



January 22, 2021

Kinna Brewington
Internal Revenue Service
Room 6526
1111 Constitution Avenue NW
Washington, DC 20224

**RE: Proposed Collection; Comment Request
for Forms 8609 and 8609A
Notice 85 FR 75406**

The Affordable Housing Tax Credit Coalition (AHTCC)¹ appreciates the opportunity to comment on Form 8609, Low-Income Housing Credit Allocation and Certification, and Form 8609-A, Annual Statement for Low-Income Housing Credit. Specifically, we wish to comment on ways to enhance the quality, utility, and clarity of the information to be collected by requesting a modification to the instructions.

Established in 1988, the AHTCC is a leading trade association of nearly 200 organizations and businesses that advocate for affordable housing financed using the Low-Income Housing Tax Credit (Housing Credit). AHTCC membership represents the full spectrum of those involved in the nation's affordable housing delivery system, including syndicators, developers, investors, state allocating agencies, and affiliated organizations, and together have financed or developed well over half of all nearly 3.5 million Housing Credit apartments.

The AHTCC previously sent a letter to the Internal Revenue Service on February 28, 2020, regarding issues that have arisen related to delays of issuance of Forms 8609. The summary of the issue and our recommendations is as follows, and the full letter is attached:

According to Internal Revenue Service instructions to Form 8609-A, owners of affordable housing developments should not report Housing Credits on returns filed with the IRS until they receive IRS Form 8609 Low-Income Housing Credit Allocation and Certification (8609) from the Authorized Housing Credit Agency Official (agency). As such, a delay in receipt of 8609s from an agency delays the reporting of Housing Credits on returns filed for the year buildings are completed and occupied by qualified tenants. Due to recent statutory changes which no longer allow partnerships to amend tax returns back to the underlying tax year, the importance of the issue has increased significantly.

The AHTCC recommends that the instructions for the 8609 and related Form 8609-A be changed to provide that Housing Credits may be reported without having filed the Form 8609 if the failure to have received the portion of the Form 8609 required to be issued by the agency is due to reasonable cause and not due to willful neglect consistent with Section 42(l)(1).

Alternatively we recommend adopting the approach IRS regulations have taken with respect to the Section 47 rehabilitation tax credit when receipt of the approval from the National Park Service

¹ Our comments do not represent the views of any individual member organization but are supported by the AHTCC as a coalition in our mission to support affordable housing investment.



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under Part 3 (Request for Certification of Completed Work) is delayed. If such regulations were to be issued, the Housing Credits could then be reported in the years they are qualified if (1) a Form 8609 is received from the agency within 30 months of the filing of the original return, or (2) if longer than 30 months then the taxpayer appropriately extends the statute of limitations until the Form 8609 is received from the agency.

As the Internal Revenue Service considers updates to Forms 8609 and 8609A, we request consideration of an instructions change to address this issue that is still in need of resolution. Our suggestions would enhance the quality, utility and clarity of the information being collected, and better align with Congress' intent. Further, it would prevent the consequence of ultimately reducing Housing Credit equity – which is even more critical today as the need for affordable housing continues to grow amid the COVID-19 crisis.

If you have any questions regarding these comments, please contact Emily Cadik, Executive Director, at emily.cadik@taxcreditcoalition.org or 202.935.1217.

Sincerely,

Emily Cadik
Executive Director
Affordable Housing Tax Credit Coalition



Attachment: AHTCC Letter to IRS Regarding Form 8609

February 28, 2020

Jian Grant
Senior Technician Reviewer
Office of Chief Counsel
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Ms. Grant,

On behalf of the Affordable Housing Tax Credit Coalition (AHTCC), we appreciate your immediate consideration of an issue that has recently arisen and impacts the ability for investors to claim Low-Income Housing Tax Credits (Housing Credits) in a timely manner, in the way that has been done for many years. Our primary concern is that the change will impact the financial feasibility and production of affordable housing.

