Impact of the Housing and Economic Recovery Act of 2008 on Current and Future Low-Income Housing Tax Credit Properties

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I. Introduction

This article addresses the impact of the Housing and Economic Recovery Act of 2008 (HERA) (H.R. 3221) on current and future Low-Income Housing Tax Credit (LIHTC) properties. HERA was passed by the U.S. House of Representatives on July 23, 2008, and by the U.S. Senate on July 26, 2008. President Bush signed the bill into law July 30, 2008. With a number of important exceptions discussed below, HERA is generally effective after its date of enactment, i.e., starting on July 31, 2008.

This article summarizes and provides commentary on the major portions of HERA that expand and modernize the LIHTC under § 42 of the Internal Revenue Code of 1986. This article segregates the changes into four major areas: those changes that will enhance investor incentives, those that may make existing and future LIHTC developments more financially feasible, those that lessen the administrative burden of complying with the LIHTC program, and, lastly, miscellaneous other changes.

HERA reflects more than a year and a half of effort by members of Congress and numerous industry participants. From the moment that the Democrats took control of Congress in November 2006, efforts to modernize the LIHTC began. This effort culminated in the inclusion of LIHTC modernization provisions in HERA.

Two West Coast senators, Gordon Smith (R-OR) and Maria Cantwell (D-WA), led the way in the Senate. In the House of Representatives, Congressman Charlie Rangel, chair of the Ways and Means Committee, took a very personal and active interest in developing the legislation. Among industry participants, the National Council of State Housing Agencies, the Affordable Housing Tax Credit Coalition, the Housing Advisory Group, and the National Association of Home Builders Housing Tax Credit Advisory Group were critical supporters.

II. Investor Incentives

The two major areas of improvement for investors relate to changes in the application of the alternative minimum tax (AMT) and the elimination of the requirement to post recapture bonds in order to avoid recapture tax on the disposition of an interest in a tax credit property during the fifteen-year compliance period.

A. AMT Changes

Prior to HERA, limitations were in place for most general business credits, including the LIHTC and the Historic Tax Credit (HTC). These credits were limited to use against income tax amounts in excess of the greater of (i) a taxpayer's "tentative minimum tax" for the year or (ii) 25 percent of the taxpayer's regular tax liability above $25,000.[1] Tentative minimum tax is an AMT concept, and the presence of the limitation effectively prevented the LIHTC and the HTC from being used against the AMT. HERA removed the reference to tentative minimum tax, thus eliminating the AMT limitation.[2] However, the 25 percent limitation continues with the effect that the LIHTC and the HTC can only be used against the sum of $25,000 plus 75 percent of a taxpayer's regular tax liability above $25,000.

Prior to HERA, interest income earned on tax-exempt bonds used to finance affordable housing was generally subject to the AMT.[3] HERA created an exception for tax-exempt housing bonds.[4]

The following discusses the differing effective dates of the AMT changes to the LIHTC, the HTC, and housing tax-exempt bonds. The following also provides a general discussion of the expected impact of the changes and reviews some of the areas in which additional guidance is needed.

1. LIHTC

The LIHTC can now offset the AMT. This provision is effective for buildings placed in service after December 31, 2007.[5]

Reportedly, some large LIHTC investors were subject to the AMT and, as a result, dropped out of the LIHTC investment market. It is hoped that the allowance of the LIHTC against the AMT will allow such investors to re-enter the market and stop the current drop in LIHTC pricing. In addition, it is hoped that new investors may come into the market because they know that if in the future they become subject to the AMT, they will still be able to use the LIHTC. Most commentators do not expect a rush of new or returning investors in the short run. However, over the next six to eighteen months, it is hoped that a meaningful number of new investors will enter the LIHTC market and serve to increase the demand for LIHTC investments.

Due to the fact that the provision is only effective for buildings placed in service starting in 2008,[6] this provision will create two different kinds of LIHTCs. Credits from buildings placed in service before 2008 will not offset the AMT. However, buildings placed in service in 2008 or later will offset the AMT. Adding another layer of complexity, projects that have buildings placed in service both before and after the effective date will have both kinds of credits.

As a result of the effective date limitation,[7] the price paid for new credits may be higher than that paid for older projects with the AMT restriction. The Internal Revenue Service (IRS) will need to revise instructions for various tax filing forms to account for the two different kinds of credits. For example, partnership Schedule K-1s will need to be adjusted to report LIHTCs from pre-2008 and post-2007 placed-in-service buildings.

2. HTC

HTCs under § 47 now offset the AMT.[8] This provision is effective for credits attributable to qualified rehabilitation expenditures "properly taken into account" for periods after December 31, 2007.

A critical question for investors will be the meaning of the words *properly taken into account*.[9] It is not clear what was intended by such language, so the IRS will probably need to offer guidance.

As with the LIHTC, this rule will create different kinds of HTCs. For expenditures properly taken into account before January 1, 2008, HTCs will not offset the AMT. However, credits from newer projects will offset the AMT. As a result, the price paid for new credits may be higher than that paid for older projects with the AMT restriction.

3. Tax-Exempt Housing Bonds

Interest on tax-exempt bonds used for qualified residential rental projects (including LIHTC projects) is now also exempt from the AMT.[10] This provision is effective for bonds issued after July 30, 2008.[11]

As with the LIHTC and the HTC, this rule will create two different categories of tax-exempt housing bonds. For bonds issued on or before July 30, 2008, bond interest will not be exempt from the AMT. However, bonds issued after July 30, 2008, will generate income that is not subject to the AMT. As a result, the price paid for more recently issued tax-exempt bonds will generally be higher than that paid for older bonds subject to the AMT. For seven-day reset variable rate bonds issued since HERA passed, this difference has been fifteen to sixteen basis points. On a $10 million tax-exempt bond, this translates into an annual savings of approximately $15,000 to $16,000. For fixed-rate bonds, the difference has been seventy to eighty basis points. On a $10 million tax-exempt bond, this translates into an annual savings of approximately $70,000 to $80,000.[12]

B. Repeal of Recapture Bond Requirement

Under the prior law, investors could not avoid recapture upon the disposition of more than one-third of their interest in an LIHTC project prior to the end of the fifteen-year compliance period without posting a recapture bond.[13] Therefore, some investors chose not to invest in LIHTC projects because fifteen years was too long of an investment horizon, and the cost of a recapture bond increased the costs of disposing of an interest in an LIHTC project.

