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December 20, 2018

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Dear Mr. Kautter, Mr. Paul, Ms. Hubbard, Mr. Cross, Mr. Hoelscher and Mr. Olmem,

The National Association of Bond Lawyers ("NABL") respectfully submits this letter requesting clarification of the public use requirement for low- and moderate-income multifamily housing facilities financed with proceeds of tax-exempt bonds ("Multifamily Bonds"). One requirement applicable to Multifamily Bonds is that facilities financed with proceeds of those bonds be available to members of the general public. In addition to tax-exempt financing with Multifamily Bonds, a low-income housing tax credit ("LIHTC") in the amount of 9% or 4% of the cost of the project is also available to owners of these projects. The LIHTC also contains a requirement that facilities receiving the LIHTC be available to members of the general public. Congress added a provision to the LIHTC which clarifies that rental preferences for specified groups ("Group Preferences") are treated as public use. During Senate discussions of this provision, Senator Bingaman stated that veterans, farm workers, first

responders, teachers, low-income parents attending college, pregnant or parenting teens, and domestic abuse victims were intended to be included in the Group Preferences.¹ Other groups can be specified under programs or policies implemented by States or by the Federal government. In order for low-income multifamily housing facilities to qualify for the 4% LIHTC a portion of the project must be financed with tax-exempt bonds and, generally, the only type of tax-exempt bonds that can be used for these purposes are Multifamily Bonds.

Because Group Preferences are permitted for purposes of the LIHTC and the 4% LIHTC requires financing with tax-exempt bonds, NABL believes that stakeholders and market participants would benefit from a clarification that the same Group Preferences also constitute public use for Multifamily Bonds. Without this clarification Group Preferences would not be available when the 4% LIHTC is used. This clarification would allow issuers of Multifamily Bonds to take advantage of grant and low-interest loan programs which are available only for projects with Group Preferences. Access to these other sources of funding will reduce the costs of acquiring, constructing or rehabilitating low- and moderate-income housing projects and result in more housing units available for low and moderate income individuals. Without this clarification projects for homeless veterans, public school teachers and similar groups have been abandoned, delayed or downsized. NABL's suggested clarification would maintain flexibility for State and local governments to address regional housing affordability issues.

Discussion of Requested Clarification

Proceeds of Multifamily Bonds issued under Section 142(a)(7) of the Internal Revenue Code of 1986 (the "Code") may be used to finance multifamily housing facilities a portion of which are reserved for low- and moderate-income tenants ("Affordable Multifamily Facilities"). The Treasury Regulations require that Affordable Multifamily Facilities be available to members of the general public. Section 42 of the Code contains rules governing the eligibility of Affordable Multifamily Facilities for the LIHTC and is generally interpreted as requiring that these facilities be available to members of the general public. Section 42(g)(9) of the Code, relating to the LIHTC, treats Group Preferences as meeting the public use requirement for purposes of the LIHTC. Group Preferences are not specifically mentioned in the Multifamily Bond provisions; however, the public use requirement under the LIHTC provisions and Multifamily

¹ 154 Cong. Rec. S7620 (daily ed. July 29, 2009 (statement of Sen. Bingaman), available here: <https://www.congress.gov/crec/2008/07/29/CREC-2008-07-29-senate.pdf>

Bond provisions has generally been interpreted in a similar manner due to the fact that both provisions are interrelated.

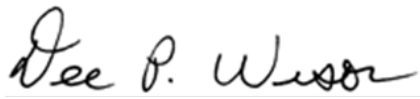
The general public use requirement applicable to Multifamily Bonds is set forth in regulations issued before the Tax Reform Act of 1986. Neither those regulations nor any other subsequent formal published guidance indicates that the general public use requirement prohibits almost all Group Preferences or indicates that “general public use” is properly interpreted differently than it is under the LIHTC provisions. However, the IRS has expressed an unwillingness to permit Group Preferences for Multifamily Bonds through the private letter ruling process. An interpretation of requirements governing Multifamily Bonds that does not incorporate Group Preferences would, in essence, make the 4% LIHTC unavailable for Affordable Multifamily Facilities with Group Preferences. We do not believe that this was the Congressional intent when Group Preferences were added to the LIHTC.

