

Low-Income Housing Tax Credit Recapture and Termination of Extended Use Period

November 2011

The IRS recently released [CCA 201146016](#) (the Advice) to clarify the impact of the termination of a building's extended use period (such as after a foreclosure) on the recapture of the low-income housing tax credit under §42 of the Code. The Advice, although not binding as precedent, provides that the termination of a building's extended use period under §42 (h)(6)(E)(i)(I) upon foreclosure does not result in the automatic recapture of credits under §42(j).



The Advice provides that the disposition of a building will result in recapture (whether through foreclosure or otherwise) if the transferor does not reasonably expect that such building will continue to be operated as a qualified low-income building for the remainder of the building's compliance period, but that if the transferor does have such a reasonable expectation there will be recapture only at the point in time when there is a decrease in qualified basis or other recapture event.

The Service's analysis focuses on the fact that the termination of the extended use period and the disposition of a building are "independent concepts." It clarifies that the extended use period may be terminated without a disposition of the building and that a building may be disposed of without terminating the extended use period.

The Advice implies, but does not state, that the termination of the extended use period would prevent additional credits from being "allowable" or taken with respect to a building after the termination of the extended use period, and clearly states that any reduction in the qualified basis of the project after the foreclosure would constitute a recapture event.

The Advice does not provide any additional guidance or insight into what constitutes a "reasonable expectation" that the building will continue to be operated as a qualified low-income building. The Service has stated that guidance concerning this issue is on its priority list of guidance, and although the Advice does help to give non-binding guidance

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as to the recapture risks of foreclosure, it does not provide the needed certainty that tax credit investors should have to determine if and how they need to negotiate post-foreclosure compliance procedures with purchasers of buildings out of foreclosure sales.

tax credits, housing bonds, New Markets Tax Credits and other community and economic development programs.

For more information on the Advice or guidance on low-income housing tax credit issues in general, contact your primary Squire Sanders lawyer or one of the lawyers listed in this alert.

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