Under the new law, there will be no recapture of credits if a building (or an interest therein) is disposed of within the fifteen-year LIHTC compliance period if it is reasonably expected that such building will continue to be operated in compliance with the LIHTC requirements for the remainder of the compliance period.[14] Congress replaced the recapture bond requirement with an extension of the statute of limitations for the LIHTC to three years after the IRS is notified of the recapture event.[15]

The repeal of the recapture bond requirement is effective for transfers after July 30, 2008.[16] However, a taxpayer can elect to have the provision apply to prior transfers of interests in buildings if it is reasonably expected that the building will continue to be operated in accordance with Code § 42 for the remainder of the compliance period.[17]

It is hoped that the repeal of the bonding requirement will make the LIHTC attractive for more investors. The removal of the recapture bond requirement will allow an investor to dispose of its interest at any time as long as it is expected that the project will continue to comply with the LIHTC requirements. Therefore, investors with shorter time horizons may be willing to invest in LIHTC projects. However, it should be noted that the provision does not eliminate recapture liability for projects that do not comply with the LIHTC requirements for the remainder of the fifteen-year compliance period.[18]

Some fear that the elimination of the bond posting requirement will greatly increase the number of secondary market transactions. A large increase in the supply of secondary market transactions might drive tax credit prices even lower than they are today. The authors do not expect a great increase because the ability to post a bond and its related cost, in our experience, have not been a tremendous impediment to disposing of an interest in an LIHTC property. Thus, it is hoped that the net effect of this provision, along with the AMT changes discussed above, will be to make the LIHTC appealing to more investors, resulting in a larger pool of investors for LIHTC projects. A larger pool of investors would stabilize LIHTC equity pricing as well as make the LIHTC industry less dependent on a few large investors.

Another benefit of the provision is that owners who have previously transferred an interest in a building and have purchased and posted a recapture bond can now elect to no longer post a recapture bond.[19] This could provide significant savings by avoiding annual payments for the cost of the bonds.[20]

As noted above, under the new rule, the statute of limitations on recapture does not start to run until the IRS is notified of a recapture event.[21] As such, an investor has an unlimited statute of limitations.

For prior projects where a bond was posted and the taxpayer seeks to make an election to not post a bond, Revenue Procedure 2008-60 provides a simple procedure for making the election. Under this procedure, a taxpayer merely sends a letter to the IRS providing (i) the taxpayer's name, address, and taxpayer identification number; (ii) "a statement that taxpayer reasonably expects that the building will continue to be operated as a qualified low-income building (within the meaning of § 42) for the remainder of the building's compliance period"; (iii) a statement under penalties of perjury that the representations are true, correct, and complete; and (iv) a copy of the signature page only of the Form 8693 that was approved by the IRS for the building.[22]

III. Enhancement of Financial Feasibility

Numerous changes were included in HERA to make existing and future LIHTC developments more financially feasible. Although not applicable to all projects, the changes discussed below will allow many projects to qualify for more credits, charge higher rents, and reduce debt.

A. 10 Percent Increase in State LIHTC Amounts

For 2008 and 2009 only, each state and possession[23] will receive an additional 10 percent allocation of LIHTCs.[24] Smaller states that currently qualify for the small state minimum, currently at $2,325,000, will be eligible for an additional $230,000.[25] For calendar year 2010, annual LIHTC credit-issuing authorities return to levels that would have been in place if HERA was not enacted.

State allocating agencies are in the process of putting procedures in place to use the additional credits. If the additional 2008 credits are not allocated before December 31, 2008, the credits will be lost and the state allocating agencies will not be able to participate in the national pool.

States will be able to choose whether to use the additional credits to (i) allocate more credits to projects that already have an LIHTC allocation but may have a financing gap due to the current reduction in equity pricing, (ii) allocate credits to new projects, or (iii) use a combination of (i) and (ii).

Some states, such as California and North Carolina, have indicated an intent to make their credits available for new LIHTC applications. Other states, such as Illinois, have indicated an intent to use the additional credits to fill financing gaps in existing projects or to replace other scarce types of government financings with credits.

B. $11 Billion Increase in Housing Bond Volume Cap

The tax-exempt bond volume cap for 2008 is increased by $11 billion.[26] This increase can be carried forward through 2010.[27] The additional volume cap, as well as any volume cap carried forward, can be used for qualified residential rental projects[28] (including LIHTC projects) as well as a qualified mortgage issue (including the refinance of a subprime loan).[29] This provision is effective for bonds issued after July 30, 2008.[30]

The increase in the tax-exempt bond volume cap is very substantial. As a result, it should be easier for an LIHTC project to obtain the volume cap necessary to finance 50 percent or more of the project's land and building costs and thus be automatically eligible to obtain an allocation of LIHTCs, subject to additional state requirements.

Table 1 lists the effect of this increase in tax-exempt bond financing for some larger states. The exact allocation is specified by IRS Notice 2008-79.

State bond allocating agencies will need to develop a procedure for allocating this additional tax-exempt bond authority. The IRS has provided

Table 1

State	Existing Volume Cap*	Additional Volume Cap**
California	$3,107,023,275	$1,144,564,324
Florida	$1,551,355,655	$571,487,942
Nevada	$262,095,000	$96,550,479
New York	$1,640,306,965	$604,255,799
Ohio	$974,687,945	$359,055,260
Texas	$2,031,872,300	$748,500,523

* I.R.C. § 146(d) (2008); Rev. Proc. 2007-66, 2007-45 I.R.B.
** I.R.S. Notice 2008-79, Sept. 17, 2008.

guidance giving some flexibility to issuers in coordinating the additional volume cap with the existing volume cap. The additional volume cap should be tracked separately from the existing volume cap. An issuer may use its discretion in using the additional volume cap or carryforwards before or after the existing volume cap or carryforwards.[31]

C. 9 Percent Credit Rate Floor

For new construction and substantially rehabilitated buildings that are placed in service before December 31, 2013, and are not subsidized with tax-exempt bonds,[32] the applicable percentage (i.e., tax credit rate) has a floor of 9 percent.[33] Prior to enactment of this provision, the so-called 9 percent rate would have been 7.94 percent for August 2008.[34] This provision is effective for buildings placed in service after July 30, 2008, and before December 31, 2013.[35]

Where applicable, this change alone results in an almost 14 percent increase in the amount of LIHTCs that a building's eligible basis can support. This increase can significantly help projects overcome a funding gap if they are allocated sufficient credits to use the higher amount. Projects that have a funding gap and already have received a carryover allocation of credits that is fully utilized under the prior law would now be able to support more credits and could request an additional allocation of credits from the state credit agency.

The example in Table 2 illustrates how the new 9 percent minimum credit percentage, when combined with a higher tax credit allocation, can help close a funding gap generated from a decline in tax credit pricing.[36]

As the example illustrates, HERA's new 9 percent floor increases equity from $6,352,000 to $7,200,000. This almost completely offsets the traumatic decrease in equity pricing that has occurred over 2007 and 2008.

It is noteworthy that the 9 percent floor provision is a new subsection (2) of Code § 42(b), and it does not replace the credit rate lock language in Code § 42(b)(1). As a result of the language stating that the applicable

Table 2

	Prior to Both (i) the Sharp Decrease in Equity Pricing over 2007–2008 and (ii) the HERA	Immediately Prior to the HERA	After the HERA
Eligible Basis	$10,000,000	$10,000,000	$10,000,000
x Applicable Percentage	7.94%	7.94%	9.00%
= Total Annual Credits	$794,000	$794,000	$900,000
x 10 Years (Total Credits)	$7,940,000	$7,940,000	$9,000,000
x Syndication Factor	92%	80%	80%
= Total Equity	$7,304,800	$6,352,000	$7,200,000

percentage for a non–federally subsidized building will be no less than 9 percent if the building is placed in service after the date of enactment and before December 31, 2013, the 9 percent floor applies even if a building has previously locked the applicable percentage under Code § 42(b).[37]

The provision also does not fix the applicable percentage for acquisition costs or for buildings that obtain their LIHTCs through the issuance of tax-exempt bonds. Therefore, evaluating the benefits of a credit rate lock will continue to be important for such projects, and project owners need to evaluate the current applicable percentage and the expectation for the future applicable percentage in deciding whether or not to lock the credit rate.

