HISTORIC
TAX CREDIT
COALITION

October 19, 2016

CC: PA: LPD: PR (REG – 102516 – 15)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044
Attention: Jennifer Records

Re: Proposed and Temporary Regulations
under Code § 50(d)(5)

Dear Jennifer:

The Historic Tax Credit Coalition greatly appreciates the efforts on the part of Treasury and the Service to clarify the treatment of Code § 50(d) income and welcomes the opportunity to submit comments concerning the recently issued proposed and temporary regulations under Code § 50(d)(5).

The Coalition's comments are set forth below.

1. Basis Reduction Election

The current version of the regulations provides for an irrevocable election on the part of the ultimate credit claimant to accelerate the realization of any Code §50(d)(5) income in the event of a lease termination or the disposition of a partnership interest after the credit recapture period. The inclusion of such an election, which is not supported by any prior law, appears to be based on a policy decision to give participants in credit transactions the opportunity to simplify their reporting obligations and to correspondingly alleviate the burden on the Service to monitor and enforce the reporting of Code §50(d) income by partners or S corporation shareholders over a period of many years.

Based on similar policy considerations, we ask that the Service include in the regulations a provision permitting the lessor and lessee of investment credit property, together with the ultimate credit claimant, to make an irrevocable election (a "basis reduction election"), following the termination of the lease or the disposition of the interest of the ultimate credit claimant following the credit recapture period, to reduce the basis of the investment credit property by the amount of the unrealized Code §50(d)(5) income in lieu of requiring the ultimate credit claimant to continue to report its allocable share of such income.

From a policy standpoint, this essentially will return the parties to the position they would have been in at the time of the basis reduction election had no Code §50(d) election been made at the outset and the lessor had continued to own the property with a corresponding basis adjustment under Code §50(c). The reduction in the lessor's future depreciation deductions should correspond exactly to the amount of Code §50(d) income that otherwise would be required to be reported by the ultimate credit claimant.

While the proposed election would result in someone other than the ultimate credit claimant bearing the "burden" of the credit, we believe such an approach will provide more flexibility in structuring equity transactions without any loss of revenue to the government. In fact, since the ultimate members of lessor entities frequently are individuals, the reduction in depreciation deductions at higher individual tax rates actually could result in an overall increase in taxes, subject to uncertainties arising from the application of the passive activity rules and similar provisions.

2. Effective Date

As currently drafted, the regulations apply to investment credit property placed in service on or after the date that is 60 days after the date of the filing of the proposed regulations in the Federal Register (which we assume to be September 19, 2016). We ask that the effective date be changed to apply to property subject to a binding lease executed on or after September 19, 2016. For this purpose, a lease would be binding if it is enforceable under local law against the taxpayer or a predecessor and does not limit damage to a specified amount (for example, by use of a liquidated damages provision). For this purpose, a contractual provision that limits damages to an amount equal to at least five percent of the total rent due under the lease will not be treated as limiting damages to a specified amount. Unless the original lease was undertaken with the intent of evading the effective date of the regulations, modifications to a binding lease, or subleases or similar transactions entered into with respect to the project, will be disregarded in determining whether a binding lease was entered into prior to the effective date.

3. Multiple Placed in Service Dates

If the current placed in service effective date is retained, we believe clarification is needed on how to apply the new regulations to projects involving multiple placed in service dates. Assume, for example, a historic rehabilitation project comprised of multiple buildings that are being rehabilitated over a period of several years. Will the regulations be applied on a building-by-building basis? Similarly, in some larger phased projects, improvements to the same building may be placed in service in different years. In such a case, the "investment credit property" consists of the improvements, not the building itself. Does this mean the regulations could apply to some improvements in a building but not to other earlier improvements to the same building? To address this issue, we propose that if there is contemporaneous evidence that a project will include more than one building or more than one wing, floor or other component of a single building, the execution of a binding lease with respect to not less than twenty percent of the entire project, or the placement in service of improvements constituting twenty percent of the

total rentable space in the project, will cause the entire project to be deemed to be placed in service for purposes of the effective date provisions in the new regulations.

4. Treatment of Pre-Effective Date Transactions

The regulations currently provide that no inference is intended "concerning the proper interpretation of section 50(d)(5) prior to the effective date of the regulations." As noted in the preamble, based on existing law, many lessee partnerships treated the Code §50(d)(5) income inclusion as a partnership tax item that increased the outside basis of each partner in its partnership interest. The Coalition previously has submitted to the Service a discussion and analysis of the provisions of existing law that supported the treatment of the Code §50(d) income as a partnership rather than a partner-level tax item. In the interests of avoiding future disputes and stabilizing the equity markets, the Coalition reiterates its request that the regulations provide (perhaps in the preamble) that the Service does not intend to challenge good faith tax positions taken by taxpayers in pre-effective date transactions that do not conform to the partner-level approach reflected in the regulations.

5. Depreciation Conventions

We request that the regulations provide that Code §50(d) income should be calculated based on the depreciation methods and conventions applicable to the underlying property generating the credit. In other words, 50(d) income should be reported over the same recovery period and convention as that used by the owner/lessor. For example, if real estate is depreciated using the straight-line method commencing in December 2016, then only ½ month of 50(d) income would be recognized in 2016. Similarly, if the owner/lessor elects to depreciate residential rental property over 40 years instead of the normal 27 ½ year recovery period, or energy property is depreciated over 12 years instead of 5 years, the corresponding 50(d) income would be reported over the same period. We believe this approach is equitable and can be justified under the "rules similar to" language in Code § 50(d)(5).

We would be happy to discuss these proposals with you in more detail at your convenience.

Sincerely yours,

HISTORIC TAX CREDIT COALITION

By: _____
John Leith-Tetrault,
President