

## Internal Revenue Service, Treasury

## § 1.45D-1

(B) Qualified active low-income community business requirements for low-income targeted populations.

(1) In general.

(2) Employee.

(3) Owner.

(4) Derived from.

(5) Fair market value of sales, rentals, services, or other transactions.

(C) 120-percent-income restriction.

(1) In general.

(2) Population census tract location.

(D) Rental of real property for low-income targeted populations.

(1) In general.

(2) Special rule for entities whose sole business is the rental to others of real property.

(ii) Individuals who otherwise lack adequate access to loans or equity investments.

(A) In general.

(B) GO Zone Targeted Population.

(C) Qualified active low-income community business requirements for the GO Zone Targeted Population.

(1) In general.

(2) Location.

(i) In general.

(ii) Determination.

(D) 200-percent-income restriction.

(1) In general.

(2) Population census tract location.

(E) Rental of real property for the GO Zone Targeted Population.

(e) Recapture.

(1) In general.

(2) Recapture event.

(3) Redemption.

(i) Equity investment in a C corporation.

(ii) Equity investment in an S corporation.

(iii) Capital interest in a partnership.

(4) Bankruptcy.

(5) Waiver of requirement or extension of time.

(i) In general.

(ii) Manner for requesting a waiver or extension.

(iii) Terms and conditions.

(6) Cure period.

(7) Example.

(f) Basis reduction.

(1) In general.

(2) Adjustment in basis of interest in partnership or S corporation.

(g) Other rules.

(1) Anti-abuse.

(2) Reporting requirements.

(i) Notification by CDE to taxpayer.

(A) Allowance of new markets tax credit.

(B) Recapture event.

(ii) CDE reporting requirements to Secretary.

(iii) Manner of claiming new markets tax credit.

(iv) Reporting recapture tax.

(3) Other Federal tax benefits.

(i) In general.

(ii) Low-income housing credit.

(4) Bankruptcy of CDE.

(h) Effective/applicability dates.

(1) In general.

(2) Exception for certain provisions.

(3) Targeted populations.

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### § 1.45D-1 New markets tax credit.

(a) *Current year credit.* The current year general business credit under section 38(b)(13) includes the new markets tax credit under section 45D(a).

(b) *Allowance of credit*—(1) *In general.* A taxpayer holding a qualified equity investment on a credit allowance date which occurs during the taxable year may claim the new markets tax credit determined under section 45D(a) and this section for such taxable year in an amount equal to the applicable percentage of the amount paid to a qualified community development entity (CDE) for such investment at its original issue. *Qualified equity investment* is defined in paragraph (c) of this section. *Credit allowance date* is defined in paragraph (b)(2) of this section. *Applicable percentage* is defined in paragraph (b)(3) of this section. A *CDE* is a qualified community development entity as defined in section 45D(c). The amount paid at original issue is determined under paragraph (b)(4) of this section.

(2) *Credit allowance date.* The term *credit allowance date* means, with respect to any qualified equity investment—

(i) The date on which the investment is initially made; and

(ii) Each of the 6 anniversary dates of such date thereafter.

(3) *Applicable percentage.* The *applicable percentage* is 5 percent for the first 3 credit allowance dates and 6 percent for the other 4 credit allowance dates.

(4) *Amount paid at original issue.* The amount paid to the CDE for a qualified equity investment at its original issue consists of all amounts paid by the taxpayer to, or on behalf of, the CDE (including any underwriter's fees) to purchase the investment at its original issue.

(c) *Qualified equity investment*—(1) *In general.* The term *qualified equity investment* means any equity investment (as defined in paragraph (c)(2) of this section) in a CDE if—

(i) The investment is acquired by the taxpayer at its original issue (directly or through an underwriter) solely in exchange for cash;

(ii) Substantially all (as defined in paragraph (c)(5) of this section) of such cash is used by the CDE to make qualified low-income community investments (as defined in paragraph (d)(1) of this section); and

(iii) The investment is designated for purposes of section 45D and this section by the CDE on its books and records using any reasonable method.

(2) *Equity investment.* The term *equity investment* means any stock (other than nonqualified preferred stock as defined in section 351(g)(2)) in an entity that is a corporation for Federal tax purposes and any capital interest in an entity that is a partnership for Federal tax purposes. See §§ 301.7701-1 through 301.7701-3 of this chapter for rules governing when a business entity, such as a business trust or limited liability company, is classified as a corporation or a partnership for Federal tax purposes.

(3) *Equity investments made prior to allocation*—(i) *In general.* Except as provided in paragraph (c)(3)(ii) of this section, an equity investment in an entity is not eligible to be designated as a qualified equity investment if it is made before the entity enters into an allocation agreement with the Secretary. An *allocation agreement* is an agreement between the Secretary and a CDE relating to a new markets tax credit allocation under section 45D(f)(2).

(ii) *Exceptions.* Notwithstanding paragraph (c)(3)(i) of this section, an equity investment in an entity is eligible to be designated as a qualified equity investment under paragraph (c)(1)(iii) of this section if—

(A) *Allocation applications submitted by August 29, 2002.* (1) The equity investment is made on or after April 20, 2001;

(2) The designation of the equity investment as a qualified equity investment is made for a credit allocation received pursuant to an allocation application submitted to the Secretary no later than August 29, 2002; and

(3) The equity investment otherwise satisfies the requirements of section 45D and this section; or

(B) *Other allocation applications.* (1) The equity investment is made on or after the date the Secretary publishes a Notice of Allocation Availability (NOAA) in the FEDERAL REGISTER;

(2) The designation of the equity investment as a qualified equity investment is made for a credit allocation received pursuant to an allocation application submitted to the Secretary under that NOAA; and

(3) The equity investment otherwise satisfies the requirements of section 45D and this section.

(iii) *Failure to receive allocation.* For purposes of paragraph (c)(3)(ii)(A) of this section, if the entity in which the equity investment is made does not receive an allocation pursuant to an allocation application submitted no later than August 29, 2002, the equity investment will not be eligible to be designated as a qualified equity investment. For purposes of paragraph (c)(3)(ii)(B) of this section, if the entity in which the equity investment is made does not receive an allocation under the NOAA described in paragraph (c)(3)(ii)(B)(1) of this section, the equity investment will not be eligible to be designated as a qualified equity investment.

(iv) *Initial investment date.* If an equity investment is designated as a qualified equity investment in accordance with paragraph (c)(3)(ii) of this section, the investment is treated as initially made on the effective date of the allocation agreement between the CDE and the Secretary.

(4) *Limitations*—(i) *In general.* The term *qualified equity investment* does not include—

(A) Any equity investment issued by a CDE more than 5 years after the date the CDE enters into an allocation agreement (as defined in paragraph (c)(3)(i) of this section) with the Secretary; and

(B) Any equity investment by a CDE in another CDE, if the CDE making the investment has received an allocation under section 45D(f)(2).

(ii) *Allocation limitation.* The maximum amount of equity investments issued by a CDE that may be designated under paragraph (c)(1)(iii) of this section by the CDE may not exceed the portion of the limitation

amount allocated to the CDE by the Secretary under section 45D(f)(2).

