

April 2, 2020

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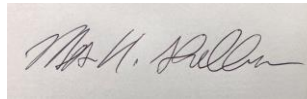
Dear Ms. Cimino and Mr. Novey:

Following up on discussions that you have had with some of the undersigned, we would like to present recommendations for urgent and necessary guidance from the Internal Revenue Service (the “**IRS**”) and the Department of Treasury (“**Treasury**”) to alleviate the significant disruption caused by the COVID-19 pandemic to the development and operation of low-income housing tax credit (“**LIHTC**”) properties. While we are all active members of the Tax Credit and Equity Financing Committee (the “Committee”) of the American Bar Association’s Forum on Affordable Housing and Community Development Law (the “Forum”), and while we have consulted with other members of the Committee and the Forum, this request is not made on behalf of the Forum and has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

Thank you for your consideration of this request. We would be pleased to discuss these matters with you or your staff at your convenience.



Judy Crosby
Kutak Rock
Co-Chair of the Tax Credit and
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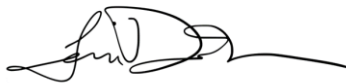
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REQUEST FOR RELIEF TO ALLEVIATE COVID-19 DISRUPTIONS

OVERVIEW

Throughout the country, governmental entities are recommending social distancing and, in many cases, enforcing stay-at-home orders that exempt only essential workers. In addition, some exempt workers are unable to work due to family responsibilities or potential or actual exposure to COVID-19. As a result, there are shortages of construction materials and workers, delays in permitting and local approvals, delays in public hearings and meetings of bond issuers, difficulties in conducting due diligence activities including site visits, surveys and environmental studies, inefficiencies in preparing legal documents and recording deeds and mortgages, and interruptions in daily operations of properties, including the ability to interact with residents and arrange maintenance and repair activities.

Transactions that should be closing right now are beginning to be delayed because of the uncertainty that technical requirements of Section 42 and the regulations thereunder may not be met given the disruptions due to the COVID-19 pandemic. In addition, for projects which had planned on beginning construction later this year or even next year, it may be difficult to meet all the timing requirement of Section 42 due to COVID-19 related disruptions and delays. Efforts of property managers that should be focused exclusively on the health and safety of tenants and staff are at risk of being diverted to satisfy technical requirements of the program.

Accordingly, the Forum of Affordable Housing and Community Development Law submits this request for relief from certain of the technical requirements applicable to LIHTC projects.

NEED FOR ACTION

We acknowledge that some of the relief we are requesting may be available to certain LIHTC projects under the provisions of Revenue Procedure 2014-49 and 2014-50. Revenue Procedures 2014-49 and 2014-50 apply to projects located in jurisdictions for which the President has declared a major disaster under the Robert T. Stafford Disaster Relief and Emergency Act (“*Stafford Act*”). For several reasons, however, we believe that Revenue Procedures 2014-49 and 2014-50 are inadequate to address the situation at hand.

First, although the President has declared major disaster areas in many states (approximately half as of the date of this letter) and other states have requested such declarations, the COVID-19 pandemic affects all projects in all states and it is critical that uncertainty be resolved by providing uniform relief. Second, the relief in the revenue procedure requires action by the applicable state housing credit agency. The staff and boards of these agencies have communicated that they are already stressed, and their ability to act is limited. The pandemic is inherently different than the disasters contemplated by Revenue Procedures 2014-49 and 2014-50, and it is important that automatic relief be granted nationwide to relieve uncertainty and the burdens on state agencies. Third, as described below, relief is needed in ways not addressed by the revenue procedures.

As described in the following section, we believe that the IRS has significant authority to address projects that are not located in major disaster areas and urge the IRS to use its authority to fully address the unprecedented issues raised by the pandemic.

AUTHORITY OF THE IRS TO GRANT REQUESTED RELIEF

There are two theories under which the Service may act.

First, Section 7508A provides that, “in the case of a taxpayer determined by the Secretary [of the Treasury] to be affected by a federally declared disaster (as defined by Section 165(i)(5)(A)), the Secretary may specify a period of up to 1 year that may be disregarded in determining ... whether any of the acts described in paragraph (1) of Section 7508(a) were performed within the time prescribed therefor ...”

Section 165(i)(5)(A) provides “The term "Federally declared disaster" means any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.”