It is recommended that new construction or rehabilitation projects without tax-exempt bond financing choose not to lock their credit rate while the monthly applicable percentage is below 9 percent. Although unlikely, it is possible for an unexpected but very large increase in interest rates to result in the applicable percentage exceeding 9 percent by the time a building is placed in service. Therefore, although the monthly credit rate is below 9 percent, the only impact of a rate lock election for a new construction or rehabilitation project would be to prevent the project from taking advantage of a rise in the credit rate above 9 percent. As time passes and the expiration of the 9 percent floor on December 31, 2013, comes closer, it will again become important to decide whether or not to lock the credit percentage. Also noteworthy is the fact that the effective date provision applies to buildings placed in service before December 31, 2013, i.e., no later than December 30, 2013. Being even one day late could result in a project not being eligible for the 9 percent floor and being eligible for far fewer credits and thus far less equity.[38] Industry advocates are expected to request that the 9 percent floor be extended or made permanent; however, the success of this request is uncertain at this time.

D. 30 Percent Basis Bonus for Financial Feasibility

Under HERA, state housing credit agencies now have the ability to designate that any building, regardless of location, is eligible to receive the 130 percent basis boost and that such buildings will be treated as if they are in a difficult to develop area (DDA).[39] HERA requires that the agency find that the basis boost is necessary for the project's financial feasibility. This limit is not much of an imposition as states already must assess financial feasibility and not allocate more credits than are necessary for financial feasibility.[40] Unfortunately, the basis boost is only available for credits allocated by the state credit agencies, i.e., the basis boost is not available for projects receiving their credits through the use of tax-exempt bonds. This provision is effective for buildings placed in service after July 30, 2008.[41]

The example in Table 3 demonstrates how the additional 30 percent basis boost, when combined with the new 9 percent credit percentage floor, and the recent declines in tax credit pricing affect the amount of tax credit equity that $10 million in eligible basis can generate. Given the assumptions, the additional tax credit equity is about 28 percent.

Table 3

	Prior to Both (i) the Sharp Decrease in Equity Pricing over 2007–2008 and (ii) the HERA	**Immediately Prior to the HERA**	**After the HERA with 130% Basis Boost but Without the 9% Floor**	**After the HERA with Both the 9% Floor and 130% Basis Boost**
Eligible Basis	$10,000,000	$10,000,000	$10,000,000	$10,000,000
x 130% Basis Boost	N/A	N/A	130%	130%
Eligible Basis	$10,000,000	$10,000,000	$13,000,000	$13,000,000
x Applicable Percentage	7.94%	7.94%	7.94%	9.00%
= Total Annual Credits	$794,000	$794,000	$1,032,200	$1,170,000
x 10 Years (Total Credits)	$7,940,000	$7,940,000	$10,322,000	$11,700,000
x Syndication Factor	92%	80%	80%	80%
= Total Equity	$7,304,800	$6,352,000	$8,257,600	$9,360,000
% Change from Prior Law with 2007 Equity Pricing			13%	28%
% Change from Immediately Prior to the HERA (i.e., Comparison to Prior Law with 2008 Equity Pricing)			30%	47%

As would be expected, the addition of the basis boost increases the amount of credit and equity by 30 percent. For eligible projects, this change alone more than offsets the recent declines in equity pricing. Furthermore, when the impact of the 130 percent basis boost is combined with the new 9 percent floor for the applicable percentage, the significance of the cumulative impact of both changes can be seen, i.e., equity has increased from $6,352,000 to $9,360,000, a 47 percent increase in equity. Of course, the above amounts are the maximum amount of LIHTCs and equity for which a project would be eligible. However, state credit agencies may decide not to give the additional basis boost to a project or may give the boost but not give the project the full amount of credits for which the project may be eligible.

How this provision will be implemented by state credit agencies is unclear. The report on HERA by the Joint Committee on Taxation[42] (JCT report) states that it is expected that the state allocating agencies shall set standards for determining which *areas* shall be designated DDAs.[43] However, HERA indicates that it is *buildings* that will be subject to the DDA designation. The JCT report also notes the expectation that the agency shall publicly express its reasons for such area designations and the basis for allocating additional credits to a project.

Because such designated buildings are deemed to be in a DDA, as opposed to a qualified census tract (QCT), such projects will not qualify for the additional basis due to the inclusion of a community service facility that is allowable if a project is located in a QCT.[44]

E. Federal Subsidy Taint Limited to Tax-Exempt Bonds

Prior to HERA, if a building had a federally funded loan with an interest rate below the applicable federal rate (AFR), then the building was considered to be "federally subsidized" and was ineligible for 9 percent credits.[45] HERA has now removed the concept of below-market federal loans with the result that tax-exempt bonds are the only financing that will now cause a project to be considered federally subsidized.[46] This provision is effective for buildings placed in service after July 30, 2008.[47]

The JCT report also clarifies that federal grants can be loaned to a project at any interest rate and that no basis reduction will be required.[48] Thus, loans derived from federal funds no longer need to be loaned at the AFR[49] in order to avoid being considered federally subsidized.[50] This should be of substantial help to projects that have a significant amount of federal loans but had difficulty demonstrating an ability to repay the principal amount of such debt plus interest at the AFR. Now such projects can carry the loans at a lower interest rate or with no interest at all. This provision will significantly reduce the complexity of LIHTC projects because they will no longer need to struggle to carry federal loans at the AFR.

This rule eliminates tax issues associated with large government loans that needed to accrue interest at the AFR in order to avoid losing the ability to use the 9 percent credit.[51] The reduction in accrued interest will also reduce book income and tax losses from accrued interest. Credit investors will generally be pleased to see book losses decreased but disappointed that tax losses will also be less.

F. Clarification of Treatment of Federal Grants

HERA provides that eligible basis cannot include any costs financed with the proceeds of a federal grant.[52] HERA also eliminates the prior requirement that eligible basis be reduced for grants used for operations.[53] This rule is effective for buildings placed in service after July 30, 2008.[54]

The JCT report clarifies that operating assistance, rental assistance, and interest reduction payments are not considered federal grants that must reduce eligible basis.[55] The JCT report also clarifies that grants that are used to finance eligible basis must be subtracted from basis even if the grant is received prior to the start of the compliance period.[56]

Because the effective date is for buildings placed in service after July 30, 2008, the new statutory language alone does not explicitly provide relief to existing buildings. As a result, in order to avoid the risk of a reduction in basis, existing buildings need to continue to avoid receiving federal grants. However, the JCT report contains language indicating that the Treasury Department should amend its regulations to clarify that a number of types of government financing will not be considered to be federal subsidies that require a reduction in eligible basis.[57] Unfortunately, the language in the JCT report is somewhat confusing as to the applicability of preexisting projects. However, it appears that the intent was for updated regulations to be issued to clarify that the indicated government subsidies did not require a reduction in eligible basis for preexisting projects.