(5) *Substantially all*—(i) *In general.* Except as provided in paragraph (c)(5)(v) of this section, the term *substantially all* means at least 85 percent. The substantially-all requirement must be satisfied for each annual period in the 7-year credit period using either the direct-tracing calculation under paragraph (c)(5)(ii) of this section, or the safe harbor calculation under paragraph (c)(5)(iii) of this section. For the first annual period, the substantially-all requirement is treated as satisfied if either the direct-tracing calculation under paragraph (c)(5)(ii) of this section, or the safe-harbor calculation under paragraph (c)(5)(iii) of this section, is performed on a single testing date and the result of the calculation is at least 85 percent. For each annual period other than the first annual period, the substantially-all requirement is treated as satisfied if either the direct-tracing calculation under paragraph (c)(5)(ii) of this section, or the safe harbor calculation under paragraph (c)(5)(iii) of this section, is performed every six months and the average of the two calculations for the annual period is at least 85 percent. For example, the CDE may choose the same two testing dates for all qualified equity investments regardless of the date each qualified equity investment was initially made under paragraph (b)(2)(i) of this section, provided the testing dates are six months apart. The use of the direct-tracing calculation under paragraph (c)(5)(ii) of this section (or the safe harbor calculation under paragraph (c)(5)(iii) of this section) for an annual period does not preclude the use of the safe harbor calculation under paragraph (c)(5)(iii) of this section (or the direct-tracing calculation under paragraph (c)(5)(ii) of this section) for another annual period, provided that a CDE that switches to a direct-tracing calculation must substantiate that the taxpayer's investment is directly traceable to qualified low-income community investments from the time of the CDE's initial investment in a qualified low-income community investment. For purposes of this paragraph (c)(5)(i), the 7-year credit period means the period of 7 years beginning on the

date the qualified equity investment is initially made. See paragraph (c)(6) of this section for circumstances in which a CDE may treat more than one equity investment as a single qualified equity investment.

(ii) *Direct-tracing calculation.* The substantially-all requirement is satisfied if at least 85 percent of the taxpayer's investment is directly traceable to qualified low-income community investments as defined in paragraph (d)(1) of this section. The direct-tracing calculation is a fraction the numerator of which is the CDE's aggregate cost basis determined under section 1012 in all of the qualified low-income community investments that are directly traceable to the taxpayer's cash investment, and the denominator of which is the amount of the taxpayer's cash investment under paragraph (b)(4) of this section. For purposes of this paragraph (c)(5)(ii), cost basis includes the cost basis of any qualified low-income community investment that becomes worthless. See paragraph (d)(2) of this section for the treatment of amounts received by a CDE in payment of, or for, capital, equity or principal with respect to a qualified low-income community investment.

(iii) *Safe harbor calculation.* The substantially-all requirement is satisfied if at least 85 percent of the aggregate gross assets of the CDE are invested in qualified low-income community investments as defined in paragraph (d)(1) of this section. The safe harbor calculation is a fraction the numerator of which is the CDE's aggregate cost basis determined under section 1012 in all of its qualified low-income community investments, and the denominator of which is the CDE's aggregate cost basis determined under section 1012 in all of its assets. For purposes of this paragraph (c)(5)(iii), cost basis includes the cost basis of any qualified low-income community investment that becomes worthless. See paragraph (d)(2) of this section for the treatment of amounts received by a CDE in payment of, or for, capital, equity or principal with respect to a qualified low-income community investment.

(iv) *Time limit for making investments.* The taxpayer's cash investment received by a CDE is treated as invested

in a qualified low-income community investment as defined in paragraph (d)(1) of this section only to the extent that the cash is so invested within the 12-month period beginning on the date the cash is paid by the taxpayer (directly or through an underwriter) to the CDE.

(v) *Reduced substantially-all percentage.* For purposes of the substantially-all requirement (including the direct-tracing calculation under paragraph (c)(5)(ii) of this section and the safe harbor calculation under paragraph (c)(5)(iii) of this section), 85 percent is reduced to 75 percent for the seventh year of the 7-year credit period (as defined in paragraph (c)(5)(i) of this section).

(vi) *Examples.* The following examples illustrate an application of this paragraph (c)(5):

*Example 1.* X is a partnership and a CDE that has received a \$1 million new markets tax credit allocation from the Secretary. On September 1, 2004, X uses a line of credit from a bank to fund a \$1 million loan to Y. The loan is a qualified low-income community investment under paragraph (d)(1) of this section. On September 5, 2004, A pays \$1 million to acquire a capital interest in X. X uses the proceeds of A's equity investment to pay off the \$1 million line of credit that was used to fund the loan to Y. X's aggregate gross assets consist of the \$1 million loan to Y and \$100,000 in other assets. A's equity investment in X does not satisfy the substantially-all requirement under paragraph (c)(5)(i) of this section using the direct-tracing calculation under paragraph (c)(5)(ii) of this section because the cash from A's equity investment is not used to make X's loan to Y. However, A's equity investment in X satisfies the substantially-all requirement using the safe harbor calculation under paragraph (c)(5)(iii) of this section because at least 85 percent of X's aggregate gross assets are invested in qualified low-income community investments.

*Example 2.* X is a partnership and a CDE that has received a new markets tax credit allocation from the Secretary. On August 1, 2004, A pays \$100,000 for a capital interest in X. On August 5, 2004, X uses the proceeds of A's equity investment to make an equity investment in Y. X controls Y within the meaning of paragraph (d)(6)(ii)(B) of this section. For the annual period ending July 31, 2005, Y is a qualified active low-income community business (as defined in paragraph (d)(4) of this section). Thus, for that period, A's equity investment satisfies the substantially-all requirement under paragraph

(c)(5)(i) of this section using the direct-tracing calculation under paragraph (c)(5)(ii) of this section. For the annual period ending July 31, 2006, Y no longer is a qualified active low-income community business. Thus, for that period, A's equity investment does not satisfy the substantially-all requirement using the direct-tracing calculation. However, during the entire annual period ending July 31, 2006, X's remaining assets are invested in qualified low-income community investments with an aggregate cost basis of \$900,000. Consequently, for the annual period ending July 31, 2006, at least 85 percent of X's aggregate gross assets are invested in qualified low-income community investments. Thus, for the annual period ending July 31, 2006, A's equity investment satisfies the substantially-all requirement using the safe harbor calculation under paragraph (c)(5)(iii) of this section.

*Example 3.* X is a partnership and a CDE that has received a new markets tax credit allocation from the Secretary. On August 1, 2004, A and B each pay \$100,000 for a capital interest in X. X does not treat A's and B's equity investments as one qualified equity investment under paragraph (c)(6) of this section. On September 1, 2004, X uses the proceeds of A's equity investment to make an equity investment in Y and X uses the proceeds of B's equity investment to make an equity investment in Z. X has no assets other than its investments in Y and Z. X controls Y and Z within the meaning of paragraph (d)(6)(ii)(B) of this section. For the annual period ending July 31, 2005, Y and Z are qualified active low-income community businesses (as defined in paragraph (d)(4) of this section). Thus, for the annual period ending July 31, 2005, A's and B's equity investments satisfy the substantially-all requirement under paragraph (c)(5)(i) of this section using either the direct-tracing calculation under paragraph (c)(5)(ii) of this section or the safe harbor calculation under paragraph (c)(5)(iii) of this section. For the annual period ending July 31, 2006, Y, but not Z, is a qualified active low-income community business. Thus, for the annual period ending July 31, 2006—

(1) X does not satisfy the substantially-all requirement using the safe harbor calculation under paragraph (c)(5)(iii) of this section;

(2) A's equity investment satisfies the substantially-all requirement using the direct-tracing calculation because A's equity investment is directly traceable to Y; and

(3) B's equity investment does not satisfy the substantially-all requirement because B's equity investment is traceable to Z.

*Example 4.* X is a partnership and a CDE that has received a new markets tax credit allocation from the Secretary. On November 1, 2004, A pays \$100,000 for a capital interest in X. On December 1, 2004, B pays \$100,000 for a capital interest in X. On December 31, 2004,

X uses \$85,000 from A's equity investment and \$85,000 from B's equity investment to make a \$170,000 equity investment in Y, a qualified active low-income community business (as defined in paragraph (d)(4) of this section). X has no assets other than its investment in Y. X determines whether A's and B's equity investments satisfy the substantially-all requirement under paragraph (c)(5)(i) of this section on December 31, 2004. The calculation for A's and B's equity investments is 85 percent using either the direct-tracing calculation under paragraph (c)(5)(ii) of this section or the safe harbor calculation under paragraph (c)(5)(iii) of this section. Therefore, for the annual periods ending October 31, 2005, and November 30, 2005, A's and B's equity investments, respectively, satisfy the substantially-all requirement under paragraph (c)(5)(i) of this section. For the subsequent annual period, X performs its calculations on December 31, 2005, and June 30, 2006. The average of the two calculations on December 31, 2005, and June 30, 2006, is 85 percent using either the direct-tracing calculation under paragraph (c)(5)(ii) of this section or the safe harbor calculation under paragraph (c)(5)(iii) of this section. Therefore, for the annual periods ending October 31, 2006, and November 30, 2006, A's and B's equity investments, respectively, satisfy the substantially-all requirement under paragraph (c)(5)(i) of this section.