The AHTCC is a leading trade association of nearly 200 organizations and businesses that advocate for affordable housing financed using the Housing Credit. Established in 1988, the AHTCC membership has grown to represent the full spectrum of the affordable housing field, including syndicators, developers, investors, state allocating agencies, and other affiliated organizations. Our primary mission is to increase our nation's affordable housing supply by protecting, strengthening, and expanding the Housing Credit.

Summary:

According to Internal Revenue Service instructions to Form 8609-A, owners of affordable housing developments should not report Housing Credits on returns filed with the IRS until they receive IRS Form 8609 Low-Income Housing Credit Allocation and Certification (8609) from the Authorized Housing Credit Agency Official (agency). As such, a delay in receipt of 8609s from an agency delays the reporting of Housing Credits on returns filed for the year buildings are completed and occupied by qualified tenants. Due to recent statutory changes which no longer allow partnerships to amend tax returns back to the underlying tax year, the importance of the issue has increased significantly.

The AHTCC recommends that the instructions for the 8609 and related Form 8609-A be changed to provide that Housing Credits may be taken without an 8609 if the failure to have an 8609 is due to reasonable cause and not due to willful neglect consistent with Section 42(1)(1).

Alternatively we recommend adopting the approach IRS regulations have taken with respect to the Section 47 rehabilitation tax credit when receipt of the Part 3 from the National Park Service is delayed. The Housing Credits could then be taken in the year it's earned if (1) an 8609 is received within 30 months of the filing of the original return, or (2) if longer than 30 months then the taxpayer appropriately extends the statute of limitations until the 8609 is received.



How do taxpayers qualify for the Housing Credit?

There are two ways a property owner can qualify for the Housing Credit. The first method is to apply for an allocation of credits from the agency in a process that is defined in the state's Qualified Allocation Plan (QAP). The requirements in the QAP vary by state but at a minimum contain the requirements outlined in IRC Section 42(m)(1). The second way to receive tax credits is to finance the development of the project with volume cap tax exempt bonds in accordance with IRC Section 42(h)(4). If 50% or more of the buildings and land are financed by volume cap tax exempt bonds, the buildings do not need an allocation of tax credits from the agency but they still must meet the requirements for an allocation under the QAP.

Most state agencies have a multi-step process for the allocation of the Housing Credit. There is an initial application that results in a reservation of credits for the most deserving deals in this competitive process. Volume cap tax exempt bond-financed deals usually receive what is called a "42(m) letter" indicating that the agency has determined that the application complies with the QAP and that the agency or bond issuer has determined the amount of Housing Credits tentatively needed for financial feasibility. These applications are done before construction starts. Developments receiving an allocation of Housing Credits will receive a carryover allocation in accordance with Reg 1.42-6 or may receive a binding agreement described in Reg 1.42-8 to receive an allocation in a future year.

In both methods, upon completion of construction and lease-up, the building owner will apply for the 8609s which will include an audited cost certification and other documents required by the agency. The agency completes its final review to make a final determination that the Housing Credits allocated to the development do not exceed what is needed for the financial feasibility of the development and that the development is expected to be viable throughout the credit period. This final review results in the issuance of the 8609s.

Who invests in the Housing Credit, and why?

Generally, Housing Credit developments are owned by partnerships or LLCs taxed as partnerships. Limited partners or members contribute capital used for the construction or rehabilitation of the development in exchange for the right to receive the Housing Credit. The investors are either funds established by syndicators or corporations that invest directly in the operating partnership. Investors determine how much they are willing to invest based on many factors but one crucial consideration is the expected rate of return provided primarily by the Housing Credit and other tax benefits. Congress expected that rate of return would be an important part of the value of the Housing Credit, which is why the Housing Credit statute explicitly determines a credit rate based on the present value of the stream of credits over the 10-year credit delivery period.

Investors negotiate adjuster provisions in the deal to protect against the late delivery of the Housing Credit. A delay in the delivery of the Housing Credit is likely to cause a reduction in the total amount of equity that the investor contributes. The adjuster provisions are usually based on a present value or internal rate of return analysis. A delay in the receipt of 8609s from an agency that delays the ability of an investor to claim Housing Credits, may result in a reduction of equity contributed. The shortfall in sources may threaten the development's viability and ultimately impact the number of affordable homes that can be provided to low-income households.



