HISTORIC
TAX CREDIT
COALITION

April 15, 2020

The Honorable Steven Terner Mnuchin
Secretary
United States Department of the Treasury
1500 Pennsylvania Avenue, Northwest
Washington, DC 20220

Dear Secretary Mnuchin,

Pursuant to your authority under Internal Revenue Code (Code) Section 7508A to make certain modifications in the event of emergency declarations, we request that you grant extensions to the "substantial rehabilitation test" requirements under Section 47 of the Code by one year.

When it was enacted in 1981 and codified under Section 47 of the Code, the goal of the federal historic rehabilitation tax credit (HTC) was to stimulate the American economy struggling to emerge from a deep recession. Today, nearly 40 years later, we find ourselves in the most extraordinary of national economic circumstances as a result of the COVID 19 pandemic. Social distancing mandates and other measures being put in place to slow the spread of the virus are jeopardizing the ability of HTC projects to meet the deadlines for completing work to qualify for the tax credit. I am writing to ask you to exercise your authority to extend these deadlines.

As the Chair of the Historic Tax Credit Coalition (HTCC), I represent professionals across the industry – developers, building owners, workers, investors, architects, preservation consultants, accountants, lawyers, and preservationists – in making this request to ensure that these unprecedented economic circumstances do not sink HTC projects across the nation, when we need economic activity the most.

Substantial Rehabilitation Test

In order for a building to qualify for HTCs, it must, among other things, satisfy the "substantial rehabilitation test". Sections 47(c)(1)(B)(i) and (ii) of the Code provide 24-month and 60-month deadlines for determining whether the rehabilitation work passes this test.

On December 17, 2017[1], Congress passed the P.L. 115-97, the Tax Cuts and Jobs Act (TCJA), which resulted in several changes to the HTC, including repealing the 10% old building credit,[2] changing the 20% credit from one which was taken all in one year into a ratable credit claimed over five years.[3] The TCJA provided a transition rule that kept the all-in-one-year credit for buildings

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[1] https://www.nytimes.com/2017/12/19/us/politics/tax-bill-vote-congress.html
[2] PL 115-97 Section 13402
[3] PL 115-97 Section 13402 (a)

owned or leased on or before December 31, 2017 and for which the 24-month period for the "substantial rehabilitation test" begins not more than 180 days after the enactment of the Act.[4]

The President signed the TCJA into law on December 22, 2017.[5] As a result of these changes, 24-month rehabilitation projects must satisfy the "substantial rehabilitation test" by June 20, 2020 in order to remain eligible for the all-in-one-year-credit.

Effect of the Pandemic.
As you know, in early to mid-March, the United States made the difficult decision to shutter most businesses and stop most in-person economic activity. In doing so, the edicts handed down by federal, state, and local governments stopped work on many construction projects across the country. Some of these projects were HTC projects, working to finish their rehabilitation work prior to the 24-month or 60-month deadline. TCJA transition rule projects in particular had been working diligently to complete their 24-month substantial rehabilitation work before June 20, 2020 in order to qualify for the all-in-one-year credit, something that they had contractually agreed to provide to their investors.

Not only were these projects stalled by a lack of labor and an inability to have more than 10 workers on site at a time, given the CDC's recent guidelines[6], they are also having trouble getting critical supplies from both domestic suppliers and foreign suppliers as a result of the worldwide shutdown. In addition, the industry has seen job site shutdowns and quarantines as a result of workers testing positive for the COVID 19 virus, and general shutdown orders imposed by many states and cities. Regardless of when the current guidance is lifted, it is going to be enormously difficult for projects to return to full force immediately and even if workers are back on site, supplies could be delayed weeks or months, forcing projects to miss the June deadline which requires a certain amount of funds to be expended on rehabilitation expenditures.

In addition these delays will likely cause many projects to fail to meet the "general" substantial rehabilitation test that applies to all projects in the applicable 24- or 60-month period if that period end date is in 2020. This rule is a "cliff test" so if the projects do not meet it, they will not be eligible at all for the credit

Emergency Declaration
Given the recent federal actions and emergency declarations, the Secretary of the Treasury has broad authority to delay upcoming deadlines.

Code Section 7508A provides that, "in the case of a taxpayer determined by the Secretary [of the Treasury] to be affected by a federally declared disaster (as defined by Section 165(i)(5)(A)), the

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4 PL 115-97 Section 13402 (c)
5 PL 115-97
6 https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf

Secretary may specify a period of up to 1 year that may be disregarded in determining ... whether any of the acts described in paragraph (1) of Section 7508(a) were performed within the time prescribed therefor ..." Section 165(i)(5)(A) defines a disaster to includes a situation that the President[7] has determined to "warrant assistance under the Stafford Act," as is the case here.[8]

Section 7508(a)(1) has a long list of items, mostly having to do with filing returns and making claims for refunds, but it ends with "(K) Any other act required or permitted under the internal revenue laws specified by the secretary." Consistent with the President's declaration of an "emergency" that requires federal assistance, the Secretary of the Treasury may grant up to one-year extensions for any act required or permitted under the revenue laws. We note that the 24- and 60-month deadlines associated with the HTC are already considered a "time-sensitive events" eligible for extensions when there is a federally declared disaster. See Rev. Proc. 2018-58, 2018-50 IRB 990.

Conclusion

As a result of the almost complete stop of the domestic economy, coupled with the inability to do most construction work due to social distancing policy and a lack of building materials, **we ask that you extend the 24-month and 60-month periods that apply for purposes of the "substantial rehabilitation test" as provided in Section 47(c)(1)(B)(i) and (ii)**.

Similarly, **we ask that you delay the June 20, 2020 deadline for TCJA transition rule HTC projects to satisfy the "substantial rehabilitation test" to June 20, 2021 and thereby extend the deadline to place such projects in service to the end of the respective tax year, December 31, 2021**. Section 7508A clearly grants the authority to make this decision and it will help ensure both that projects are held as harmless as possible during this economic crisis as well as giving them the tools when our economy begins its recovery to get working immediately.

I look forward to your response and am happy to answer any questions you may have.

Sincerely,

Merrill F. Hoopengardner

Merrill Hoopengardner
Chair

cc: Jian Grant, IRS
Michael Novey, Department of the Treasury

[7] https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/
[8] https://www.fema.gov/disasters