(6) *Aggregation of equity investments.* A CDE may treat any qualified equity investments issued on the same day as one qualified equity investment. If a CDE aggregates equity investments under this paragraph (c)(6), the rules in this section shall be construed in a manner consistent with that treatment.

(7) *Subsequent purchasers.* A qualified equity investment includes any equity investment that would (but for paragraph (c)(1)(i) of this section) be a qualified equity investment in the hands of the taxpayer if the investment was a qualified equity investment in the hands of a prior holder.

(d) *Qualified low-income community investments—(1) In general.* The term *qualified low-income community investment* means any of the following:

(i) *Investment in a qualified active low-income community business.* Any capital or equity investment in, or loan to, any qualified active low-income community business (as defined in paragraph (d)(4) of this section).

(ii) *Purchase of certain loans from CDEs—(A) In general.* The purchase by

a CDE (the ultimate CDE) from another CDE (whether or not that CDE has received an allocation from the Secretary under section 45D(f)(2)) of any loan made by such entity that is a qualified low-income community investment. A loan purchased by the ultimate CDE from another CDE is a qualified low-income community investment if it qualifies as a qualified low-income community investment either—

(1) At the time the loan was made; or  
(2) At the time the ultimate CDE purchases the loan.

(B) *Certain loans made before CDE certification.* For purposes of paragraph (d)(1)(ii)(A) of this section, a loan by an entity is treated as made by a CDE, notwithstanding that the entity was not a CDE at the time it made the loan, if the entity is a CDE at the time it sells the loan.

(C) *Intermediary CDEs.* For purposes of paragraph (d)(1)(ii)(A) of this section, the purchase of a loan by the ultimate CDE from a CDE that did not make the loan (the second CDE) is treated as a purchase of the loan by the ultimate CDE from the CDE that made the loan (the originating CDE) if—

(1) The second CDE purchased the loan from the originating CDE (or from another CDE); and

(2) Each entity that sold the loan was a CDE at the time it sold the loan.

(D) *Examples.* The following examples illustrate an application of this paragraph (d)(1)(ii):

*Example 1.* X is a partnership and a CDE that has received a new markets tax credit allocation from the Secretary. Y, a corporation, made a \$500,000 loan to Z in 1999. In January of 2004, Y is certified as a CDE. On September 1, 2004, X purchases the loan from Y. At the time X purchases the loan, Z is a qualified active low-income community business under paragraph (d)(4)(i) of this section. Accordingly, the loan purchased by X from Y is a qualified low-income community investment under paragraphs (d)(1)(ii)(A) and (B) of this section.

*Example 2.* The facts are the same as in *Example 1* except that on February 1, 2004, Y sells the loan to W and on September 1, 2004, W sells the loan to X. W is a CDE. Under paragraph (d)(1)(ii)(C) of this section, X's purchase of the loan from W is treated as the purchase of the loan from Y. Accordingly, the loan purchased by X from W is a qualified low-income community investment

under paragraphs (d)(1)(ii)(A) and (C) of this section.

*Example 3.* The facts are the same as in *Example 2* except that W is not a CDE. Because W was not a CDE at the time it sold the loan to X, the purchase of the loan by X from W is not a qualified low-income community investment under paragraphs (d)(1)(ii)(A) and (C) of this section.

(iii) *Financial counseling and other services.* Financial counseling and other services (as defined in paragraph (d)(7) of this section) provided to any qualified active low-income community business, or to any residents of a low-income community (as defined in section 45D(e)).

(iv) *Investments in other CDEs—(A) In general.* Any equity investment in, or loan to, any CDE (the second CDE) by a CDE (the primary CDE), but only to the extent that the second CDE uses the proceeds of the investment or loan—

(1) In a manner—

(i) That is described in paragraph (d)(1)(i) or (iii) of this section; and

(ii) That would constitute a qualified low-income community investment if it were made directly by the primary CDE;

(2) To make an equity investment in, or loan to, a third CDE that uses such proceeds in a manner described in paragraph (d)(1)(iv)(A)(I) of this section; or

(3) To make an equity investment in, or loan to, a third CDE that uses such proceeds to make an equity investment in, or loan to, a fourth CDE that uses such proceeds in a manner described in paragraph (d)(1)(iv)(A)(I) of this section.

(B) *Examples.* The following examples illustrate an application of paragraph (d)(1)(iv)(A) of this section:

*Example 1.* X is a partnership and a CDE that has received a new markets tax credit allocation from the Secretary. On September 1, 2004, X uses \$975,000 to make an equity investment in Y. Y is a corporation and a CDE. On October 1, 2004, Y uses \$950,000 from X's equity investment to make a loan to Z. Z is a qualified active low-income community business under paragraph (d)(4)(i) of this section. Of X's equity investment in Y, \$950,000 is a qualified low-income community investment under paragraph (d)(1)(iv)(A)(I) of this section.

*Example 2.* W is a partnership and a CDE that has received a new markets tax credit allocation from the Secretary. On September

1, 2004, W uses \$975,000 to make an equity investment in X. On October 1, 2004, X uses \$950,000 from W's equity investment to make an equity investment in Y. X and Y are corporations and CDEs. On October 5, 2004, Y uses \$925,000 from X's equity investment to make a loan to Z. Z is a qualified active low-income community business under paragraph (d)(4)(i) of this section. Of W's equity investment in X, \$925,000 is a qualified low-income community investment under paragraph (d)(1)(iv)(A)(2) of this section because X uses proceeds of W's equity investment to make an equity investment in Y, which uses \$925,000 of the proceeds in a manner described in paragraph (d)(1)(iv)(A)(I) of this section.

*Example 3.* U is a partnership and a CDE that has received a new markets tax credit allocation from the Secretary. On September 1, 2004, U uses \$975,000 to make an equity investment in V. On October 1, 2004, V uses \$950,000 from U's equity investment to make an equity investment in W. On October 5, 2004, W uses \$925,000 from V's equity investment to make an equity investment in X. On November 1, 2004, X uses \$900,000 from W's equity investment to make an equity investment in Y. V, W, X, and Y are corporations and CDEs. On November 5, 2004, Y uses \$875,000 from X's equity investment to make a loan to Z. Z is a qualified active low-income community business under paragraph (d)(4)(i) of this section. U's equity investment in V is not a qualified low-income community investment because X does not use proceeds of W's equity investment in a manner described in paragraph (d)(1)(iv)(A)(I) of this section.

(2) *Payments of, or for, capital, equity or principal—(i) In general.* Except as otherwise provided in this paragraph (d)(2), amounts received by a CDE in payment of, or for, capital, equity or principal with respect to a qualified low-income community investment must be reinvested by the CDE in a qualified low-income community investment no later than 12 months from the date of receipt to be treated as continuously invested in a qualified low-income community investment. If the amounts received by the CDE are equal to or greater than the cost basis of the original qualified low-income community investment (or applicable portion thereof), and the CDE reinvests, in accordance with this paragraph (d)(2)(i), an amount at least equal to such original cost basis, then an amount equal to such original cost basis will be treated as continuously invested in a qualified low-income community investment. In

addition, if the amounts received by the CDE are equal to or greater than the cost basis of the original qualified low-income community investment (or applicable portion thereof), and the CDE reinvests, in accordance with this paragraph (d)(2)(i), an amount less than such original cost basis, then only the amount so reinvested will be treated as continuously invested in a qualified low-income community investment. If the amounts received by the CDE are less than the cost basis of the original qualified low-income community investment (or applicable portion thereof), and the CDE reinvests an amount in accordance with this paragraph (d)(2)(i), then the amount treated as continuously invested in a qualified low-income community investment will equal the excess (if any) of such original cost basis over the amounts received by the CDE that are not so reinvested. Amounts received by a CDE in payment of, or for, capital, equity or principal with respect to a qualified low-income community investment during the seventh year of the 7-year credit period (as defined in paragraph (c)(5)(i) of this section) do not have to be reinvested by the CDE in a qualified low-income community investment in order to be treated as continuously invested in a qualified low-income community investment.