How are Housing Credits claimed?

Form 8609-A Annual Statement for Low-Income Housing Credit (8609-A) is filed with the owner's tax return for each year during the 15-year compliance period. This form contains several questions in addition to the calculation of the Housing Credits that can be awarded for the development. Question C asks "Do you have in your records the original Form 8609 (or copy thereof) signed and issued by the housing credit agency for the building in A? If "No" see instructions and stop here – do not go to Part II". The implication is that the owner should not claim Housing Credits. The instructions confirm that these requirements apply to tax exempt bond financed projects. The instructions also state that "any building owner claiming a credit without receiving a completed Form 8609 that is signed and dated by an authorized official of the housing credit agency and submitting the completed Form 8609 (Part I and Part II) to the IRS is subject to having the credit disallowed." This language suggests that Housing Credits are "subject to" disallowance, but does not overtly state the credits "will be" disallowed if an 8609 has not been received at the time the tax return is filed.

The fact that there is not a statement that credits "will" be disallowed likely stems from Section 42(l)(1) which states that if credits are claimed without the taxpayer providing a statement as to date of placement in service, eligible basis and some other items (all of which normally would be on the 8609), then credit will not be allowable unless the failure to provide the required certification is due to reasonable cause rather than willful neglect. This approach is consistent with the IRS Audit Technique Guide for the Low-Income Housing Credit which provides that "Any building owner claiming a credit without receiving a completed Form 8609 that is signed and dated by an authorized official of the housing credit agency is subject to having the credit disallowed." The audit guide further states, regarding disallowance, "Factors to consider:

- When was the request for the Forms 8609 made?
- What follow-up efforts did the taxpayer make to secure the Forms 8609?
- Why did the agency delay executing the Forms 8609?"

In evaluating taxpayer compliance, the audit guide also reviews the terms reasonable cause and willful neglect which is consistent with Section 42(l)(1).

Also worth noting, Chief Counsel Advice 200137044 provides that:

"Q3. If a taxpayer has claimed IRC §42 credits for any year prior to the issuance of the Form 8609, can all credits claimed prior to the issuance of the Form 8609 be disallowed?"

"A3. Under certain circumstances, if a taxpayer claimed IRC §42 credits for a year prior to issuance of the Form 8609 by the applicable allocating authority, all credits claimed prior to issuance of the Form 8609 can be disallowed."

The implication of this CCA is that credits "can be" disallowed "under certain circumstances", as opposed to "will be" disallowed "under all circumstances". Again this is consistent with 42(l)(1).



Investors, both fund and direct investors, usually require that a development owner provide a draft tax return for their review. These drafts are generally due in February or March following the calendar tax yearend. If the development owner has not received 8609s but expects to receive them by the extended due date of September 15th, the draft return will include the expected Housing Credits. Funds use the draft tax returns to prepare their draft returns in March and April and ensure that sufficient taxes have been paid before the original due date of the return. The development owner and fund will elect to extend the date when the final tax return is filed to the extended due date. If the 8609s are received in time, the partnership and fund returns are filed claiming the Housing Credits. The challenge arises when 8609s are not received prior to filing of development owner and/or fund returns.

If the 8609s are not received by the extended due date, many development owners remove the Housing Credits and file the return. The fund will either file its return using the best available information which may be the final k-1 reflecting no Housing Credits, or the draft k-1, which contained the Housing Credits.

What has changed regarding the ability to claim Housing Credits?

The Bipartisan Budget Act (BBA) of 2015 created a new partnership audit regime which also revised the way that partnership tax returns are amended. These new rules apply starting with the 2018 calendar year returns. Prior to 2018 when an owner received the 8609s they would amend the applicable tax return to claim the Housing Credits. The fund or direct investor would receive the amended tax return. If the 8609 is consistent with the amount of Housing Credits shown on a draft return used by the fund, then no adjustment would be needed. If the 8609 differs for some reason – usually by a minor amount – then the fund would adjust its return appropriately. Ultimately the Housing Credits claimed by the fund or direct investor would match the amended tax return of the development owner.

