

# New Concern Over Issuing IRS Forms 8609

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Developers and investors have been interested in timely issuance of Internal Revenue Service (IRS) Form 8609 since the beginning of the Low-Income Housing Tax Credit (LIHTC). However, a law that recently went into effect has greatly increased the stakes.

The Bipartisan Budget Act of 2015 created the centralized partnership audit regime (CPAR). In addition to other provisions, CPAR created a new process for amending or making changes to certain federal partnership tax returns effective for tax years beginning after Dec. 31, 2017. The result is most partnerships are no longer allowed to amend a tax return after its extended due date. Instead, a partnership now does what is called an administrative adjustment request (AAR).

In the past, when a partnership did not have the Form 8609 by its extended due date, it would amend the return upon receipt to claim the LIHTCs for the applicable tax year. However, under CPAR, the investor will have to claim the LIHTCs on the tax return for the year in which the AAR is filed.

To take a hypothetical example, assume a partnership placed buildings in service between July 2018 and May 2019. The taxpayer submitted the final cost certification and all documents to the agency Aug. 1, 2019. The allocating agency issued the Form 8609 in January 2020. Because the due date for the 2018 return was Sept. 15, 2019, the partnership must do an AAR, meaning the 2018 LIHTCs would now be claimed on the 2020 tax return. Therefore, the investor would not be able to use the 2018 LIHTCs to offset 2018 taxes and would not realize the tax benefit until two years later than anticipated.

Such an outcome has immediate and potentially long-term consequences. The former is less of a return to the investor because of the time value of money (realizing tax benefits in later years than anticipated). Because of the reduced yield, the investor response may be to impose some form of compensation (known as a timing adjuster), usually in the form of a reduced equity contribution. As a result, the property has less benefit from the LIHTC program for the same amount of allocation. The additional debt and/or deferred fee can cause a strain on cash flows.

The possible secondary effect is on allocating agencies. As the effects of CPAR grow in consequence, so will the pressure to issue Forms 8609 quickly. Agencies are already working as quickly as they can. Unfortunately, many do not have the option of either adding staff or forgoing other tasks. However, agencies will likely see even more demands to process Forms 8609, even if it means not being able to conduct as thorough reviews as they would like, because

issuing even one day after the extended due date of the tax return will result in a one-year delay in the investors' ability to claim LIHTCs.

However, the above is all premised on the current IRS expectation that investors not claim LIHTCs until after an agency issues the Form 8609. Changing that requirement would release the pressure without losing any of the necessary oversight. In fact, it actually would allow adequate time for agency review. Historic tax credits (HTC) had similar issues in the past because of the time involved with receiving Part 3 (the Form 8609 equivalent in the HTC world), but taxpayers have special guidance that allows for the Part 3 to be provided on the first tax return following final sign-off from the National Park Service. A similar rule for LIHTC would be helpful in preserving the maximum benefit of the LIHTC to the property.

Various parties, including Novogradac and the LIHTC Working Group, are working on a solution. In the meantime, LIHTC property owners should do everything possible to submit complete cost certifications to the agency as quickly as possible.

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