(ii) *Subsequent reinvestments.* In applying paragraph (d)(2)(i) of this section to subsequent reinvestments, the original cost basis is reduced by the amount (if any) by which the original cost basis exceeds the amount determined to be continuously invested in a qualified low-income community investment.

(iii) *Special rule for loans.* Periodic amounts received during a calendar year as repayment of principal on a loan that is a qualified low-income community investment are treated as continuously invested in a qualified low-income community investment if the amounts are reinvested in another qualified low-income community investment by the end of the following calendar year.

(iv) *Example.* The application of paragraphs (d)(2)(i) and (ii) of this section is illustrated by the following example:

*Example.* On April 1, 2003, A, B, and C each pay \$100,000 to acquire a capital interest in

X, a partnership. X is a CDE that has received a new markets tax credit allocation from the Secretary. X treats the 3 partnership interests as one qualified equity investment under paragraph (c)(6) of this section. In August 2003, X uses the \$300,000 to make a qualified low-income community investment under paragraph (d)(1) of this section. In August 2005, the qualified low-income community investment is redeemed for \$250,000. In February 2006, X reinvests \$230,000 of the \$250,000 in a second qualified low-income community investment and uses the remaining \$20,000 for operating expenses. Under paragraph (d)(2)(i) of this section, \$280,000 of the proceeds of the qualified equity investment is treated as continuously invested in a qualified low-income community investment. In December 2008, X sells the second qualified low-income community investment and receives \$400,000. In March 2009, X reinvests \$320,000 of the \$400,000 in a third qualified low-income community investment. Under paragraphs (d)(2)(i) and (ii) of this section, \$280,000 of the proceeds of the qualified equity investment is treated as continuously invested in a qualified low-income community investment (\$40,000 is treated as invested in another qualified low-income community investment in March 2009).

(3) *Special rule for reserves.* Reserves (not in excess of 5 percent of the taxpayer's cash investment under paragraph (b)(4) of this section) maintained by the CDE for loan losses or for additional investments in existing qualified low-income community investments are treated as invested in a qualified low-income community investment under paragraph (d)(1) of this section. Reserves include fees paid to third parties to protect against loss of all or a portion of the principal of, or interest on, a loan that is a qualified low-income community investment.

(4) *Qualified active low-income community business—(i) In general.* The term *qualified active low-income community business* means, with respect to any taxable year, a corporation (including a nonprofit corporation) or a partnership engaged in the active conduct of a qualified business (as defined in paragraph (d)(5) of this section), if the requirements of paragraphs (d)(4)(i)(A), (B), (C), (D), and (E) of this section are met (or in the case of an entity serving targeted populations, if the requirements of paragraphs (d)(4)(i)(D), (E), and (d)(9)(i) or (ii) of this section are met). Solely for purposes of this section, a nonprofit corporation will be

deemed to be engaged in the active conduct of a trade or business if it is engaged in an activity that furthers its purpose as a nonprofit corporation.

(A) *Gross-income requirement.* At least 50 percent of the total gross income of such entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within any low-income community (as defined in section 45D(e)). An entity is deemed to satisfy this paragraph (d)(4)(i)(A) if the entity meets the requirements of either paragraph (d)(4)(i)(B) or (C) of this section, if “50 percent” is applied instead of 40 percent. In addition, an entity may satisfy this paragraph (d)(4)(i)(A) based on all the facts and circumstances. See paragraph (d)(4)(iv) of this section for certain circumstances in which an entity will be treated as engaged in the active conduct of a trade or business. See paragraph (d)(9) of this section for rules relating to targeted populations.

(B) *Use of tangible property—(1) In general.* At least 40 percent of the use of the tangible property of such entity (whether owned or leased) is within any low-income community. This percentage is determined based on a fraction the numerator of which is the average value of the tangible property owned or leased by the entity and used by the entity during the taxable year in a low-income community and the denominator of which is the average value of the tangible property owned or leased by the entity and used by the entity during the taxable year. Property owned by the entity is valued at its cost basis as determined under section 1012. Property leased by the entity is valued at a reasonable amount established by the entity. See paragraph (d)(9) of this section for rules relating to targeted populations.

(2) *Example.* The application of paragraph (d)(4)(i)(B)(1) of this section is illustrated by the following example:

*Example.* X is a corporation engaged in the business of moving and hauling scrap metal. X operates its business from a building and an adjoining parking lot that X owns. The building and the parking lot are located in a low-income community (as defined in section 45D(e)). X’s cost basis under section 1012 for the building and parking lot is \$200,000. During the taxable year, X operates its business 10 hours a day, 6 days a week. X owns and

uses 40 trucks in its business, which, on average, are used 6 hours a day outside a low-income community and 4 hours a day inside a low-income community (including time in the parking lot). The cost basis under section 1012 of each truck is \$25,000. During non-business hours, the trucks are parked in the lot. Only X’s 10-hour business days are used in calculating the use of tangible property percentage under paragraph (d)(4)(i)(B)(1) of this section. Thus, the numerator of the tangible property calculation is \$600,000 ( $\frac{1}{10}$  of \$1,000,000 (the \$25,000 cost basis of each truck times 40 trucks) plus \$200,000 (the cost basis of the building and parking lot)) and the denominator is \$1,200,000 (the total cost basis of the trucks, building, and parking lot), resulting in 50 percent of the use of X’s tangible property being within a low-income community. Consequently, X satisfies the 40 percent use of tangible property test under paragraph (d)(4)(i)(B)(1) of this section.

(C) *Services performed.* At least 40 percent of the services performed for such entity by its employees are performed in a low-income community. This percentage is determined based on a fraction the numerator of which is the total amount paid by the entity for employee services performed in a low-income community during the taxable year and the denominator of which is the total amount paid by the entity for employee services during the taxable year. If the entity has no employees, the entity is deemed to satisfy this paragraph (d)(4)(i)(C), and paragraph (d)(4)(i)(A) of this section, if the entity meets the requirement of paragraph (d)(4)(i)(B) of this section if “85 percent” is applied instead of 40 percent. See paragraph (d)(9) of this section for rules relating to targeted populations.

(D) *Collectibles.* Less than 5 percent of the average of the aggregate unadjusted bases of the property of such entity is attributable to collectibles (as defined in section 408(m)(2)) other than collectibles that are held primarily for sale to customers in the ordinary course of business.

(E) *Nonqualified financial property—(1) In general.* Less than 5 percent of the average of the aggregate unadjusted bases of the property of such entity is attributable to *nonqualified financial property*. For purposes of the preceding



sentence, the term *nonqualified financial property* means debt, stock, partnership interests, options, futures contracts, forward contracts, warrants, notional principal contracts, annuities, and other similar property except that such term does not include—

(i) Reasonable amounts of working capital held in cash, cash equivalents, or debt instruments with a term of 18 months or less (because the definition of *nonqualified financial property* includes debt instruments with a term in excess of 18 months, banks, credit unions, and other financial institutions are generally excluded from the definition of a *qualified active low-income community business*); or

(ii) Debt instruments described in section 1221(a)(4).

(2) *Construction of real property.* For purposes of paragraph (d)(4)(i)(E)(I)(i) of this section, the proceeds of a capital or equity investment or loan by a CDE that will be expended for construction of real property within 12 months after the date the investment or loan is made are treated as a reasonable amount of working capital.

(ii) *Proprietorships.* Any business carried on by an individual as a proprietor is a qualified active low-income community business if the business would meet the requirements of paragraph (d)(4)(i) of this section if the business were incorporated.