Under the new regime established by the BBA, partnership returns can no be longer amended. When the 8609s are received by the owner, the owner will electronically file a BBA Administrative Adjustment Request (AAR) using Form 8082. The owner must determine if the adjustment to be made results in an imputed underpayment. For simplicity, we'll assume that the only adjustment being made is to add the Housing Credits so there is no imputed underpayment. The BBA AAR would contain all the forms that support the claiming of the Housing Credit, which at a minimum would be the 8609-A and Form 8586 Low-Income Housing Credit (8586) plus new Form 8985 Pass-Through Statement – Transmittal/Partnership Adjustment Tracking Report (8985) and Form 8986 Partner's Share of Adjustment(s) to Partnership-Related Items(s) (8986). The 8985 summarizes all the changes to the owner's partnership return and the 8986 is like an amended k-1 and has each partner's share of the adjustments. An 8986 is sent to each partner in the reporting year which is the year that the BBA AAR is being filed.

The adjustments that are reflected on the property owner 8986 will go on the fund's 8985 and 8986s potentially aggregating adjustments from several operating partnerships. The adjustments will not be reflected on an amended return for the fund or direct investor. For example, a 2018 Housing Credit allocation that would have otherwise been included on a 2018 amended tax return will end up in the ultimate taxpayer's 2020 tax return, assuming the BBA AAR is received in 2020. As explained above, this delay has a negative impact on the investor's return on investment and may result in a reduction of capital contributed to the property owner. The receipt of the first year Housing Credits two years after the building qualifies is contrary to how the Housing Credit statute was established, wherein the credit rate (the "Applicable Percentage") is calculated based on Housing Credits being received in the year they are earned.



Why are 8609s needed?

Reg 1.42-1(h) states “unless otherwise provided in forms or instructions, a completed Form 8586, “Low-Income Housing Credit,” (or any successor form) must be filed with the owner's Federal income tax return for each taxable year the owner of a qualified low-income building is claiming the Housing Credit under section 42(a). Unless otherwise provided in forms or instructions, a completed Form 8609, “Low-Income Housing Credit Allocation and Certification,” (or any successor form) must be filed by the building owner with the IRS. The requirements for completing and filing Forms 8586 and 8609 are addressed in the instructions to the forms.” This regulation has been in effect since November 2005.

The instructions to the 8609 tell the owner to make a one-time submission of the completed 8609 to the Low-Income Housing Credit unit at the Philadelphia IRS campus no later than the due date of the first return with which they are claiming the Housing Credit on 8609-A. Question 2 in CCA 200137044 asks if a taxpayer can amend its return once it receives 8609s to claim credits during the compliance period and the IRS's answer is yes. This is an indication that the concept of delayed 8609s is not a new one.

The goal for all parties is to have 8609s in a timely fashion but unfortunately that may not be possible in all situations. There are many reasons why an owner may not receive the 8609s in time to claim the Housing Credits on the partnership return initially filed. If a development is complete and occupied by qualifying low income tenants in 2018, and the cost certification and final application is submitted to the agency in 2019, it is not uncommon for the 8609s to be received after the extended due date of the return. The agency does final underwriting and may determine that documentation of permanent finance closing or capital contributions from the investor are necessary. (Whether such information is technically required is unclear) A large development with some buildings completed in 2018 and the balance of the construction not complete until the end of 2019 would not be able to submit final documentation until 2020 which could result in 2018 credits being received not in 2018, but in 2020 or later.

What are the alternatives?

We recommend that the IRS modify the 8609 and 8609-A instructions to provide that it is appropriate for an owner to claim the Housing Credit prior to receipt of the 8609s if the failure to have an 8609 is due to reasonable cause and not willful neglect. This approach would be in accordance with Section 42(1)(1), the IRS Audit Technique Guide for the Low-Income Housing Credit and Chief Counsel Advice 200137044. We suggest that Housing Credits may be taken on a tax return if a statement describing the reasonable cause is attached along with the available information used to compute and show entitlement to the credit, e.g. data from books and records as well as the carryover or 42(m) letter. We also suggest that the instructions include a provision that if the taxpayer has already applied to the credit agency for the 8609, then this would be deemed to satisfy the reasonable cause requirement and only the information required to compute the amount of credit would need to be attached to the return. If the final 8609 is different than the amount of Housing Credits previously taken, such differences would be accounted for on a BBA AAR.