The Stafford Act has two relevant definitions:

(1) Emergency.—

“Emergency” means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

(2) Major disaster.—

“Major disaster” means any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

However, we respectfully note that Section 165 does not require a “major disaster.” It requires a disaster where “in the determination of the President, Federal assistance is needed.” Plainly the President’s finding of a national emergency in this situation is consistent with this conclusion. We believe a fair reading of the statute leads one to conclude that a disaster under Section 165(i)(5)(a) can include both Major Disasters and Emergencies. Accordingly, relief under Section 7508A (and, by reference, Section 7508) is authorized.

Notice 2020-18 reaches a similar conclusion:

“On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic (Emergency Declaration). The Emergency Declaration instructed the Secretary of the Treasury ‘to provide relief from tax deadlines to Americans who have been

adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).’ ”

Once relief is authorized, Section 7508A(a)(1) provides a lengthy list of actions that may be taken. Most have to do with filing returns and making claims for refunds, but the Section ends with “(K) *Any other act required or permitted under the internal revenue laws specified by the secretary.*”

Accordingly, consistent with the major disaster declared in many states, and the President’s declaration of an “emergency” generally, we have a disaster that requires federal assistance, and the Secretary of the Treasury could grant one year extensions for any act required or permitted under the revenue laws.

As noted above, this is not the only source of authorization.

More specifically as to the LIHTC, Section 42(n) gives the Secretary of Treasury authority to issue “such regulations as may be necessary or appropriate to carry out the purposes of this section” Treas. Reg. 1.42-13(a) repeats that authority and adds that the Secretary can provide guidance in a variety of ways.

Consistent with that authority, the Service has issued many rulings authorizing agencies grant extensions of certain deadlines, see the aforementioned Rev. Proc. 2014-49 and 2014-50, and the many rulings cited therein. Those guidance items typically provided specific extensions of deadlines to specific locales. However, we note that after Hurricane Katrina, the Service issued Notice 2005-69. It announced that for a temporary period of 13 months (i.e., even longer than the one year period specified in Section 7805A) owners across the entire country could rent to individuals displaced by the hurricane without regard to income limitations. We observe that this kind of relief was a common-sense policy determination, and not a mere waiver of any specific Code provision or period of time. Similarly, in Notice 2007-66, Rev. Proc. 95-28, and Rev. Proc. 2007-54 the IRS gave relief pursuant to Section 42(n).

Accordingly, based on either of these theories, we respectfully offer that the Service is authorized to take suitable action to respond to the current crisis, including the actions proposed in this request.

REQUESTED RELIEF

We respectfully request that the IRS publish a notice granting relief to LIHTC properties with respect to the following items:

- Provide a nationwide 12-month extension of the 10% Test deadline required by IRC Section 42(h)(1)(E)(ii) for carryover allocations issued in 2019, 2020 and 2021.
- Provide a nationwide 12-month extension to the normal 24-month period to meet the minimum rehabilitation expenditure deadline required by IRC Section 42(e)(3) and IRC Section 42(e)(4) for rehabilitation expenditures placed in service in taxable years ending in 2020-2022.

- Provide a nationwide 12-month extension of the placed-in-service deadline required in IRC Section 42(h)(1)(E)(i) for projects issued carryover allocations in 2019, 2020 and 2021.
- Provide a nationwide 12-month extension of the 25-month rehabilitation period currently allowed under IRS Revenue Procedures 2014-49 and 2014-50 to properties that suffered a casualty loss due to a Presidentially declared major disaster in the 25-month period prior to the onset of COVID-19.
- Provide a nationwide 12-month extension (from December 31, 2020 until December 31, 2021) of the year-end deadline for property restoration that allows a LIHTC project that suffers a casualty loss not associated with a major disaster to avoid loss of LIHTC for 2020.
- Provide a nationwide 12-month moratorium on both physical inspections and tenant file reviews as required by IRS regulation 1.42-5.
- Provide a nationwide 12-month moratorium on tenant income recertification requirements.
- Provide a nationwide 12-month extension for all open noncompliance corrective action periods.
- Provide a nationwide temporary suspension of income limitations and transient occupancy rules to allow rental of low-income units (i) to homeless persons infected or suspected of being infected with COVID-19 to allow them to safely quarantine themselves given the reduced capacity and social distancing issues that many shelter facilities are facing during this period, and (ii) to medical personal and other essential workers infected or suspected of being infected with COVID-19. Such treatment should apply both for purposes of Section 42 and Section 142 and also provide that such temporary usage would not impact the classification of such housing as residential rental property or a qualified residential rental project.
- Amend the instructions to the Form 8609-A to allow taxpayers to claim LIHTC without a Form 8096-A executed by a credit agency if the failure to have a Form 8609 is due to reasonable cause and not due to willful neglect consistent with Section 42(l)(1). The problem addressed by this action predated the declaration, but the COVID-19 emergency has made it substantially worse.
- Provide a nationwide 12-month extension for qualifying for the transition rules applicable to the Historic Rehabilitation Tax Credit. Under Section 47, a taxpayer may claim the 20% rehabilitation credit in the year property is placed in service if, among other requirements, the rehabilitation satisfies a 24-month or 60-month rehabilitation period that begins within 180-days of December 22, 2017, (*i.e.*, starts on or before June 20, 2018) and ends 24 months or 60 months thereafter. It is requested that the 24-month and 60-month rehabilitation periods be extended to 36 and 72 months.