(iii) *Portions of business—(A) In general.* A CDE may treat any trade or business (or portion thereof) as a qualified active low-income community business if the trade or business (or portion thereof) would meet the requirements of paragraph (d)(4)(i) of this section if the trade or business (or portion thereof) were separately incorporated and a complete and separate set of books and records is maintained for that trade or business (or portion thereof). However, the CDE's capital or equity investment or loan is not a qualified low-income community investment under paragraph (d)(1)(i) of this section to the extent the proceeds of the investment or loan are not used for the trade or business (or portion thereof) that is treated as a qualified active low-income community business under this paragraph (d)(4)(iii)(A).

(B) *Examples.* The following examples illustrate an application of paragraph (d)(4)(iii) of this section:

*Example 1.* X is a partnership and a CDE that receives a new markets tax credit allocation from the Secretary. A pays \$1 million for a capital interest in X. Z is a corporation that operates a supermarket that is not in a low-income community (as defined in section 45D(e)). X uses the proceeds of A's equity investment to make a loan to Z that Z will use to construct a new supermarket in a low-income community. Z will maintain a complete and separate set of books and records for the new supermarket. The proceeds of X's loan to Z will be used exclusively for the new supermarket. Assume that Z's new supermarket in the low-income community would meet the requirements to be a qualified active low-income community business under paragraph (d)(4)(i) of this section if it were separately incorporated. Pursuant to paragraph (d)(4)(iii)(A) of this section, X treats Z's new supermarket as the qualified active low-income community business. Accordingly, X's loan to Z is a qualified low-income community investment under paragraph (d)(1)(i) of this section.

*Example 2.* X is a partnership and a CDE that receives a new markets tax credit allocation from the Secretary. A pays \$1 million for a capital interest in X. Z is a corporation that operates a liquor store in a low-income community (as defined in section 45D(e)). A liquor store is not a qualified business under paragraph (d)(5)(iii)(B) of this section. X uses the proceeds of A's equity investment to make a loan to Z that Z will use to construct a restaurant next to the liquor store. Z will maintain a complete and separate set of books and records for the new restaurant. The proceeds of X's loan to Z will be used exclusively for the new restaurant. Assume that Z's restaurant would meet the requirements to be a qualified active low-income community business under paragraph (d)(4)(i) of this section if it were separately incorporated. Pursuant to paragraph (d)(4)(iii) of this section, X treats Z's restaurant as the qualified active low-income community business. Accordingly, X's loan to Z is a qualified low-income community investment under paragraph (d)(1)(i) of this section.

*Example 3.* X is a partnership and a CDE that receives a new markets tax credit allocation from the Secretary. A pays \$1 million for a capital interest in X. Z is a corporation that operates an insurance company in a low-income community (as defined in section 45D(e)). Five percent or more of the average of the aggregate unadjusted bases of Z's property is attributable to nonqualified financial property under paragraph (d)(4)(i)(E) of this section. Z's insurance operations include different operating units including a

claims processing unit. X uses the proceeds of A's equity investment to make a loan to Z for use in Z's claims processing operations. Z will maintain a complete and separate set of books and records for the claims processing unit. The proceeds of X's loan to Z will be used exclusively for the claims processing unit. Assume that Z's claims processing unit would meet the requirements to be a qualified active low-income community business under paragraph (d)(4)(i) of this section if it were separately incorporated. Pursuant to paragraph (d)(4)(iii) of this section, X treats Z's claims processing unit as the qualified active low-income community business. Accordingly, X's loan to Z is a qualified low-income community investment under paragraph (d)(1)(i) of this section.

(iv) *Active conduct of a trade or business*—(A) *Special rule.* For purposes of paragraph (d)(4)(i) of this section, an entity will be treated as engaged in the active conduct of a trade or business if, at the time the CDE makes a capital or equity investment in, or loan to, the entity, the CDE reasonably expects that the entity will generate revenues (or, in the case of a nonprofit corporation, engage in an activity that furthers its purpose as a nonprofit corporation) within 3 years after the date the investment or loan is made. This paragraph (d)(4)(iv) applies only for purposes of determining whether an entity is engaged in the active conduct of a trade or business and does not apply for purposes of determining whether the gross-income requirement under paragraph (d)(4)(i)(A), (d)(9)(i)(B)(I)(i), or (d)(9)(ii)(C)(I)(i) of this section is satisfied.

(B) *Example.* The application of paragraph (d)(4)(iv)(A) of this section is illustrated by the following example:

*Example.* X is a partnership and a CDE that receives a new markets tax credit allocation from the Secretary on July 1, 2004. X makes a ten-year loan to Y. Y is a newly formed entity that will own and operate a shopping center to be constructed in a low-income community. Y has no revenues but X reasonably expects that Y will generate revenues beginning in December 2005. Under paragraph (d)(4)(iv)(A) of this section, Y is treated as engaged in the active conduct of a trade or business for purposes of paragraph (d)(4)(i) of this section.

(5) *Qualified business*—(i) *In general.* Except as otherwise provided in this paragraph (d)(5), the term *qualified business* means any trade or business.

There is no requirement that employees of a qualified business be residents of a low-income community.

(ii) *Rental of real property.* The rental to others of real property located in any low-income community (as defined in section 45D(e)) is a qualified business if and only if the property is not residential rental property (as defined in section 168(e)(2)(A)) and there are substantial improvements located on the real property. However, a CDE's investment in or loan to a business engaged in the rental of real property is not a qualified low-income community investment under paragraph (d)(1)(i) of this section to the extent a lessee of the real property is described in paragraph (d)(5)(iii)(B) of this section.

(iii) *Exclusions*—(A) *Trades or businesses involving intangibles.* The term *qualified business* does not include any trade or business consisting predominantly of the development or holding of intangibles for sale or license.

(B) *Certain other trades or businesses.* The term *qualified business* does not include any trade or business consisting of the operation of any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.

(C) *Farming.* The term *qualified business* does not include any trade or business the principal activity of which is farming (within the meaning of section 2032A(e)(5)(A) or (B)) if, as of the close of the taxable year of the taxpayer conducting such trade or business, the sum of the aggregate unadjusted bases (or, if greater, the fair market value) of the assets owned by the taxpayer that are used in such a trade or business, and the aggregate value of the assets leased by the taxpayer that are used in such a trade or business, exceeds \$500,000. For purposes of this paragraph (d)(5)(iii)(C), two or more trades or businesses will be treated as a single trade or business under rules similar to the rules of section 52(a) and (b).

(6) *Qualifications*—(i) *In general.* Except as provided in paragraph (d)(6)(ii) of this section, an entity is treated as

a qualified active low-income community business for the duration of the CDE's investment in the entity if the CDE reasonably expects, at the time the CDE makes the capital or equity investment in, or loan to, the entity, that the entity will satisfy the requirements to be a qualified active low-income community business under paragraph (d)(4)(i) of this section throughout the entire period of the investment or loan.

(ii) *Control*—(A) *In general*. If a CDE controls or obtains control of an entity at any time during the 7-year credit period (as defined in paragraph (c)(5)(i) of this section), the entity will be treated as a qualified active low-income community business only if the entity satisfies the requirements of paragraph (d)(4)(i) of this section throughout the entire period the CDE controls the entity.

(B) *Definition of control*. Control means, with respect to an entity, direct or indirect ownership (based on value) or control (based on voting or management rights) of more than 50 percent of the entity. For purposes of the preceding sentence, the term *management rights* means the power to influence the management policies or investment decisions of the entity.

(C) *Disregard of control*. For purposes of paragraph (d)(6)(ii)(A) of this section, the acquisition of control of an entity by a CDE is disregarded during the 12-month period following such acquisition of control (the 12-month period) if—

(1) The CDE's capital or equity investment in, or loan to, the entity met the requirements of paragraph (d)(6)(i) of this section when initially made;

(2) The CDE's acquisition of control of the entity is due to financial difficulties of the entity that were unforeseen at the time the investment or loan described in paragraph (d)(6)(ii)(C)(I) of this section was made; and

(3) If the acquisition of control occurs before the seventh year of the 7-year credit period (as defined in paragraph (c)(5)(i) of this section), either—

(i) The entity satisfies the requirements of paragraph (d)(4) of this section by the end of the 12-month period; or

(ii) The CDE sells or causes to be redeemed the entire amount of the investment or loan described in paragraph (d)(6)(ii)(C)(I) of this section and, by the end of the 12-month period, reinvests the amount received in respect of the sale or redemption in a qualified low-income community investment under paragraph (d)(1) of this section. For this purpose, the amount treated as continuously invested in a qualified low-income community investment is determined under paragraphs (d)(2)(i) and (ii) of this section.