G. Rural Projects and the National Nonmetropolitan Income Level

Prior to HERA, tenant income limits were based on the area median income (AMI) of such area.[58] Under new provisions, rural projects (as defined in § 520 of the Housing Act of 1949), which are not tax-exempt bond-financed, will now have tenant income measured by the greater of the area median gross income (AMGI) of such area or the national nonmetropolitan median income.[59] For example, the Alabama state nonmetropolitan AMGI is $45,400, and the national nonmetropolitan AMGI is $49,300. However, the new rule will have no effect in California because the state nonmetropolitan AMGI of $53,800 is more than the national AMGI.[60] This provision allows projects in rural areas to use a higher nonmetropolitan median income. This could make rural projects more viable from a financial perspective by allowing higher tenant income and rent.

Taxpayers cannot independently determine if they are in a rural area as defined by the 1949 Housing Act because there are many subjective standards in the definition, such as *rural in character* and *lack of mortgage credit*.[61] The IRS has not issued guidance on the definition of *rural*. However, § 520 of the 1949 Housing Act is generally under the jurisdiction of the U.S. Department of Agriculture (USDA), and tax professionals expect that USDA's current definition of *rural* under the 1949 Housing Act will be used. Nonetheless, additional clarity is needed from USDA on its definition of *rural* within the context of § 520 of the 1949 Housing Act as referenced in the 2008 Housing Act.[62] This provision is effective for determinations made after July 30, 2008.[63]

In determining AMGI for an area, the Department of Housing and Urban Development (HUD) uses statewide AMGI as a floor. As such, only states that have statewide AMGI below the national nonmetropolitan income level will benefit from this rule. The example in Table 4 illustrates how California will not see benefits from this rule, but Alabama will.[64]

Table 4

State	State Nonmetropolitan	National Nonmetropolitan
California	$53,800	$49,300
Alabama	$45,400	$49,300

As explained above, LIHTC projects that are eligible for tax credits by virtue of their tax-exempt bond financing are not eligible for this rule.[65]

H. Community Service Facility Increase in Allowable Basis

Projects in a QCT are allowed to include in eligible basis the costs of a community service facility.[66] The amount of community service facility basis allowed under this rule was previously limited to 10 percent of the project's eligible basis.[67] HERA increases the limitation to 25 percent of the first $15 million of eligible basis of the project plus 10 percent of additional amounts.[68] Unlike many other provisions of HERA, the increase in includable community service space costs applies to buildings regardless of whether such buildings are federally subsidized due to the use of tax-exempt bond proceeds. This provision is effective for buildings placed in service after July 30, 2008.[69]

The provision only applies to projects in a QCT. Thus, projects either in a DDA or designated by a state as being in a DDA as described in Part III.D above are not permitted to include the cost of a community service facility in eligible basis.[70]

I. Exception to Ten-Year Rule for Acquisition Credits

Prior to HERA, in order for the acquisition costs of a building to be eligible for the LIHTC, the building must not have been placed in service during the ten years prior to the relevant acquisition.[71] HERA has substantially modified this requirement by waiving the ten-year nonacquisition requirement for any "federally- or state-assisted building."[72] A federally assisted building is defined as a building

> substantially assisted, financed, or operated under section 8 of the United States Housing Act of 1937, section 221(d)(3), 221(d)(4), or 236 of the National Housing Act, section 515 of the Housing Act of 1949, or any other housing program administered by the Department of Housing and Urban Development or by the Rural Housing Service of the Department of Agriculture.[73]

A "state-assisted building" is defined as "any building which is substantially assisted, financed, or operated under any State law similar in purposes to any of the laws referred to in [the definition of *federally-assisted building*]."[74] A waiver may also be requested for buildings that are being acquired from an FDIC-insured depository institution that is in default.[75] This provision is in effect for buildings placed in service after July 30, 2008.[76]

The impact of this change is that a new tax credit partnership could get LIHTCs on the cost of acquiring federally assisted or state-assisted buildings even though the building to be acquired may have been constructed or acquired by another party within the last ten years. This will allow a substantial number of buildings to now qualify for the LIHTC on their acquisition costs. As a result, the amount of LIHTCs generated by the acquisition and rehabilitation of the building would increase and could make the rehabilitation viable where it would not have been previously.

For example, a project receiving project-based HUD Section 8 assistance could be purchased and obtain acquisition credits even though it was placed in service in the last ten years.[77]

One point that remains unclear under the statute is what *substantially* means in the requirement that the building be "substantially assisted, financed, or operated under [the identified federal or state programs]." Many practitioners believe that if the federal or state program represents 20 percent of the existing project's financings or subsidizes 20 percent of the building's units, then that would be sufficient to be considered substantial.

J. Moderate Rehabilitation

The prohibition against using the LIHTC with buildings that receive moderate rehabilitation assistance under the McKinney Act is repealed.[78] This rule is effective for buildings placed in service after July 30, 2008.[79]

This change will assist projects that continue to receive Section 8 payments related to a prior McKinney Act moderate rehabilitation. Under prior law, the continuation of the Section 8 payments disqualified the project for LIHTCs.[80] The repeal of this provision allows LIHTCs to be generated on projects that continue to receive the Section 8 payments related to the prior moderate rehabilitation.

K. Waiver of GO Zone Depreciation Deadline

Prior law required that in order to obtain the 50 percent bonus depreciation for residential rental property buildings located in the GO Zone, construction of such buildings had to begin by December 31, 2007, and be completed by December 31, 2010.[81] HERA removes the commencement date deadline.[82] This provision is effective for property placed in service after December 31, 2007.[83]

Congress previously extended the placement in service deadline from December 31, 2008, to December 31, 2010, for buildings in the specified portions of the GO Zone.[84] However, at that time, Congress did not extend the December 31, 2007, deadline by which construction needed to commence. Due to the many difficulties in the GO Zone as well as problems in the equity and credit markets, many projects unexpectedly did not commence construction by December 31, 2007, although they still expected to be completed by December 31, 2009 (or December 31, 2010, if located in the specified GO Zone). Such projects were relying on the additional investor equity generated by the GO Zone depreciation to make them financially feasible, and the failure to meet the commencement deadline resulted in the likely failure of such projects. By eliminating the commencement deadline, the provision allows such projects to obtain the GO Zone depreciation if completed within the required time frame.

L. Additional Counties in GO Zone

HERA added Colbert County, Alabama, and Dallas County, Alabama, to the GO Zone for purposes of GO Zone bonds only.[85] This provision is effective for bonds issued after December 21, 2005, and before January 1, 2011, for tax years ending after August 27, 2005.[86] This allows a qualified bond that would otherwise be taxable to be treated as an exempt facility bond or a qualified mortgage bond.[87]

M. Military Basic Allowance for Housing Not Income

HERA added a provision providing that the Military Basic Allowance for Housing (BAH) is not counted as income for tenant qualification purposes for tenants of "qualified buildings."[88]

> A qualified building is a building located in a county with a military installation (1) that had at least 1,000 members of the armed forces as of June 1, 2008, and (2) at which the number of members of the armed forces as of June 1, 2008, had increased at least 20 percent as compared to such number on December 31, 2005.[89]

This provision has a bifurcated effective date. For buildings with credits allocated on or before July 30, 2008, or for tax-exempt bond-financed buildings placed in service before the date of enactment, this provision is effective for income determinations after July 30, 2008, and before January 1, 2012.[90] For buildings with credits allocated after July 30, 2008, and before January 1, 2012, or for tax-exempt bond-financed buildings placed in service after July 30, 2008, and before January 1, 2012, this provision is effective for income determinations after July 30, 2008.[91] There is no sunset date for this second category of buildings.

