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June 9, 2023

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2023-36)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2023-36 Recommendations for 2023-2024 Priority Guidance Plan

To Whom It May Concern:

Stewards of Affordable Housing for the Future (SAHF) appreciates the opportunity to provide recommendations on guidance to include in the 2023-2024 Priority Guidance Plan. We urge the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) to issue guidance to better assure preservation of Low Income Housing Tax Credit (Housing Credit) properties, by clarifying provisions related to the right of first refusal (ROFR), including relocation expenses in rehabilitation expenditures, and better restricting planned foreclosures.

SAHF is a collaborative of twelve mission-driven, multi-state non-profit affordable housing developers – Mercy Housing, Volunteers of America, National Church Residences, National Housing Trust, Retirement Housing Foundation, Preservation of Affordable Housing, The NHP Foundation, BRIDGE Housing, CommonBond Communities, Community Housing Partners, Homes for America, and The Community Builders. SAHF members preserve and develop affordable multifamily homes that expand opportunity and create dignity for low-income persons with disabilities, the elderly, families, and the homeless. SAHF members partner with the National Affordable Housing Trust (NAHT) – an affiliate of SAHF – which is a nonprofit low-income housing tax credit syndicator. By efficiently and creatively leveraging private, public, and philanthropic resources, SAHF members have developed or preserved more than 149,000 affordable rental homes across the county, over half (56 percent) of which were financed using the Low-Income Housing Tax Credit (Housing Credit).

SAHF's specific recommendations for the 2023-2024 Priority Guidance Plan follow.

Right of First Refusal

Section 42(i)(7) of the Internal Revenue Code provides a safe harbor for nonprofit organizations to exercise their ROFR to purchase a Housing Credit property for the minimum price of outstanding debt plus any taxes owed. Nonprofits typically exercise this right after the investor/limited partner has claimed all Housing Credits and is exiting the partnership. In recent years, however, outside investors have been gaining control of Housing Credit partnerships and challenging the nonprofit ROFR. These investors recognize that nonprofits do not have the resources to combat ROFR challenges in court, so they demand a payout or force the nonprofit partners to sell the affordable housing property before they agree to exit the partnership. The continuation of these ROFR challenges puts affordable housing stock at risk and threatens the longevity of both the Housing Credit program and impacted nonprofit developers.

These ROFR challenges, at least in part, are a result of ambiguities in federal law and unclear partnership agreement language. Legal disputes across the country have led to a patchwork of court interpretations that further increases the conflict around the nonprofit ROFR. In the absence of action from Congress, nonprofit developers are pursuing solutions to improve the situation for new deals while managing risks on existing ones, but this would be more effective with IRS action (as suggested below). If challenges to the ROFR continue, nonprofits and the communities they serve will endure lasting harm as these outside investors divert scarce resources and make Housing Credit partnerships more difficult to forge.

To date, the IRS has not issued guidance on section 42(i)(7). SAHF urges the IRS to publish guidance in the 2023-2024 Priority Guidance Plan to accomplish the following:

- Clarify that the section 42(i)(7) ROFR is not a state or common law ROFR, but a special right of first refusal under federal law that does not require application of state common law rules including a requirement that a third-party offer, when required, must meet some test of being bona fide;
- Clarify that the term “property” in section 42(i)(7) includes all partnership assets (including all partnership reserves), not just the real estate;
- Clarify that, unless the partnership agreement provides otherwise, no offer from a third party is required to trigger the ROFR rights of the nonprofit; and
- Clarify that, unless the partnership agreement provides otherwise, limited partner consent is not required to exercise the ROFR, and that the ROFR may be initiated by an offer from any entity, including a related party.

Include Relocation Expenses in Rehabilitation Expenditures

IRS guidance currently provides different tax treatment for relocation costs depending on whether or not a property is demolished. The Audit Technique Guide for the Housing Credit provided guidance that the cost of relocating tenants in properties not demolished is expensed as ordinary business income and thus deductible while, under the section 280B of the Internal Revenue Code (IRC), the costs of relocating residents out of an acquired building that will be demolished may be associated with the demolition and, if so, are capitalized to the land.

Because the IRS does not allow relocation costs to be capitalized in cases when a building is not demolished, developers of Housing Credit projects may not have the resources needed to relocate tenants and may instead be forced to undertake the rehabilitation with the residents in place. This makes rehabilitation far more difficult and time-consuming, impacting residents for longer and more directly, and potentially adding unnecessary costs. In some instances, these obstacles make rehabilitation financially unfeasible.

The IRS should re-evaluate the guidance in the Audit Technique Guide addressing the treatment of relocation costs incurred for the rehabilitation of a building assisted by the Housing Credit and allow for these costs to be capitalized as an indirect cost to the building under IRC section 263A, and thus be includible in eligible basis under IRC section 42. The IRS can do this without Congressional action.

Better Restrict Planned Foreclosure

In the rare instances in which a Housing Credit property is acquired by foreclosure or instrument in lieu of foreclosure, the Internal Revenue Code provides that the affordability restrictions are terminated unless the Secretary of the Treasury determines that the acquisition is part of an arrangement with the taxpayer to terminate the affordability restrictions. It is not practical for these case-by-case determinations to rest

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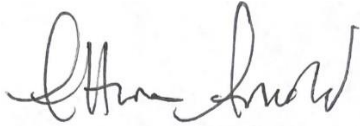
with the Secretary; and in practice, we are aware of no instances in which Treasury has intervened in a foreclosure. The Affordable Housing Credit Improvement Act (Section 310) would allow either Treasury or the state Housing Credit agency to make this determination. However, we believe Treasury has the authority to delegate this responsibility to state Housing Credit agencies now and should issue guidance to facilitate this action.

Thank you for this opportunity to recommend guidance for the Housing Credit program. Please feel free to contact Althea Arnold, SAHF's Senior Vice President for Policy (aarnold@sahfnet.org) or Jenna Hampton, SAHF's Policy and Program Manager (jhampton@sahfnet.org) with any questions about our comments above.

Sincerely,



Althea Arnold
Senior Vice President, Policy