(7) *Financial counseling and other services*. The term *financial counseling and other services* means advice provided by the CDE relating to the organization or operation of a trade or business.

(8) *Special rule for certain loans*—(i) *In general*. For purposes of paragraphs (d)(1)(i), (ii), and (iv) of this section, a loan is treated as made by a CDE to the extent the CDE purchases the loan from the originator (whether or not the originator is a CDE) within 30 days after the date the originator makes the loan if, at the time the loan is made, there is a legally enforceable written agreement between the originator and the CDE which—

(A) Requires the CDE to approve the making of the loan either directly or by imposing specific written loan underwriting criteria; and

(B) Requires the CDE to purchase the loan within 30 days after the date the loan is made.

(ii) *Example*. The application of paragraph (d)(8)(i) of this section is illustrated by the following example:

*Example*. (i) X is a partnership and a CDE that has received a new markets tax credit allocation from the Secretary. On October 1, 2004, Y enters into a legally enforceable written agreement with W. Y and W are corporations but only Y is a CDE. The agreement between Y and W provides that Y will purchase loans (or portions thereof) from W within 30 days after the date the loan is made by W, and that Y will approve the making of the loans.

(ii) On November 1, 2004, W makes an \$825,000 loan to Z pursuant to the agreement between Y and W. Z is a qualified active low-income community business under paragraph (d)(4) of this section. On November 15, 2004, Y purchases the loan from W for \$840,000. On December 31, 2004, X purchases the loan from Y for \$850,000.

(iii) Under paragraph (d)(8)(i) of this section, the loan to Z is treated as made by Y. Y's loan to Z is a qualified low-income community investment under paragraph (d)(1)(i) of this section. Accordingly, under paragraph (d)(1)(ii)(A) of this section, X's purchase of the loan from Y is a qualified low-income community investment in the amount of \$850,000.

(9) *Targeted populations.* For purposes of section 45D(e)(2), targeted populations that will be treated as a low-income community are individuals, or an identifiable group of individuals, including an Indian tribe, who are low-income persons as defined in paragraph (d)(9)(i) of this section or who are individuals who otherwise lack adequate access to loans or equity investments as defined in paragraph (d)(9)(ii) of this section.

(i) *Low-income persons—(A) Definition—(1) In general.* For purposes of section 45D(e)(2) and this paragraph (d)(9), an individual shall be considered to be low-income if the individual's family income, adjusted for family size, is not more than—

(i) For metropolitan areas, 80 percent of the area median family income; and

(ii) For non-metropolitan areas, the greater of 80 percent of the area median family income, or 80 percent of the statewide non-metropolitan area median family income.

(2) *Area median family income.* For purposes of paragraph (d)(9)(i)(A)(1) of this section, *area median family income* is determined in a manner consistent with the determinations of median family income under section 8 of the Housing Act of 1937, as amended. Taxpayers must use the annual estimates of median family income released by the Department of Housing and Urban Development (HUD) and may rely on those figures until 45 days after HUD releases a new list of income limits, or until HUD's effective date for the new list, whichever is later.

(3) *Individual's family income.* For purposes of paragraph (d)(9)(i)(A)(1) of this section, an individual's family income is determined using any one of the following three methods for measuring family income:

(i) Household income as measured by the U.S. Census Bureau,

(ii) Adjusted gross income under section 62 as reported on Internal Revenue

Service Form 1040. Adjusted gross income must include the adjusted gross income of any member of the individual's family (as defined in section 267(c)(4)) if the family member resides with the individual regardless of whether the family member files a separate return,

(iii) Household income determined under section 8 of the Housing Act of 1937, as amended.

(B) *Qualified active low-income community business requirements for low-income targeted populations—(1) In general.* An entity will not be treated as a qualified active low-income community business for low-income targeted populations unless—

(i) Except as provided in paragraph (d)(9)(i)(D)(2) of this section, at least 50 percent of the entity's total gross income for any taxable year is derived from sales, rentals, services, or other transactions with individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9);

(ii) At least 40 percent of the entity's employees are individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9); or

(iii) At least 50 percent of the entity is owned by individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9).

(2) *Employee.* The determination of whether an employee is a low-income person must be made at the time the employee is hired. If the employee is a low-income person at the time of hire, that employee is considered a low-income person for purposes of section 45D(e)(2) and this paragraph (d)(9) throughout the time of employment, without regard to any increase in the employee's income after the time of hire.

(3) *Owner.* The determination of whether an owner is a low-income person must be made at the time the qualified low-income community investment is made, or at the time the ownership interest is acquired by the owner, whichever is later. If an owner is a low-income person at the time the qualified low-income community investment is made or at the time the ownership interest is acquired by the owner, whichever is later, that owner is considered a low-income person for

purposes of section 45D(e)(2) and this paragraph (d)(9) throughout the time the ownership interest is held by that owner.

(4) *Derived from.* For purposes of paragraph (d)(9)(i)(B)(I)(i) of this section, the term *derived from* includes gross income derived from:

(i) Payments made directly by low-income persons to the entity; and

(ii) Money and the fair market value of property or services provided to the entity primarily for the benefit of low-income persons, but only if the persons providing the money, property, or services do not receive a direct benefit from the entity (for this purpose, a contribution that benefits the general public is not a direct benefit).

(5) *Fair market value of sales, rentals, services, or other transactions.* For purposes of paragraph (d)(9)(i)(B)(I)(i) of this section, an entity with gross income that is derived from sales, rentals, services, or other transactions with both non low-income persons and low-income persons may treat the gross income derived from the sales, rentals, services, or other transactions with low-income persons as including the full fair market value even if the low-income persons do not pay fair market value.

(C) *120-percent-income restriction—(I) In general—(i)* In no case will an entity be treated as a qualified active low-income community business under paragraph (d)(9)(i) of this section if the entity is located in a population census tract for which the median family income exceeds 120 percent of, in the case of a tract not located within a metropolitan area, the statewide median family income, or in the case of a tract located within a metropolitan area, the greater of statewide median family income or metropolitan area median family income (120-percent-income restriction).

(ii) The 120-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is not located in a metropolitan area.

(iii) The 120-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if

such tract is located in a metropolitan area and more than 75 percent of the tract is zoned for commercial or industrial use. For this purpose, the 75 percent calculation should be made using the area of the population census tract. For purposes of this paragraph (d)(9)(i)(C)(I)(iii), property for which commercial or industrial use is a permissible zoning use will be treated as zoned for commercial or industrial use.

(2) *Population census tract location—(i)* For purposes of the 120-percent-income restriction, an entity will be considered to be located in a population census tract for which the median family income exceeds 120 percent of the applicable median family income under paragraph (d)(9)(i)(C)(I)(i) of this section (non-qualifying population census tract) if at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more non-qualifying population census tracts (non-qualifying gross income amount); at least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts (non-qualifying tangible property usage); and at least 40 percent of the services performed for the entity by its employees are performed in one or more non-qualifying population census tracts (non-qualifying services performance).

(ii) The entity is considered to have the non-qualifying gross income amount if the entity has non-qualifying tangible property usage or non-qualifying services performance of at least 50 percent instead of 40 percent.

(iii) If the entity has no employees, the entity is considered to have the non-qualifying gross income amount and non-qualifying services performance if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts.