For decades, state and local issuers have used Multifamily Bonds and the LIHTC to facilitate public/private partnerships that take advantage of federal financial support and private investment to develop affordable rental housing and generate economic activity. Because all or a portion of these housing facilities are rented to individuals of low or moderate income paying lower rents, they may not be financially viable without the combination of low interest tax-exempt financing and subsidies provided by the LIHTC. In addition, States, local entities, housing authorities and charitable organizations will often provide additional low- or no-interest financing or grants in support of projects with Group Preferences. All of these sources of financing and subsidies enable a greater number of affordable housing projects to be acquired, built or renovated thereby benefiting more low-income individuals. For example, the Veterans Administration and the Department of Housing and Urban Development offer vouchers for projects providing preferences for veterans with incomes at or below Federal income thresholds. The current lack of clarity regarding the public use requirement has caused many Affordable Multifamily Projects across the country to be abandoned, delayed or downsized. We are aware of specific circumstances in which the uncertainty surrounding this issue has held up transactions for housing for homeless veterans, public school teachers and similar groups. NABL believes that stakeholders would benefit from a clarification that Group Preferences apply for purposes of both the LIHTC and Multifamily Bonds.

We request that this clarification be made either through legislation, such as a technical correction, or through guidance published by the Treasury Department and/or Internal Revenue Service. We note that a technical

correction providing a cross reference in Section 142(d)(2) of the Code to Section 42(g)(9) of the Code is contained in The Retirement, Savings, and Other Tax Relief Act of 2018 (the "2018 Bill"). If enacted, the 2018 Bill will provide the clarification that we are seeking. If the 2018 Bill is not enacted or otherwise delayed, we ask that the IRS and Treasury Department promulgate guidance clarifying that Group Preferences permitted in Section 42(g)(9) be treated as meeting the public use requirement for purposes of Section 142(a)(7). We have attached a suggested form of a Notice which would provide this guidance.

Sincerely,

A handwritten signature in black ink that reads "Dee P. Wisor". The signature is written in a cursive style and is contained within a thin black rectangular border.

Dee P. Wisor
President, National Association of Bond Lawyers

Enclosure

Notice 2018-__

Full Text:

I. Purpose

In order to enable the issuance of tax-exempt bonds under § 142(a)(7) of the Internal Revenue Code of 1986 (except as noted, section references in this Notice are to the Internal Revenue Code of 1986 and the Income Tax Regulations) to finance the acquisition, construction, and/or rehabilitation of low-and-moderate income multifamily housing units with preferences or restrictions that favor or require renting units to specified groups such as homeless veterans, low-and-moderate income veterans, public school teachers, disabled individuals, homeless, transitional teens, first responders, etc., this notice is issued to clarify that the term “general public use” should be interpreted in the same manner for purposes of § 142 as it is for purposes of § 42.

This Notice is effective as of _____, 2019. For the scope of application of this Notice, see § IV of this Notice.

This Notice invites public comment on the guidance provided herein.

II. Background

§ 103(a) of the code provides that “Except as provided in subsection (b), gross income does not include interest on any State or local bond.”

§ 103(b)(1) of the code provides that:

“Subsection (a) shall not apply to--

(1) Private activity bond which is not a qualified bond

Any private activity bond which is not a qualified bond (within the meaning of section 141).”

§ 141(e) of the code provides that an “exempt facility bond” is a “qualified bond”.

§ 142(a)(7) of the code provides that an “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide a “qualified residential rental project”.

§ 1.103-8 (a)(2) of the Income Tax Regulations states that "To qualify . . . as an exempt facility, a facility must serve or be available on a regular basis for general public use, or be a part of a facility so used, as contrasted with similar types of facilities which are constructed for the exclusive use of a limited number of nonexempt persons in their trades or businesses.”