The IRS has identified the following military installations that qualify: U.S. Air Force Academy, Colorado; Fort Shafter, Hawaii; Fort Riley, Kansas; Annapolis Naval Station (including U.S. Naval Academy), Maryland; Fort Jackson, South Carolina; Fort Bliss, Texas; Fort Hood, Texas; Dam

Neck Training Center Atlantic, Virginia; and Naval Station Bremerton, Washington.[92]

N. Students Previously Under Foster Care

HERA adds an exception to the general rule disallowing student housing. The exception permits units to be occupied by students who previously received foster care.[93] This rule is effective for determinations after July 30, 2008.[94]

HERA language does not contain an age requirement. As a result, it appears that once a person is under foster care, he can be a student and still be eligible for LIHTC housing regardless of his age.

O. Hold Harmless for Reductions in AMGI

HERA added two provisions addressing areas where decreases have occurred in AMGI. Both of these provisions are effective for determinations of AMGI for calendar years after 2008.[95]

The first provision applies to projects financed with tax-exempt bonds and/or LIHTCs and provides that the AMGI determination for a project after 2008 shall not be less than the income determination for the preceding year.[96] HERA puts in the tax code a rule that HUD had historically been adopting as part of its annual calculation of AMGI. This rule prevents projects from having a decrease in tenant income and rents if there happens to be a decrease in AMGI in a future year. This will eliminate the risk that project gross rents could decrease, thereby jeopardizing a project's financial viability.

The second provision provides that for HUD Hold Harmless Impacted Projects, AMGI will be no less than the prior HUD hold harmless amount for 2008 plus any increase in AMGI after 2008.[97] The term *HUD Hold Harmless Impacted Project* is any project with respect to which AMGI was determined for calendar year 2007 or 2008 and such determination would have been less but for the HUD hold harmless policy.[98]

This provision was adopted in response to a change in HUD methodology that resulted in AMGI decreasing in a number of areas of the country in 2007. HUD issued a hold harmless policy providing that projects in such areas could continue to use the prior AMGI. The new AMGI increase rule provides that AMGI for such projects will be no less than the 2008 HUD hold harmless AMGI amount plus any change to AMGI in the area. For example, if AMGI had decreased from $60,000 to $55,000 due to HUD methodology changes, projects could continue to use the $60,000 AMGI amount under the hold harmless rule. If AMGI in the next year went up to $57,000, then a hold harmless project's AMGI would be $62,000 (the $60,000 hold harmless amount plus the $2,000 increase in AMGI).

However, a new project in the same area that was not subject to the HUD hold harmless policy would have to use the $57,000 AMGI. As a result, the new project would have a lower income and rent than the old project.

Additional guidance is needed from the IRS to determine which projects will qualify as HUD Hold Harmless Impacted Projects. For instance, if a project receives a tax credit allocation in 2008 and makes a gross rent floor election such that the project's qualifying income levels cannot be less than the AMGI in 2008 and the 2008 AMGI was higher as the result of the HUD hold harmless rule, then will the project qualify as a HUD Hold Harmless Impacted Project?

IV. Reduced Administrative Burdens and Restrictions

HERA created several provisions that will reduce the administrative burdens and restrictions of complying with LIHTC program requirements. Some of these provisions eliminate rules that created administrative burdens without sufficient benefit, e.g., annual recertification of 100 percent LIHTC projects.[99] Other provisions will permit projects that would not have previously qualified, e.g., relaxation of related-party acquisition credit rules.[100]

A. Coordination of Tax-Exempt Bond Rules for Credit Projects

For projects with both tax-exempt bonds and LIHTCs, a number of tax-exempt bond rules are modified to mirror the LIHTC rules. These coordinating rules are effective for determinations of the status for periods beginning after July 30, 2008, with respect to bonds issued before, on, or after such date.[101]

1. Next Available Unit Rule

The Next Available Unit Rule (NAUR) change resolves a conflict between the tax-exempt bond rules and the LIHTC rules. The NAUR provided that if a tenant's income exceeded 140 percent of AMGI, the unit would continue to be considered a low-income unit if the next available unit in the *building* (of a comparable size or smaller) was rented to a low-income tenant. The bond rules applied the NAUR on a project basis rather than on a building basis. The result of the conflicting rules was that in certain circumstances, the number of units required to be rented to low-income persons could "creep up" over time. Under HERA, the NAUR under the tax-exempt bond rules is modified for LIHTC projects to apply on a building basis rather than a project basis.[102]

2. Student Rule

Under HERA, the bond rules are modified for LIHTC projects to allow student tenants to the same extent as allowed under the LIHTC rules.[103]

3. Single-Room Occupancy Units

Previously, single-room occupancy (SRO) projects were not allowed in tax-exempt bond transactions.[104] Under HERA, the bond rules are modified for LIHTC projects to allow SRO units to the same extent as allowed under the LIHTC rules.[105] This change will allow SRO projects where both LIHTCs and tax-exempt financing are present.

B. Simplification of Related-Party Acquisition Credit Rules

Prior to HERA, the costs of acquiring a building were not eligible for LIHTCs if the buyer and seller of a building had more than a 10 percent overlap of related ownership.[106] HERA changes that threshold to 50 percent.[107] This rule is effective for buildings placed in service after July 30, 2008.[108]

This provision should significantly help preserve buildings that had previously received tax credits. Because of the limited number of tax credit investors and the consolidation that has occurred in the banking industry, it was becoming difficult for some LIHTC projects that had completed their fifteen-year compliance period to find an unrelated investor for the acquisition and rehabilitation of the building using a new allocation of LIHTCs. By raising the relatedness standard to 50 percent, investors with a previous minority interest in a project are now able to invest in the acquisition and rehabilitation of the project.

An important point to keep in mind is that the 50 percent threshold applies to all partners in common between the selling entity and the buying entity.[109] Thus, if there were two partners with a combined interest greater than 50 percent in the selling entity, then those partners would need to have a combined interest of no more than 50 percent in the buying entity.

C. Extension of Timing for Meeting 10 Percent Carryover Requirement

For projects receiving a carryover allocation, the timing requirement for incurring 10 percent of project costs has been extended from six months after the date of the carryover allocation to one year from the date of the carryover allocation.[110] This provision is effective for buildings placed in service after July 30, 2008.[111]

This provision should help many projects that have received a carryover allocation of LIHTCs but that have been delayed in starting construction due to delays in obtaining financing or necessary government approvals. Hopefully, the results will be that most projects will no longer be forced to begin work or acquire project assets at a time earlier than otherwise makes sense given the project's progress in achieving the necessary financing and approvals.

Although the relaxation of the 10 percent requirement is effective for buildings placed in service after July 30, 2008, 2008 carryover allocations that already have been received likely have an explicit requirement that the carryover allocation be met within six months or, in some states, even earlier. In such a case, the building owner should contact the state credit agency and request that the 10 percent deadline be extended to be consistent with the new HERA.