(D) *Rental of real property for low-income targeted populations—(I) In general.* An entity that rents to others real property for low-income targeted populations and that otherwise satisfies the requirements to be a qualified business

under paragraph (d)(5) of this section will be treated as located in a low-income community for purposes of paragraph (d)(5)(ii) of this section if at least 50 percent of the entity's total gross income is derived from rentals to individuals who are low-income persons for purposes of section 45D(e)(2) and this paragraph (d)(9) or rentals to a qualified active low-income community business that meets the requirements for low-income targeted populations under paragraphs (d)(9)(i)(B)(I)(i) or (ii) and (d)(9)(i)(B)(2) of this section.

(2) *Special rule for entities whose sole business is the rental to others of real property.* If an entity's sole business is the rental to others of real property under paragraph (d)(9)(i)(D)(I) of this section, then the gross income requirement in paragraph (d)(9)(i)(B)(I)(i) of this section will be considered satisfied if the entity is treated as being located in a low-income community under paragraph (d)(9)(i)(D)(I) of this section.

(ii) *Individuals who otherwise lack adequate access to loans or equity investments—(A) In general.* Paragraph (d)(9)(ii) of this section may be applied only with regard to qualified low-income community investments made under the increase in the new markets tax credit limitation pursuant to section 1400N(m)(2). Therefore, only CDEs with a significant mission of recovery and redevelopment of the Gulf Opportunity Zone (GO Zone) that receive an allocation from the increase described in section 1400N(m)(2) may make qualified low-income community investments from that allocation pursuant to the rules in paragraph (d)(9)(ii) of this section.

(B) *GO Zone Targeted Population.* For purposes of the targeted populations rules under section 45D(e)(2), an individual otherwise lacks adequate access to loans or equity investments only if the individual was displaced from his or her principal residence as a result of Hurricane Katrina or the individual lost his or her principal source of employment as a result of Hurricane Katrina (GO Zone Targeted Population). In order to meet this definition, the individual's principal residence or principal source of employment, as applicable, must have been located in a population census tract

within the GO Zone that contains one or more areas designated by the Federal Emergency Management Agency (FEMA) as flooded, having sustained extensive damage, or having sustained catastrophic damage as a result of Hurricane Katrina.

(C) *Qualified active low-income community business requirements for the GO Zone Targeted Population—(1) In general.* An entity will not be treated as a qualified active low-income community business for the GO Zone Targeted Population unless—

(i) At least 50 percent of the entity's total gross income for any taxable year is derived from sales, rentals, services, or other transactions with the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof;

(ii) At least 40 percent of the entity's employees consist of the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof; or

(iii) At least 50 percent of the entity is owned by the GO Zone Targeted Population, low-income persons as defined in paragraph (d)(9)(i) of this section, or some combination thereof.

(2) *Location—(i) In general.* In order to be a qualified active low-income community business under paragraph (d)(9)(ii)(C) of this section, the entity must be located in a population census tract within the GO Zone that contains one or more areas designated by FEMA as flooded, having sustained extensive damage, or having sustained catastrophic damage as a result of Hurricane Katrina (qualifying population census tract).

(ii) *Determination—*For purposes of the preceding paragraph, an entity will be considered to be located in a qualifying population census tract if at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more qualifying population census tracts (gross income requirement); at least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within

one or more qualifying population census tracts (use of tangible property requirement); and at least 40 percent of the services performed for the entity by its employees are performed in one or more qualifying population census tracts (services performed requirement). The entity is deemed to satisfy the gross income requirement if the entity satisfies the use of tangible property requirement or the services performed requirement on the basis of at least 50 percent instead of 40 percent. If the entity has no employees, the entity is deemed to satisfy the services performed requirement and the gross income requirement if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more qualifying population census tracts.

(D) *200-percent-income restriction*—(1) *In general*—(i) In no case will an entity be treated as a qualified active low-income community business under paragraph (d)(9)(ii) of this section if the entity is located in a population census tract for which the median family income exceeds 200 percent of, in the case of a tract not located within a metropolitan area, the statewide median family income, or, in the case of a tract located within a metropolitan area, the greater of statewide median family income or metropolitan area median family income (200-percent-income restriction).

(ii) The 200-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is not located in a metropolitan area.

(iii) The 200-percent-income restriction shall not apply to an entity located within a population census tract with a population of less than 2,000 if such tract is located in a metropolitan area and more than 75 percent of the tract is zoned for commercial or industrial use. For this purpose, the 75 percent calculation should be made using the area of the population census tract. For purposes of this paragraph (d)(9)(ii)(D)(1)(iii), property for which commercial or industrial use is a permissible zoning use will be treated as zoned for commercial or industrial use.

(2) *Population census tract location*—(i) For purposes of the 200-percent-income restriction, an entity will be considered to be located in a population census tract for which the median family income exceeds 200 percent of the applicable median family income under paragraph (d)(9)(ii)(D)(1)(i) of this section (non-qualifying population census tract) if—at least 50 percent of the total gross income of the entity is derived from the active conduct of a qualified business (as defined in paragraph (d)(5) of this section) within one or more non-qualifying population census tracts (non-qualifying gross income amount); at least 40 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts (non-qualifying tangible property usage); and at least 40 percent of the services performed for the entity by its employees are performed in one or more non-qualifying population census tracts (non-qualifying services performance).

(ii) The entity is considered to have the non-qualifying gross income amount if the entity has non-qualifying tangible property usage or non-qualifying services performance of at least 50 percent instead of 40 percent.

(iii) If the entity has no employees, the entity is considered to have the non-qualifying gross income amount and non-qualifying services performance if at least 85 percent of the use of the tangible property of the entity (whether owned or leased) is within one or more non-qualifying population census tracts.

(E) *Rental of real property for the GO Zone Targeted Population*. The rental to others of real property for the GO Zone Targeted Population that otherwise satisfies the requirements to be a qualified business under paragraph (d)(5) of this section will be treated as located in a low-income community for purposes of paragraph (d)(5)(ii) of this section if at least 50 percent of the entity's total gross income is derived from rentals to the GO Zone Targeted Population, rentals to low-income persons as defined in paragraph (d)(9)(i) of this section, or rentals to a qualified active low-income community business that meets the requirements for the

GO Zone Targeted Population under paragraph (d)(9)(ii)(C)(I)(i) or (ii) of this section.

(e) *Recapture*—(1) *In general.* If, at any time during the 7-year period beginning on the date of the original issue of a qualified equity investment in a CDE, there is a recapture event under paragraph (e)(2) of this section with respect to such investment, then the tax imposed by Chapter 1 of the Internal Revenue Code for the taxable year in which the recapture event occurs is increased by the credit recapture amount under section 45D(g)(2). A recapture event under paragraph (e)(2) of this section requires recapture of credits allowed to the taxpayer who purchased the equity investment from the CDE at its original issue and to all subsequent holders of that investment.

(2) *Recapture event.* There is a recapture event with respect to an equity investment in a CDE if—

- (i) The entity ceases to be a CDE;
- (ii) The proceeds of the investment cease to be used in a manner that satisfies the substantially-all requirement of paragraph (c)(1)(ii) of this section; or
- (iii) The investment is redeemed or otherwise cashed out by the CDE.

(3) *Redemption*—(i) *Equity investment in a C corporation.* For purposes of paragraph (e)(2)(iii) of this section, an equity investment in a CDE that is treated as a C corporation for Federal tax purposes is redeemed when section 302(a) applies to amounts received by the equity holder. An equity investment is treated as cashed out when section 301(c)(2) or section 301(c)(3) applies to amounts received by the equity holder. An equity investment is not treated as cashed out when only section 301(c)(1) applies to amounts received by the equity holder.

(ii) *Equity investment in an S corporation.* For purposes of paragraph (e)(2)(iii) of this section, an equity investment in a CDE that is an S corporation is redeemed when section 302(a) applies to amounts received by the equity holder. An equity investment in an S corporation is treated as cashed out when a distribution to a shareholder described in section 1368(a) exceeds the accumulated adjustments account determined under § 1.1368-2 and

any accumulated earnings and profits of the S corporation.

