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Department of the Treasury  
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Person To Contact:  
ID No.

Telephone Number:

Refer Reply To:  
CC:FIP:B05  
PLR-131418-18  
Date:  
November 21, 2018

LEGEND:

Issuer =

County =

Bonds =

Borrower =

Date 1 =

Date 2 =

Dear :

This is in response to your request for an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to elect the use of the 20-50 test as described in § 142(d)(1)(A) of the Internal Revenue Code (the Code).

**Facts and Representations**

Issuer is authorized to issue debt to improve the welfare of the people living in County. Issuer issued the Bonds on Date 1 to finance a qualified residential rental project (the "Project") within the meaning of § 142(d)(1). Borrower, the conduit borrower of the Bond proceeds, expects to place Project into service on or about Date 2.

Borrower covenanted in the Bond documents to operate Project as a qualified residential rental project under § 142(d)(1). To be qualified under that section the Project must at all times during the qualified project period meet the requirements of either § 142(d)(1)(A) (the 20-50 test) or § 142(d)(1)(B) (the 40-60 test).

Throughout the process of planning for, designing, and obtaining financing for the Project, Issuer and Borrower intended that Project would proceed under the 20-50 test as defined in § 142(d)(1)(A). Thus, documents prepared by or at the direction of Borrower such as a feasibility study, a current and proposed rents worksheet, and a agreement between Borrower and the dissemination agent, reference the 20-50 test. Certain documents prepared by or at the direction of the Bond underwriter, including the Bond purchase agreement and the Bonds preliminary limited offering memorandum, also reference the 20-50 test. Finally, certain documents prepared by or on behalf of Issuer including the Project lease agreement also reference the 20-50 test.

However, during the course of document preparation by Bond counsel certain Bond documents inadvertently reference the 40-60 test under § 142(d)(1)(B) rather than the 20-50 test under § 142(d)(1)(A). These documents include the final limited offering memorandum, the regulatory agreement, the tax certificate, and Form 8038 filed with the IRS.

The inclusion of the 20-50 test in certain Bond documents and the 40-60 test in other Bond documents was the result of parties focusing on different aspects of the transaction and an unintentional failure by certain parties to communicate fully with one another.

Prior to lease-up of Project, Borrower discovered that the regulatory agreement referenced the wrong test and promptly communicated the discrepancy to Bond counsel. Bond counsel immediately identified the discrepancy in the other Bond documents as noted above, and prepared amendments to the regulatory agreement, the tax certificate, and Form 8038 reflecting the 20-50 election. Subsequently, this ruling request was submitted to the IRS before the Project was placed in service.

### **Law and Analysis**

Section 103(a) provides that, except as provided in § 103(b), gross income does not include interest on any state or local bond. Section 103(b)(1) provides that § 103(a) shall not apply to any private activity bond unless it is a qualified bond. Section 141(e) provides that an exempt facility bond is a qualified bond. Section 142(a)(7) provides that the term exempt facility bond includes 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.

Section 142(d)(1) defines a qualified residential rental project as a project for residential rental property that, at all times during the qualified project period meets the requirements of either subparagraph (A) or (B), whichever is elected by the issuer at the time of the issuance of the issue with respect to such project.

The project meets the requirements of § 142(d)(1)(A) if 20 percent or more of the residential units in such project are occupied by individuals whose income is 50 percent or less of area median gross income.

The project meets the requirements of § 142(d)(1)(B) if 40 percent or more of the residential units in such project are occupied by individuals whose income is 60 percent or less of area median gross income.

Section 301.9100-7T(g) of the Temporary Procedure and Administration Regulations provides, in part, that the election under § 142(d)(1) must be made in the bond indenture or a related document on or before the date of issue. Under § 301.9100-7T(a)(4)(i), the election is irrevocable.

Section 301.9100-1 of the Procedure and Administration Regulations provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections that do not meet the requirements for automatic extensions in § 301.9100-2, such as this request, must be made under the rules of § 301.9100-3. Pursuant to § 301.9100-3(a), requests for relief will be granted if the taxpayer provides evidence establishing to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requested relief under § 301.9100-3 before the failure to make the regulatory election is discovered by the IRS. Section 301.9100-3(b)(3)(iii) provides, however, that the taxpayer has not acted in good faith if it used hindsight in requesting relief.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability than the taxpayer would have had if the election had been timely (taking into account the time value of money).

Based on the facts as recited above, election of the 40-60 test as reflected in certain bond documents prepared by Bond counsel, including Form 8038 filed with the IRS was inadvertent. Although other bond documents prepared by Issuer and Borrower prior to those prepared by Bond Counsel accurately reflect the Issuer and Borrower's intent to elect the 20-50 test, we conclude that the ambiguity created by Bond counsel's inadvertent reference to the 40-60 test in certain documents caused an election not to have been properly made.

We note that (1) the inadvertent reference was discovered before the property was placed in service (and before discovery by IRS) and (2) if we grant the relief requested by Issuer, neither the Bond holders nor the Issuer will have a lower tax liability than if the election had been properly and timely made.

Based on all of the facts and circumstances, we conclude the Issuer acted promptly and in good faith upon discovery of the mistake and that the request for relief is not based on Issuer's hindsight. We also conclude that the interests of the government will not be prejudiced if we grant the relief requested by Issuer. Thus, we permit the Issuer, within a reasonable time after the date of this letter ruling, to make a proper election under § 301.9100-7T to have the 20-50 test as described in § 142(d)(1)(B) apply to the Project.

### **Conclusion**

Issuer is granted an extension of time of 45 days from the date of this letter ruling to make a proper election in accordance with § 301.9100-7T(g), of the 20-50 test described in § 142(d)(1)(A).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any transaction or item discussed or referenced in this letter. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with a Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

The ruling contained in this letter is based upon information and representations submitted by Issuer and accompanied by penalty of perjury statements executed by the appropriate parties. While this office has not verified any of the materials submitted in support of the request for a ruling, it is subject to verification upon examination.

Sincerely,

Assistant Chief Counsel  
(Financial Institutions and Products)

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By: \_\_\_\_\_  
Timothy L. Jones  
Senior Counsel, Branch 5