



President  
Ronne Thielen  
Centerline Capital Group

Vice Presidents  
Richard Angino  
SunAmerica Affordable Housing Partners  
John P. Casey  
Meridian Investments, Inc.  
Chris Collins  
First Atlantic Capital, LLC  
Todd Crow  
PNC MultiFamily Capital  
Emily Evers  
RBC Apollo Equity Partners  
Robert J. Greer  
Michaels Development Company  
Joseph Hagan  
National Equity Fund, Inc.  
Daniel L. Kraus  
Greenberg Traurig  
Aline Lavelle  
Moors & Cabot  
Peter Lawrence  
Enterprise Community Partners  
James McDermott  
Holland and Knight, LLP  
Michael J. Novogradac  
Novogradac & Company LLP  
David Robbins  
MMA Financial, LLC

Secretary  
Alan S. Cohen  
Paul, Hastings, Janofsky & Walker LLP

Treasurer  
Beth Mullen  
The Reznick Group

Immediate Past President and  
Chairman of the Board  
G. David Sebastian  
Capmark Financial Inc.

General Counsel  
Richard S. Goldstein  
Nixon Peabody, LLP

Legislative Counsel  
James F. Miller  
Winston & Strawn LLP

Executive Director  
Victoria E. Spielman

May 30, 2008

Courier's Desk  
Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2008-47)  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224

Re: Recommendations for 2008-2009 Guidance Priority List

Ladies and Gentlemen:

The Affordable Housing Tax Credit Coalition (the "Coalition") has become aware of certain interpretations regarding implementation of the low-income housing tax credit under Section 42 (the "Housing Tax Credit") of the Internal Revenue Code of 1986, as amended (the "Code"), which differ from what the Coalition believes to be commonly followed practice within the industry that is consistent with the language and tax policy of the Code. The Coalition feels it is important that the industry receive prompt guidance with respect to these legal issues so that Housing Tax Credit developments may go forward efficiently and with certainty. Accordingly, the Coalition recommends that the following issues be included in the Service's 2008-2009 Guidance Priority List:

#### **1. Non-Renewal of Leases of Over Income Tenants**

- The Housing Tax Credit statute provides that with respect to units initially income-qualified, the unit may continue to be claimed as a low-income unit provided that the unit remains rent restricted.
- Further, the Code provides that should the tenant's income rise about 140% of the applicable income limitation, the unit may continue to be claimed as low-income if each unit of comparable or smaller size that becomes vacant is rented to tenants who satisfy the applicable income limitation.
- These rules were created to provide an elective safe harbor to property owners and do not create a right of continued occupancy by overincome tenants.
- **The Coalition believes an interpretive release either in the form of a Revenue Procedure or Chief Counsel Memorandum should be released providing that failure to renew a lease of a tenant who initially qualified but whose income has exceeded the applicable**



income limitation does not violate the provisions of Section 42(g)(2)(D) of the Code.

## **2. Occupational Preferences in Tenant Selection**

- The Housing Tax Credit statute requires Housing Tax Credit properties to be “available for used by the general public.” Section 1.42-9 of the Treasury Regulations provides three tests for determining whether housing is provided to the general public: (a) the “HUD Rule”, (b) a rule with respect to housing for social organizations or employers, and (c) a rule with respect to certain facilities, i.e., “hospital, nursing home, sanitarium, life care facility, trailer park, or intermediate care facility”.
- Recent guidance from the Service seems to be attempting to broaden the application of its regulations despite the plain wording of the regulations through the “Guide for Completing Form 8823: Low Income Housing Tax Credit Agencies Report of Noncompliance or Building Disposition”. The Guide contains statements that giving preferences to occupational groups would violate the general public use rule.
- Occupational preferences or similar preferences which do not otherwise violate Fair Housing Law or the other exceptions set forth in 1.42-9, do not violate the General Public Use requirement.
- **The Coalition believes that interpreting the general public use requirement as prohibiting occupational preferences or other preferences which do not discriminate against protected classes or have the effect of discriminating against protected classes will result in the inability to claim Housing Tax Credits for thousands of units of existing affordable rental housing, which have relied upon the existing regulations as being a complete statement of the law. Further, this new interpretation will greatly discourage development of new housing for occupational groups or to address other social policies, even though the Treasury regulations and HUD policy have not changed. Therefore, we request the statements prohibiting provision of occupational preferences or other preferences supporting social policies contained in the Form 8823 Guide be removed.**

## **3. Failure to Timely File Form 8609 Due to Credit Agency Delay**

- The Housing Tax Credit statute requires various certifications and reports be filed with the Treasury prior to claiming Credits. Code Section 42(l)(1) requires a certification from the taxpayer with respect to certain information pertaining to the first year of the Credit period. Subsection (2) requires annual reports from the taxpayer with respect to certain other information for periods after the first year of the Credit. Subsection (3) requires annual reports from state allocating agencies as