§ 1.103-8(b)(4)(i)(b) of the Income Tax Regulations provides that the units of a qualified residential rental project must be “available to the general public.”

§1.103-8(b)(9) of the Income Tax Regulations, Example 2 states that an apartment building constructed adjacent to a factory wherein the factory employees are given preference as tenants violates the public use requirement.

§1.103-8(b)(9) of the Income Tax Regulations, Example 4 provides, indirectly, that a multifamily project restricted to tenants 65 years or older does not violate the public use requirement. In this example, the preference for seniors was imposed by the county issuing the bonds.

§ 42 of the code provides for tax credits to be provided under § 38 for certain costs of acquiring, constructing, and/or rehabilitating low-income residential rental units (a “LIHTC”).

§ 1.42-9(a) of the Income Tax Regulations provides “If a residential rental unit in a building is not for use by the general public, the unit is not eligible for a section 42 credit. A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development (HUD) (24 CFR subtitle A and Chapter I through XX). See HUD Handbook 4350.3 (or its successor). A copy of HUD Handbook 4350.3 may be requested by writing to: HUD, Directives Distribution Section, room B-100, 451 7th Street, SW, Washington, DC 20410.”

§ 42(g)(9) of the code, which was added by the Housing Assistance Tax Act of 2008, provides:

“(9) Clarification of general public use requirement. A project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants:

(A) with special needs,

(B) who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group, or

(C) who are involved in artistic or literary activities.”

The addition of § 42(g)(9) creates a possible conflict with § 142(a)(7) of the code if the public use requirement of § 142(a)(7) is interpreted as prohibiting the use of exempt facility bonds for low-and-moderate income multifamily housing with a rental preference or restriction in favor of the groups specified in § 42(g)(9). Under § 42(h)(1), the amount of LIHTCs allocated to a project is generally limited to the housing credit dollar amount allocated to the project by the State in which such project is located. § 42(h)(3) provides the formula for the ceiling for such amount in each State.

Under § 42(h)(4) a project can be eligible for a reduced LIHTC (a “4% LIHTC”) without receiving a LIHTC volume cap allocation as long as the project is financed with tax-exempt

bonds taken under account under § 146 (if at least 50% of the project is financed with tax-exempt bonds taken into account under § 146, the entire basis of the project is eligible for the 4% LIHTC).

Accordingly, if § 142(a)(7) is interpreted as prohibiting the use of tax-exempt private activity bonds to finance multifamily housing projects with preferences for specified groups which are otherwise permitted under § 42(g)(9), the 4% LIHTC is largely unavailable for any project meeting the requirements of § 42(g)(9). In other words, interpreting § 142(a)(7) as prohibiting rental preferences permitted by § 42(g)(9) essentially reads § 42(g)(9) out of the Internal Revenue Code for all 4% LIHTC transactions. Given the overlap between § 42 and § 142(a)(7), the term “general public use” should be interpreted the same for both sections. Nothing in the history of the enactment of § 42(g)(9) suggests that Congress intended otherwise.

III. Clarification of General Public Use Requirement for Purposes of § 142

A unit shall not fail to be treated as available to the general public for purposes of § 142 solely because of occupancy restrictions or preferences that meet the general public use requirement under § 42.

IV. Effective Date

This Notice shall apply to qualified residential rental projects placed in service before, on, or after the date of publication of this Notice.

V. Request For Comments

Before any notice of proposed rulemaking is issued with respect to the guidance provided in this Notice, consideration will be given to any written public comments on this Notice that are

submitted timely by _____, and a signed original and eight (8) copies) of such comments should be sent to the IRS. Send submissions to: CC:PA:LPD:PR (NOT-), room 5203, IRS, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be sent electronically, via the IRS Internet site at www.irs.gov/regs or via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-_____). All comments will be available for public inspection and copying.

VI. Drafting Information

The principal author of this notice is _____. For further information regarding this notice contact _____ at (202) _____ (not a toll-free call).