTC) Working Group. The members of the Working Group are 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 housing. Our group includes nonprofit and for-profit developers, syndicators, investors, lenders, accountants, lawyers and other professionals.

Since its inception in 1986, the LIHTC has financed the production or preservation of more than 3 million affordable rental homes for veterans, seniors, working families, and people with special needs. Virtually all affordable housing developed in the United States depends on the LIHTC as the most important source of capital, making it the main tool for creating and preserving affordable rental housing.

Prior to the election, President-elect Joe Biden introduced his Build Back Better plan, a component of which was a plan to Invest in Housing. Included was the expansion of the LIHTC by providing a $10 billion investment to increase efficiency and the number of new or rehabilitated affordable housing units across the country. We appreciate this opportunity to express our gratitude for the incoming Administration's support of the LIHTC.

In this letter, we detail our recommendations to the Biden-Harris Transition Team to aid in the goal of supporting and expanding the LIHTC through regulatory action, the most expedient manner in which to address the needs of the nation within the opening months of the new administration. We also welcome the opportunity to meet with members of the incoming administration to discuss these recommendations and other potential enhancements to the LIHTC.

Support the LIHTC Through Community Reinvestment Act (CRA) Regulatory Reform

For banks that regularly invest in LIHTC equity, the CRA is a crucial incentive. Ever since the promulgation of the revised CRA regulations in 1995, the CRA has helped make the LIHTC the most successful affordable rental housing production incentive nationwide. Since 1987, the LIHTC has provided more than $200 billion in equity investment, financed nearly 3.5 million affordable rental homes and housed more than 7.5 million low-income households, according to data from the National Council of State Housing Agencies and analysis from the National Association of Home Builders. It has also supported the more than 3.7 million jobs for more than one year, generated more than $350 billion in wages and business income and spurred more than $140 billion in tax revenue.

Given the rental affordability crisis facing the country, and the LIHTC's position as the premier resource for affordable rental housing production, we cannot afford to reduce LIHTC investment by reducing the CRA incentive for affordable housing investment and lending, as contained within in the final CRA rule released by the Office of the Comptroller of the Currency (OCC) in May 2020.

Most of the public comments in response to OCC's proposed CRA rulemaking took issue with OCC's emphasis on the dollar volume of loans, and the repeal of a separate investment test raises concerns it could deemphasize LIHTC equity investment as compared to community development lending. Given the acting Comptroller resigned on Jan. 14, the LIHTC Working Group urges President-elect Biden appoint a new Comptroller that would withdraw the May 2020 OCC regulations, and would join the Federal Reserve's (the Fed's) CRA rulemaking efforts. The Fed's advance notice of proposed rulemaking ANPR on CRA reform published in October 2020 varies significantly from the OCC final rule released in May; the Fed has requested comments on the ANPR and the LIHTC Working Group will be submitting a response in advance of the February 16 deadline.

With the third banking regulator, the Federal Deposit Insurance Corporation (FDIC), declining to sign on to the final CRA regulations issued by the OCC, the LIHTC Working Group urges all three federal banking regulators coalesce around a shared vision for CRA regulations. The Working Group looks forward to working with the Biden-Harris Administration on CRA modernization and welcomes the opportunity to discuss the matter further.

Address Issues Relating to Amending Tax Returns and Forms 8609

Each year, the LIHTC Working Group provides recommendations to the IRS on action items to be included in the annual Priority Guidance Plans. The main focus of the letter submitted for the 2020-2021 Priority Guidance Plan will be a request for guidance on the revised edition of IRS Form 8609-A and its instructions.

According to Internal Revenue Service instructions to Form 8609-A, owners of affordable housing developments should not report LIHTCs on returns filed with the IRS until they receive IRS Form 8609 Low-Income Housing Credit Allocation and Certification (8609) from the Authorized Housing Credit Agency Official (Agency). As such, a delay in receipt of 8609s from an Agency delays the reporting of LIHTCs on returns filed for the year buildings are completed and occupied by qualified tenants. Due to recent statutory changes which no longer allow partnerships to amend tax returns back to the underlying tax year, the importance of the issue has increased significantly.

Partners in a LIHTC property contribute capital in exchange for the right to receive LIHTC and other tax benefits. The partners negotiate adjustments to capital contributed based on the timing of the tax benefits. A delay in the delivery of the LIHTC is likely to cause a reduction in the total amount of capital that the investor contributes. The adjuster provisions are usually based on a present value or internal rate of return analysis. The shortfall in sources may threaten the development's viability and ultimately impact the number of affordable homes that can be provided to low-income households

The instructions for the 8609 and related Form 8609-A should be changed to provide that LIHTCs may be taken without an 8609 if the failure to have an 8609 is due to reasonable cause and not due to willful neglect consistent with Section 42(l)(1).

Reform Housing Credit Average Income Test Regulations Proposed by the IRS

In 2020, the IRS resolved how to set area median income limits and on Oct. 30, the IRS released long-awaited proposed rulemaking on LIHTC average income minimum set-aside. Of all the proposed requirements, two provisions prove troubling–the inability to change designations of each low-income unit regardless of what a tax credit allocating agency may allow and the IRS' interpretation of unit noncompliance, which effectively leads to an additional minimum set-aside risk. Ideally, the IRS would reconsider both before finalizing the regulation. The LIHTC Working Group submitted comments to the IRS in late Dec. detailing how the regulations, as currently drafted, would interact/conflict with other federal housing programs. Nearly every other major federal housing program has statutory or programmatic rules that require the floating of unit designations to some degree, including Section 8, the HOME Investment Partnerships (HOME) program, the National Housing Trust Fund, Rural Development, and tax-exempt bonds. Fixing the designations would not work with these programs. Further, the prohibition against changing a unit's designation would eliminate the taxpayer's ability to operate in a manner consistent with the existing minimum set-asides provided under LIHTC guidance. The letter also alerted the IRS to potential consequences it may not have foreseen.

Legislative Action to Support Affordable Housing Production and Preservation

While it is necessary to act quickly to address the nation's affordable housing needs through the regulatory process, legislators must also lay the groundwork to address longstanding housing issues. To that end, housing advocates have been pushing for the inclusion of provisions of the Affordable Housing Credit Improvement Act (AHCIA) of 2019. As noted above, the LIHTC is responsible for the creation and preservation of more than 3 million affordable homes and strengthening this incentive will address the severe shortage of affordable rental housing. In 2020, Congress passed the Fiscal Year 2021 omnibus appropriations bill, H.R. 133, which enacted a minimum 4 percent LIHTC rate, a prominent AHCIA provision. Still, there are additional AHCIA provisions that should be enacted by future legislation, including: lowering the 50% bond financing threshold to 25%; increasing the allocations for the 9% LIHTC;

and, providing additional LIHTC basis boosts. The LIHTC Working Group would also support the inclusion of the AHCIA in the U. S. Department of the Treasury's FY 2022 Green Book. Acting now to increase and preserve the supply of affordable housing will not only address immediate needs and aid in economic recovery but will also ensure that affordable rental housing will be available for the future.

The LIHTC Working Group appreciates your consideration of our comments. We welcome the opportunity to discuss these issues with you further.