D. No Annual Recertification for 100 Percent Low-Income Projects

The annual tenant income recertification requirement for tax-exempt bond and LIHTC projects is waived as long as all new project tenants are income-qualified.[112] This provision is effective for years ending after July 30, 2008.[113]

The new provision does not modify other HUD rules that may apply to a particular project. Therefore, some projects may need to continue annual recertification to comply with HUD rules that apply to a project apart from LIHTC concerns.[114]

Many states may still require recertifications. California, for instance, is proposing to require recertification in the first year.[115]

V. Other Changes

HERA also makes five other changes to the LIHTC or HTC rules.

A. Increase in Minimum Rehabilitation Requirement

In order for the rehabilitation of an existing building to be eligible for the LIHTC, the minimum rehabilitation requirement has been increased to the greater of (i) 20 percent of the adjusted basis of the building or (ii) $6,000 per unit.[116] For buildings placed in service after 2009, the $6,000 requirement will be indexed for inflation.[117] This change doubled the pre-HERA requirement that the rehabilitation cost be the greater of $3,000 per unit or 10 percent of the adjusted basis of the building.[118]

For projects receiving LIHTCs allocated from the state credit agency, this provision is effective for buildings receiving allocations after July 30, 2008.[119] For buildings receiving LIHTCs through the issuance of tax-exempt bonds, the provision applies to buildings financed with bonds issued pursuant to allocations made after the date of enactment.[120]

Most projects have rehabilitation expenditures that exceed even the revised requirements, and therefore the impact of this provision will be limited. However, because the minimum rehabilitation requirement is inflation-indexed and is linked to the date of placement in service, a delay in placement in service could result in an unexpected increase in the minimum rehabilitation requirement and could impact a project that involved a light rehabilitation.

In applying the effective date rule to tax-exempt bond projects, it is not clear when a bond is considered to have a tax-exempt bond allocation.[121] The term *allocation* could mean the date that a project receives an inducement from the entity issuing the tax-exempt bonds. Alternatively, *allocation* could refer to the date of the actual allocation of the volume cap under Code § 146. In such a case, the allocation date could vary depending on the practice of a state or locality, with some of the possible allocation dates being the date an ordinance is issued regarding the volume cap up through the date that the bonds are actually issued.

B. Consideration of Energy Efficiency and Historic Nature of Buildings

State qualified allocation plans are now required to consider both the energy efficiency and historic nature of a project.[122] This provision of HERA is effective for allocations made after December 31, 2008.[123]

The JCT report lists “encouraging rehabilitation of certified historic structures under [Code] Section 47(c)(3)” as an example of the historic criteria. This refers to projects that are on the National Register of Historic Places or that are in a registered historic district and are determined to be significant to such district by the Secretary of the Interior. However, the statute appears to be broad enough to allow state credit agencies to consider the historic nature of buildings that may have historic qualities (e.g., on a state list of historic places) but do not meet the federal definition of a certified historic structure.

C. Clarification of General Public Use Requirement

Treasury Regulation § 1.42-9 provides that a unit is not eligible for the LIHTC if the unit is not available for use by the general public.[124] HERA clarifies this general public use (GPU) requirement to confirm that otherwise qualifying buildings will not be considered to fail GPU solely because of occupancy restrictions or preferences that favor the following classes of tenants: (1) tenants with special needs, (2) tenants who are members of a specified group under a federal or state program or a policy that supports housing for such a specified group, or (3) tenants who are involved in artistic or literary activities.[125]

This provision applies to buildings placed in service before, on, or after July 30, 2008.[126]

The GPU provision of HERA is a significant victory for the housing industry as this provision reverses guidance provided in the recent IRS 8823 audit guide[127] and a recent IRS audit position that projects involving tenant targeting or preferences violate the requirement that projects be available for GPU and thus do not qualify for any LIHTCs. These positions were in conflict with both IRS regulations and the treatment of such housing for over twenty years.[128] The congressional confirmation of prior industry practice removes a significant impediment for a number of types of housing, such as housing for veterans, farm workers, first responders, teachers, artists, low-income parents attending college, pregnant or parenting teens, and domestic abuse victims.

The reference to state policy appears to allow states to include preferences in their qualified allocation plans for certain types of projects without raising a GPU issue.

D. Historic Rehabilitation Tax-Exempt Use Safe Harbor

Projects receiving credits for the rehabilitation of historic buildings under Code § 47 are now allowed to lease up to 50 percent of the property to tax-exempt entities in disqualified leases rather than the prior 35 percent maximum.[129] This provision of HERA is effective for expenditures properly taken into account for periods after December 31, 2007.[130]

The Code identifies four types of tax-exempt leases that are disqualified leases and result in tax-exempt use property.[131] One type of disqualified lease involves a situation where a tax-exempt entity previously owned and used a building, then sold the building, but then leases back a portion of the building.[132] Under the new provision, such tax-exempt entities can sell a building to a taxpayer that will perform the historic rehabilitation, and then the seller can lease back up to 50 percent of the building space.[133] Similarly, tax-exempt entities will now be able to lease up to 50 percent of project space in leases that have terms longer than twenty years or have a fixed or determinable purchase option.[134]

E. Data Collection and GAO Study

HERA requires state agencies to collect certain data on tax credit projects. It also mandates a Government Accounting Office (GAO) study of the LIHTC, to be submitted to Congress by December 31, 2012.[135]

VI. Conclusion

The changes contained in HERA are a tremendous enhancement to the LIHTC program and should improve the viability and availability of LIHTC housing. From an industry perspective, the current appeal of LIHTC projects to investors hopefully will broaden the number of investors interested in investing in such projects and thus stabilize the prices such investors are willing to pay. From an individual project perspective, the financial feasibility enhancements will allow many projects with financing gaps to qualify for more LIHTCs and therefore more investor equity. Other provisions have significantly clarified or simplified areas of the LIHTC, HTC, and GO Zone programs. Overall, HERA should provide a significant stimulus for the LIHTC program and allow it to continue to offer vital housing to low-income people even in the current turbulent times.

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1. I.R.C. § 38(c)(1) (2008).

2. The Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3022, 122 Stat. 2653, 2893–94 (2008) [hereinafter HERA]; I.R.C. § 386(c)(4)(B)(ii), *amended by* HERA. In this article, citations to portions of the Code in existence prior to HERA or that were not changed by HERA include a "(2008)" reference. Citations to the portions of the Internal Revenue Code that have been amended by the Housing and Economic Recovery Act of 2008 include " *amended by* HERA" after the relevant Code section. For ease of reference, we have included both the citation to the specific provision in HERA as well as a citation to the applicable section of the Code.