PROPOSED FORM OF NOTICE

Given the urgency of this request, we have taken the liberty of drafting a partial proposed form of notice which may be helpful to you in granting the requested relief. Specifically, the attached Exhibit A contains draft Purpose and Background statements. We are currently drafting the substantive provisions, however we encourage the IRS to not wait on the outcome of these efforts.

CONCLUSION

In this difficult time, urgent action is required to relieve uncertainty and allow the LIHTC to continue its critical role in providing affordable housing to the low-income tenants severely affected by the pandemic. As outlined above, we believe that the IRS has authority to extend deadlines and take similar actions that will alleviate the disruption caused by the pandemic. The requested relief is consistent with similar actions taken by the IRS in the past, but new and additional actions are required given the unprecedented and wide-ranging effects of the COVID-19 pandemic.

EXHIBIT A TO REQUEST FOR RELIEF
FORM OF PROPOSED IRS NOTICE

Low-Income Housing Credit COVID-19 Relief

Notice 2020-__

I. PURPOSE

On March 13, 2020, the President of the United States issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121- 5206 (the Stafford Act) in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic. The Emergency Declaration instructed the Secretary of the Treasury “to provide relief from tax deadlines to Americans who have been adversely affected by the COVID-19 emergency, as appropriate, pursuant to 26 U.S.C. 7508A(a).”

Pursuant to the Emergency Declaration, this notice provides relief under sections 42(n) and 7508A(a) of the Internal Revenue Code by modifying and supplementing the relief that is provided in Rev. Proc. 2014-49, 2014-37 I.R.B. 535, and Rev. Proc. 2014-50, 2014-37 I.R.B. 540.

The expanded relief in this notice is limited to the Emergency Declaration. Except as expressly provided in this notice, all provisions of Rev. Procs. 2014-49 and 2014-50 continue to apply by their terms without modification.

II. BACKGROUND

Section 7508A provides the Secretary of the Treasury or his delegate (Secretary) with authority to postpone the time for performing certain acts under the internal revenue laws for a taxpayer determined by the Secretary to be affected by a Federally declared disaster as defined in section 165(i)(5)(A). Pursuant to section 7508A(a), a period of up to one year may be disregarded in determining whether the performance of certain acts is timely under the internal revenue laws.

Under §Section 42(n) of the Internal Revenue Code and § 1.42-13(a) of the Income Tax Regulations, the Secretary may provide guidance to carry out the purposes of § 42 through various publications in the Internal Revenue Bulletin.

Rev. Procs. 2014-49 and 2014-50 provide temporary relief from certain requirements of §§ 42 and 142(d) of the Internal Revenue Code in the context of a major disaster.

Rev. Proc. 2014-49 provides guidance and relief to the owners of qualified low-income housing projects (each such project, a § 42 Project) and to Agencies (as defined in section 5.01 of Rev. Proc. 2014-49) that are responsible for those § 42 Projects.

Rev. Proc. 2014-50 provides guidance to issuers of exempt facility bonds financing qualified residential rental projects under § 142(d) (each such issuer, an Issuer; each such project, a § 142(d) Project) and to operators of those § 142(d) Projects. Various aspects of these revenue procedures apply with respect to § 42 Projects and § 142(d) Projects both inside and outside of the area in which the major disaster occurs.

The circumstances surrounding the Emergency Declaration closely match the underlying rationales for the relief provided Rev. Procs. 2014-49 and 2014-50. Like a major weather event, the nation's response to COVID-19 almost certainly will lead to consequential disruptions in transactions and construction, including citywide mandatory halts in construction activity, understaffed lenders, suspended site inspections, and broken supply chains.