



National Council of
State Housing Agencies

February 26, 2021

Ms. Nicole Cimino
Branch Chief
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Michael Novey
Associate Tax Legislative Counsel
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Ms. Cimino and Mr. Novey:

The National Council of State Housing Agencies (NCSHA)¹ is very pleased that the Consolidated Appropriations Act of 2021 (the Act), which was signed into law December 27, establishes a minimum 4 percent credit rate for Low Income Housing Tax Credit (Housing Credit) buildings financed with multifamily Housing Bonds and for property acquisition and provides additional Housing Credit authority for states that experienced major disasters declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

To implement these provisions effectively, the state Housing Credit allocating agencies need guidance from the Internal Revenue Service (IRS) to address certain questions about the Act and to provide clarity on allocation procedures. These provisions also necessitate updates to IRS forms to ensure accurate reporting. This letter outlines the specific areas for which NCSHA urges IRS action.

Minimum 4 Percent Credit Rate

The effective date language in the Act related to the minimum 4 percent credit rate provides that the minimum rate is available to buildings placed in service after December 31, 2020 that satisfy the following requirements:

- (1) any building which receives an allocation of housing credit dollar amount after December 31, 2020, and

¹ NCSHA is a nonprofit, nonpartisan organization. None of NCSHA's activities related to federal legislation or regulation are funded by organizations that are prohibited by law from engaging in lobbying or related activities.

(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 second clause in this effective date language lacks the clarity necessary for state agencies and Housing Credit industry partners to understand how to apply the minimum credit rate to certain tax-exempt bond financed projects.

First, the language suggests that “any portion” of a building financed by bonds issued after 2020 allows application of the minimum 4 percent rate, and the Act does not specify a minimum amount for such portion. Affordable housing developments may receive tax-exempt bond authority from more than one calendar year. IRS guidance is needed to clarify whether buildings financed by bonds issued in 2020 and 2021 are eligible for the minimum 4 percent credit rate, regardless of the relative amount issued in each year.

Second, it is common for bond financed Housing Credit properties to utilize so-called “draw-down” bonds, in which the bond issuer provides volume cap authority for a bond and an individual property (or properties) make multiple draws from that bond authority over time as financing is needed. In accordance with IRS Notice 2010-81, each draw is technically considered a separate bond issuance:

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.

This interpretation was reiterated in subsequent IRS Notice 2011-63:

Under the general rule set forth in Notice 2010-81, a bond is treated as issued on the “issue date” of the “bond” under § 1.150-1(b) of the Income Tax Regulations (as contrasted with the “issue date” of the “issue” that includes the bond). This analysis particularly affects certain financing structures, such as draw-down loans and commercial paper, in which bonds of the same issue are issued at different times.

IRS guidance is needed to clarify whether a project for which volume cap authority was initially issued in 2020 would qualify for the 4 percent minimum credit rate if it makes a draw against that bond authority in 2021.

The Act does not specify the extent to which a previous binding election by a taxpayer to fix the credit percentage is impacted by the new minimum 4 percent credit rate. IRS guidance is needed to clarify whether such previous elections remain in force or if the new minimum rate supersedes the previous election.

Finally, we note that the minimum 4 percent credit rate will necessitate timely revision of IRS Form 8609 and IRS Form 8610 (Schedule A), including form instructions, to allow proper reporting of the minimum rate by taxpayers.

Disaster Housing Credit Authority

The Act provides additional Housing Credit authority for 2021 and 2022 to states that experienced Presidentially declared major disasters. The additional credit authority is equal to \$3.50 multiplied by the population in “qualified disaster zones” and is capped at 65 percent of the state’s 2020 credit ceiling. This additional Housing Credit authority is provided to 11 states (Alabama, California, Florida, Iowa, Louisiana, Michigan, Mississippi, Oregon, South Carolina, Tennessee, and Utah) and Puerto Rico.

The Act defines the term qualified disaster zone as “that portion of any qualified disaster area which was determined by the President, during the period beginning on January 1, 2020, and ending on the date which is 60 days after the date of the enactment of this Act, to warrant individual or individual and public assistance from the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the qualified disaster with respect to such disaster area.” IRS guidance is needed to confirm the exact population of each qualified disaster zone so the state allocating agencies can calculate their respective annual state credit ceilings accurately.

The legislation extends by 12 months each the Housing Credit 10 percent test deadline and the placed in service deadline for projects located in qualified disaster zones and provides that such allocations must be “designated (at such time and in such manner as the Secretary may provide) by such state housing credit agency as housing credit dollar amount to which this paragraph applies.” IRS guidance is needed to confirm this designation procedure so state agencies can make allocations and report deadline extensions accurately to IRS.

The Act clarifies that state agencies may allocate additional disaster credit authority in 2021 or 2022, or a portion in each of the two years. It does not specify any limitations on the valid return of such credit allocations to the state agency. Consistent with previous IRS treatment of returned disaster credit allocations, we assume states may reallocate any returned disaster credits in eligible areas in subsequent years. IRS guidance is needed to confirm this assumption.

Finally, we note that the new disaster credit authority will necessitate timely

revision of IRS Form 8609, IRS Form 8610, and IRS Form 8610 (Schedule A), including form instructions, to allow proper reporting by taxpayers. In particular, we strongly encourage IRS to add a new category to Line 7 of Form 8610 for disaster credit authority to allow better tracking of credit amounts by state agencies across the two-year period. The current Form 8610 instructs states to combine disaster credits on Line 7a along with per capita credits. A separate category for disaster credit authority will simplify and improve reporting to IRS.

Thank you in advance for your consideration of these issues. Please let us know if we can provide additional details on any of the matters discussed.

Sincerely,

A handwritten signature in black ink, appearing to read "Garth Rieman", with a long horizontal flourish extending to the right.

Garth Rieman
Director of Housing Advocacy and Strategic Initiatives