3. I.R.C. § 56(g)(4)(B) (2008).

4. HERA § 3022(a)(2); I.R.C. § 56(g)(4)(B)(iii), *amended by* HERA.

5. HERA § 3022(b); I.R.C. § 38(c)(4)(B)(ii), *amended by* HERA.

6. HERA § 3022(b), (d)(2).

7. HERA § 3022(d)(2), 122 Stat. 2653, 2894.

8. HERA § 3022(c); I.R.C. § 38(c)(4)(B)(v), *amended by* HERA.

9. HERA § 3022(c); I.R.C. § 38(c)(4)(B)(v), *amended by* HERA.

10. HERA § 3022(a); I.R.C. § 57(a)(5)(C)(iii), *amended by* HERA.

11. HERA § 3022(d)(1).

12. Fred Eoff, *Affordable Housing Debt Markets: A Look at Early Trends Post H.R. 3221*, J. Tax Credit Hous., Sept. 2008, at 30.

13. I.R.C. § 42(j)(6) (2008).

14. HERA § 3004(c), 122 Stat. 2653, 2882; I.R.C. § 42(j)(6)(A), *amended by* HERA. This restriction regarding continuing compliance is consistent with prior

law requirements that had to be satisfied to post a bond. *See* I.R.C. § 42(j)(6)(B) (2008).

15. HERA § 3004(c); I.R.C. § 42(j)(6)(B)(i), *amended by* HERA.
16. HERA § 3004(i)(2)(A).
17. HERA § 3004(i)(2)(B).
18. HERA § 3004(c).
19. HERA § 3004(i)(2)(B), 122 Stat. 2653, 2884.
20. Taxpayers who paid the full recapture bond premium up front may seek to get a partial refund of the bond payment and cancel the bond. Sureties may be willing to refund a portion of the bond premium in order to eliminate their risk under the bond.
21. HERA § 3004(c); I.R.C. § 42(j)(6)(B)(i), *amended by* HERA.
22. Rev. Proc. 2008-60, 2008-43 I.R.B.
23. I.R.C. § 42(h)(8)(B) (2008). The term *state* includes possessions of the United States.
24. HERA § 3001; I.R.C. § 42(h)(3)(I)(ii), *amended by* HERA.
25. Under HERA § 3001, the small state minimum is an additional 10 percent, rounded down to the nearest $5,000; I.R.C. § 42(h)(3)(I)(ii), *amended by* HERA.
26. HERA § 3021(a)(1), 122 Stat. 2653, 2892; I.R.C. § 146(d)(5)(A), *amended by* HERA.
27. HERA § 3021(a)(2); I.R.C. § 146(f)(6)(B), *amended by* HERA.
28. HERA § 3021(a)(1); I.R.C. § 146(d)(5)(a)(ii), *amended by* HERA.
29. HERA § 3021(b)(1); I.R.C. § 143(k)(12), *amended by* HERA.
30. HERA § 3021(c).
31. *Id.*
32. HERA § 3002(b) amended I.R.C. § 42(i)(2) to limit the definition of *federally subsidized building* to a building financed with tax-exempt bonds. Changes to the definition of *federally subsidized* are further discussed in Part III.E of this article.
33. HERA § 3002(a)(1), 122 Stat. 2653, 2879; I.R.C. § 42(b)(2)(B), *amended by* HERA.
34. Rev. Rul. 2008-43, 2008-31 I.R.B. 258.
35. HERA § 3002(a)(1); I.R.C. § 42(b)(2)(A), *amended by* HERA.
36. As this article is heading to press, the authors note that credit pricing has continued to decline, with some projects located in less-sought-after areas reportedly receiving offers of less than 70 cents per credit.
37. *See* I.R.S. Notice 2008-106 (Nov. 13, 2008).
38. HERA § 3002(a)(1); I.R.C. § 42(b)(2)(A), *amended by* HERA.
39. HERA § 3003(a); I.R.C. § 42(d)(5)(C)(v), *amended by* HERA.
40. I.R.C. § 42(m)(2) (2008).
41. HERA § 3003(h)(1).
42. Joint Comm. on Taxation, Technical Explanation of Division C of H.R. 3221, the "Housing Assistance Tax Act of 2008" as Scheduled for Consideration by the House of Representatives on July 23, 2008, JCX-63-08, (July 23, 2008) [hereinafter JCT Report].
43. *Id.* § I(A)(3)(a).
44. I.R.C § 42(d)(4)(C) (2008).
45. I.R.C. § 42(b)(1)(B)(i) (2008); *see also* I.R.C. § 42(i)(2)(D) (2008).
46. HERA § 3002(b)(2)(B)(i), 122 Stat. 2653, 2880; I.R.C. § 42(i)(2)(C), *amended by* HERA.

47. HERA § 3002(c).
48. JCT Report, *supra* note 42, § I(A)(3)(d).
49. The AFR is determined under I.R.C. § 1274(d).
50. I.R.C. § 42(i)(2)(D) (2008).
51. Under § 42, as in effect prior to HERA, if a building had a federally funded loan with an interest rate below the AFR, then the building was generally considered to be federally subsidized and was ineligible for 9 percent credits. I.R.C. § 42(b) (2008); *see also* I.R.C. § 42(i)(2) (2008).
52. HERA § 3003(d); I.R.C. § 42(d)(4)(a), *amended by* HERA.
53. I.R.C. § 42(d)(5)(A) (2008).
54. HERA § 3003(h)(1).
55. JCT Report, *supra* note 42, § I(A)(3)(d).
56. *Id*. § I(A)(3)(d).
57. *Id*. § I(A)(2)(b).
58. I.R.C. § 42(g)(1) (2008).
59. HERA § 3004(f), 122 Stat. 2653, 2883; I.R.C. § 42(i)(8), *amended by* HERA.
60. *See* Office of Pol'y Dev. & Research, U.S. Dep't of Hous. & Urban Dev., Fiscal Year 2008 HUD Income Limits Briefing Material (Jan. 18, 2008) [hereinafter Office of Pol'y Dev. & Research], *available at* www.novoco.com/low_income_housing/resource_files/income_limits/2008_briefing.pdf (listing of state and national AMGI).
61. 42 U.S.C. § 1490.
62. *See* U.S. Government Accountability Office, Report to the Chairman, Subcommittee on Housing and Community Opportunity Committee on Financial Services, House of Representatives, Rural Housing: Changing the Definition of Rural Could Improve Eligibility Determinations, GAO-05-110, Dec. 2004, *available at* www.novoco.com/low_income_housing/resource_files/research_center/GAO_RHS_010305.pdf; *see also* Rural Dev., U.S. Dep't of Agriculture, Rural Housing Services: USDA Property Eligibility, http://eligibility.sc.egov.usda.gov/eligibility/welcomeAction.do?pageAction=sfp&NavKey= property@12.
63. HERA § 3004(i)(5), 122 Stat. 2653, 2884.
64. See Office of Pol'y Dev. & Research, *supra* note 60.
65. HERA § 3004(f), 122 Stat. 2653, 2883; I.R.C. § 42(i)(8), *amended by* HERA.
66. I.R.C. § 42(d)(4)(C) (2008).
67. I.R.C. § 42(d)(4)(C)(ii) (2008).
68. HERA § 3003(c); I.R.C. § 42(d)(4)(C)(ii), *amended by* HERA.
69. HERA § 3003(h)(1).
70. I.R.C. § 42(d)(4)(C) (2008).
71. I.R.C. § 42(d)(2)(B)(ii) (2008).
72. HERA § 3003(f), 122 Stat. 2653, 2881–82; I.R.C. § 42(d)(6), *amended by* HERA.
73. HERA § 3003(f); I.R.C. § 42(d)(6)(C)(i), *amended by* HERA.
74. HERA § 3003(f); I.R.C. § 42(d)(6)(C)(ii), *amended by* HERA.
75. HERA § 3003(f); I.R.C. § 42(d)(6)(B), *amended by* HERA.
76. HERA § 3003(h)(1).
77. An interesting question is whether a building that has some existing tenants with Section 8 vouchers would qualify as a federally assisted building. Because the Section 8 assistance is linked to the tenant rather than the building, there seems to be a risk that the IRS could determine that it is the tenant rather

than the building that is assisted by the Section 8 voucher. This may be an issue ripe for guidance by the IRS.