An alternative approach adopts the treatment of another tax credit program that requires final certification by a third party to permanently claim the credit. The historic rehabilitation credit under IRC Section 47 requires that the rehabilitation of a certified historic structure be completed in manner consistent with the historic character of the building. This certification is done by the National Park Service (NPS) and is referred to as Part 3 – Request for Certification of Completed Work. Tres. Reg 1.48-12(d)(7) provides that in general the Part 3 approval must be attached to the owner's return when the credit is claimed. The



regulation further provides that if the final certification of completed work is not received from the NPS by the time the owner files its return, the credit is claimed and the return is filed with proof that the Historic Preservation Certification Application – Part 2 has been received by the NPS and that the building has at least requested status as a certified historic structure. When the owner receives the approved Part 3, it is attached to the first return filed after receipt. If the Part 3 is not received, the owner would file a BBA AAR to remove the rehabilitation credits originally claimed. A similar approach could be adopted for the Housing Credit.

If an owner wants to claim Housing Credits there would be documentation that the owner has qualified on a preliminary basis subject to the final determination by the agency. This documentation in the form of the carryover allocation or 42(m) letter would be attached to the return. The owner would claim the Housing Credits using the eligible basis, qualified occupancy and tax credit percentage with the total credit not to exceed the amount in a carryover allocation (the latter does not apply to bond-financed developments).

When the owner receives the 8609s, the owner would complete Part II and submit them to the IRS as required though it would now be after the owner has claimed the Housing Credits on its return. If the 8609s require an upward or downward adjustment to the credits claimed on the originally filed return, the owner would file a BBA AAR to account for the difference. If the difference results in an imputed underpayment, the payment could be made by the owner or pushed out through the 8985 and 8986. This approach will deal with the timing delays that are currently being experienced without denying the agency the appropriate time to do its final underwriting of the development.

Conclusion:

The present value of the ten-year stream of Housing Credits is an essential part of our affordable housing delivery system. It affects not only what investors will contribute, but also impacts the statutory computation of the amount. The changes to the process for filing amended returns will delay the receipt of Housing Credits in a way that impacts the viability of developments and may mean less affordable housing is built. It is also contrary to Congress' intent.

To resolve this issue, we propose the IRS modify the 8609 and 8609-A instructions to allow taxpayers to claim Housing Credits without having received an 8609 if the failure to receive the 8609 is due to reasonable cause and not willful neglect. If the final 8609 is different than the amount of Housing Credits previously taken, such difference would be accounted for on a BBA AAR.

Alternatively, the Section 47 approach could be adopted to allow current year tax returns to claim Housing Credits that have been earned, even if the 8609 has been delayed. Owners must receive and file the 8609 within 30 months, or alternatively if the delay is longer than 30 months then the statute of limitations would be extended. This approach ensures that Housing Credits are claimed when earned and their value is preserved. If for any reason the final 8609 is different than reflect on the original return, such difference would be accounted for on a BBA AAR. This simple solution which has worked for the rehabilitation credit for decades will resolve this issue and help ensure the continued production of the maximum amount of low-income housing.

We appreciate the IRS' longstanding partnership in administering the Housing Credit program, and our members look forward to discussing this matter with you at your earliest possible convenience.



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If you have any questions, please contact:

Emily Cadik, AHTCC Executive Director, at emily.cadik@taxcreditcoalition.org or 202.434.8288;

Beth Mullen, CPA, Affordable Housing Industry Leader at CohnReznick LLP, at Beth.Mullen@CohnReznick.com or 916-930-5750; or

Glenn Graff, Attorney at Applegate & Thorne-Thomsen, at GGraff@att-law.com or 312-491-3313.

Sincerely,

Emily Cadik
Executive Director
Affordable Housing Tax Credit Coalition