78. HERA § 3004(a), 122 Stat. 2653, 2882; I.R.C. § 42(C), *amended by* HERA.
79. HERA § 3004(i)(1).
80. I.R.C. § 42(c) (2008); *see also* I.R.S. Priv. Ltr. Rul. 2000-44-013 (Nov. 3, 2003).
81. I.R.C. § 1400N(d)(6)(B)(ii)(II) (2008).
82. HERA § 3082(b)(1); I.R.C. § 1400N(d)(3)(B), *amended by* HERA.
83. HERA § 3082(b)(2).
84. I.R.C. § 1400N(d)(6)(C) (2008).
85. HERA § 3082(c)(1), 122 Stat. 2653, 2907; I.R.C. § 1400N(a)(8), *amended by* HERA.
86. HERA § 3082(c)(2).
87. I.R.C. § 1400N(a)(1) (2008).
88. HERA § 3005(a)(2); I.R.C. § 142(d)(2)(b), *amended by* HERA.
89. HERA § 3005(a)(2); I.R.C. § 142(d)(2)(b)(iii), *amended by* HERA.
90. HERA § 3005(b)(1).
91. HERA § 3005(b)(2).
92. I.R.S. Notice 2008-79, Sept. 17, 2008.
93. HERA § 3004(e); I.R.C. § 142(i)(3)(D)(i)(ii), *amended by* HERA.
94. HERA § 3004(i)(4), 122 Stat. 2653, 2884.
95. HERA § 3009(b).
96. HERA § 3009(a). It appears that this rule applies to income determinations by rural projects using the higher national nonmetropolitan income levels. Additional clarification from the IRS may be needed.
97. HERA § 3009(a); I.R.C. § 142(d)(2)(E)(ii), *amended by* HERA.
98. HERA § 3009(a); I.R.C. § 142(d)(2)(E)(iv), *amended by* HERA.
99. HERA § 3010(a); I.R.C. § 142(d)(3)(a), *amended by* HERA.
100. HERA § 3003(e), 122 Stat. 2653, 2881; I.R.C. § 142(d)(2)(D)(ii), *amended by* HERA.
101. HERA § 3008(d).
102. HERA § 3008(a); I.R.C. § 142(d)(3)(c), *amended by* HERA.
103. HERA § 3008(b); I.R.C. § 142(d)(2)(c), *amended by* HERA.
104. Treas. Reg. § 1.103-8(b)(8)(i) (2005).
105. HERA § 3008(c); I.R.C. § 142(d)(2)(D), *amended by* HERA.
106. I.R.C. § 42(d)(2)(D)(iii) (2008).
107. HERA § 3003(e), 122 Stat. 2653, 2881; I.R.C. § 42(d)(2)(D)(ii), *amended by* HERA.
108. HERA § 3003(h)(1).
109. I.R.C. § 42(d)(2)(B)(i) & (iii), (d)(2)(D)(iii) (2008); *see also* I.R.C. § 707(b) (2008).
110. HERA § 3004(b); I.R.C. § 42(h)(1)(E)(ii), *amended by* HERA.
111. HERA § 3004(i)(1).
112. HERA § 3010(a), 122 Stat. 2653, 2888; I.R.C. § 142(d)(3)(A), *amended by* HERA.
113. HERA § 3010(b)
114. *See* JCT Report, *supra* note 42, § I(A)(9).
115. Memorandum from William J. Pavao, Executive Editor, California Tax Credit Allocation (July 31, 2008).
116. HERA § 3003(b)(1); I.R.C. § 42(e)(3)(A)(ii), *amended by* HERA.

117. HERA § 3003(b)(2), 122 Stat. 2653, 2880–81; I.R.C. § 42(e)(3)(D), *amended by* HERA.
118. I.R.C. § 42(e)(3)(A)(ii) (2008).
119. HERA § 3003(h)(2)(A).
120. HERA § 3003(h)(2)(B).
121. Per HERA § 3003(h), the effective date under the act is as follows:

> (2) REHABILITATION REQUIREMENTS.—
> (A) IN GENERAL.—The amendments made by subsection (b) shall apply to buildings with respect to which housing credit dollar amounts are allocated after the date of the enactment of this Act.
> (B) BUILDINGS NOT SUBJECT TO ALLOCATION LIMITS.—
> To the extent paragraph (1) of section 42(h) of the Internal Revenue Code of 1986 does not apply to any building by reason of paragraph (4) thereof, the amendments made by subsection (b) shall apply to buildings financed with bonds issued pursuant to allocations made after the date of the enactment of this Act.

122. HERA § 3004(d), 122 Stat. 2653, 2883; I.R.C. § 42(m)(1)(C)(ix), (x), *amended by* HERA.
123. HERA § 3004(i)(3).
124. Treas. Reg. § 1.42-9 (2007) defines use by the general public as rental policies consistent with HUD fair housing requirements. In addition, it excludes from the definition of use by the general public "any residential rental unit (i) provided only for a social organization, (ii) by an employer for its employees, or (iii) that is part of a hospital, nursing home sanitarium, lifecare facility, trailer park or intermediate care facility for the mentally and physically handicapped."
125. HERA § 3004(g); I.R.C. § 42(c)(iii), *amended by* HERA.
126. HERA § 3004(i)(6).
127. NOVOGRADAC & CO., LLP, AFFORDABLE HOUS. RESOURCE CTR., LOW INCOME HOUSING TAX CREDIT: 8823, *available at* www.novoco.com/low_income_housing/lihtc/8823_guide.php.
128. The language in Treasury Regulation § 1.42-9 is very specific. Under the regulation, if a unit complies with the HUD fair housing rules as required by § 1.42-9(a), then it is available for GPU unless the unit violates one of the requirements of § 1.42-9(b) (social group or employer-employee housing), or the unit is part of one of the identified health-related types of projects. Thus, unit targeting or unit preferences (for example, a preference for teachers) that comply with fair housing rules should have satisfied the GPU requirements.
129. HERA § 3025(a), 122 Stat. 2653, 2883; I.R.C. § 42(c)(2)(B)(v)(I), *amended by* HERA; *see also* I.R.C. § 47(c)(2)(B)(v)(I) (2008).
130. HERA § 3025(b).
131. I.R.C. § 168(h)(1)(B)(ii) (2008).
132. I.R.C. § 168(h)(1)(B)(ii)(IV) (2008).
133. *Id.*
134. I.R.C. § 168(h)(1)(B)(ii)(II), (III) (2008).
135. HERA § 3004(h), 122 Stat. 2653, 2884.