(iii) *Capital interest in a partnership.* In the case of an equity investment that is a capital interest in a CDE that is a partnership for Federal tax purposes, a pro rata cash distribution by the CDE to its partners based on each partner's capital interest in the CDE during the taxable year will not be treated as a redemption for purposes of paragraph (e)(2)(iii) of this section if the distribution does not exceed the CDE's *operating income* for the taxable year. In addition, a non-pro rata *de minimis* cash distribution by a CDE to a partner or partners during the taxable year will not be treated as a redemption. A non-pro rata *de minimis* cash distribution may not exceed the lesser of 5 percent of the CDE's *operating income* for that taxable year or 10 percent of the partner's capital interest in the CDE. For purposes of this paragraph (e)(3)(iii), with respect to any taxable year, *operating income* is the sum of:

(A) The CDE's taxable income as determined under section 703, except that—

(1) The items described in section 703(a)(1) shall be aggregated with the non-separately stated tax items of the partnership; and

(2) Any gain resulting from the sale of a capital asset under section 1221(a) or section 1231 property shall not be included in taxable income;

(B) Deductions under section 165, but only to the extent the losses were realized from qualified low-income community investments under paragraph (d)(1) of this section;

(C) Deductions under sections 167 and 168, including the additional first-year depreciation under section 168(k);

(D) Start-up expenditures amortized under section 195; and

(E) Organizational expenses amortized under section 709.

(4) *Bankruptcy.* Bankruptcy of a CDE is not a recapture event.

(5) *Waiver of requirement or extension of time*—(i) *In general.* The Commissioner may waive a requirement or extend a deadline if such waiver or extension does not materially frustrate the purposes of section 45D and this section.



(ii) *Manner for requesting a waiver or extension.* A CDE that believes it has good cause for a waiver or an extension may request relief from the Commissioner in a ruling request. The request should set forth all the relevant facts and include a detailed explanation describing the event or events relating to the request for a waiver or an extension. For further information on the application procedure for a ruling, see Rev. Proc. 2005-1 (2005-1 I.R.B. 1) or its successor revenue procedure (see § 601.601(d)(2) of this chapter).

(iii) *Terms and conditions.* The granting of a waiver or an extension to a CDE under this section may require adjustments of the CDE's requirements under section 45D and this section as may be appropriate.

(6) *Cure period.* If a qualified equity investment fails the substantially-all requirement under paragraph (c)(5)(i) of this section, the failure is not a recapture event under paragraph (e)(2)(ii) of this section if the CDE corrects the failure within 6 months after the date the CDE becomes aware (or reasonably should have become aware) of the failure. Only one correction is permitted for each qualified equity investment during the 7-year credit period under this paragraph (e)(6).

(7) *Example.* The application of this paragraph (e) is illustrated by the following example:

*Example.* In 2003, A and B acquire separate qualified equity investments in X, a partnership. X is a CDE that has received a new markets tax credit allocation from the Secretary. X uses the proceeds of A's qualified equity investment to make a qualified low-income community investment in Y, and X uses the proceeds of B's qualified equity investment to make a qualified low-income community investment in Z. Y and Z are not CDEs. X controls both Y and Z within the meaning of paragraph (d)(6)(ii)(B) of this section. In 2003, Y and Z are qualified active low-income community businesses. In 2007, Y, but not Z, is a qualified active low-income community business and X does not satisfy the substantially-all requirement using the safe harbor calculation under paragraph (c)(5)(iii) of this section. A's equity investment satisfies the substantially-all requirement of paragraph (c)(1)(ii) of this section using the direct-tracing calculation of paragraph (c)(5)(ii) of this section because A's equity investment is traceable to Y. However, B's equity investment fails the substantially-all requirement using the direct-trac-

ing calculation because B's equity investment is traceable to Z. Therefore, under paragraph (e)(2)(ii) of this section, there is a recapture event for B's equity investment (but not A's equity investment).

(f) *Basis reduction*—(1) *In general.* A taxpayer's basis in a qualified equity investment is reduced by the amount of any new markets tax credit determined under paragraph (b)(1) of this section with respect to the investment. A basis reduction occurs on each credit allowance date under paragraph (b)(2) of this section. This paragraph (f) does not apply for purposes of sections 1202, 1400B, and 1400F.

(2) *Adjustment in basis of interest in partnership or S corporation.* The adjusted basis of either a partner's interest in a partnership, or stock in an S corporation, must be appropriately adjusted to take into account adjustments made under paragraph (f)(1) of this section in the basis of a qualified equity investment held by the partnership or S corporation (as the case may be).

(g) *Other rules*—(1) *Anti-abuse.* If a principal purpose of a transaction or a series of transactions is to achieve a result that is inconsistent with the purposes of section 45D and this section, the Commissioner may treat the transaction or series of transactions as causing a recapture event under paragraph (e)(2) of this section.

(2) *Reporting requirements*—(i) *Notification by CDE to taxpayer*—(A) *Allowance of new markets tax credit.* A CDE must provide notice to any taxpayer who acquires a qualified equity investment in the CDE at its original issue that the equity investment is a qualified equity investment entitling the taxpayer to claim the new markets tax credit. The notice must be provided by the CDE to the taxpayer no later than 60 days after the date the taxpayer makes the investment in the CDE. The notice must contain the amount paid to the CDE for the qualified equity investment at its original issue and the taxpayer identification number of the CDE.

(B) *Recapture event.* If, at any time during the 7-year period beginning on the date of the original issue of a qualified equity investment in a CDE, there is a recapture event under paragraph (e)(2) of this section with respect to

## § 1.45G-0

## 26 CFR Ch. I (4-1-12 Edition)

such investment, the CDE must provide notice to each holder, including all prior holders, of the investment that a recapture event has occurred. The notice must be provided by the CDE no later than 60 days after the date the CDE becomes aware of the recapture event.

(ii) *CDE reporting requirements to Secretary.* Each CDE must comply with such reporting requirements to the Secretary as the Secretary may prescribe.

(iii) *Manner of claiming new markets tax credit.* A taxpayer may claim the new markets tax credit for each applicable taxable year by completing Form 8874, “New Markets Credit,” and by filing Form 8874 with the taxpayer’s Federal income tax return.

(iv) *Reporting recapture tax.* If there is a recapture event with respect to a taxpayer’s equity investment in a CDE, the taxpayer must include the credit recapture amount under section 45D(g)(2) on the line for recapture taxes on the taxpayer’s Federal income tax return for the taxable year in which the recapture event under paragraph (e)(2) of this section occurs (or on the line for total tax, if there is no such line for recapture taxes) and write *NMCR* (new markets credit recapture) next to the entry space.

(3) *Other Federal tax benefits*—(i) *In general.* Except as provided in paragraph (g)(3)(ii) of this section, the availability of Federal tax benefits does not limit the availability of the new markets tax credit. Federal tax benefits that do not limit the availability of the new markets tax credit include, for example:

(A) The rehabilitation credit under section 47;

(B) All deductions under sections 167 and 168, including the additional first-year depreciation under section 168(k), and the expense deduction for certain depreciable property under section 179; and

(C) All tax benefits relating to certain designated areas such as empowerment zones and enterprise communities under sections 1391 through 1397D, the District of Columbia Enterprise Zone under sections 1400 through 1400B, renewal communities under sec-

tions 1400E through 1400J, and the New York Liberty Zone under section 1400L.

(ii) *Low-income housing credit.* If a CDE makes a capital or equity investment or a loan with respect to a qualified low-income building under section 42, the investment or loan is not a qualified low-income community investment under paragraph (d)(1) of this section to the extent the building’s eligible basis under section 42(d) is financed by the proceeds of the investment or loan.

(4) *Bankruptcy of CDE.* The bankruptcy of a CDE does not preclude a taxpayer from continuing to claim the new markets tax credit on the remaining credit allowance dates under paragraph (b)(2) of this section.

(h) *Effective/applicability dates*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, this section applies on or after December 22, 2004, and may be applied by taxpayers before December 22, 2004. The provisions that apply before December 22, 2004, are contained in § 1.45D-1T (see 26 CFR part 1 revised as of April 1, 2003, and April 1, 2004).

(2) *Exception.* Paragraph (d)(5)(ii) of this section as it relates to the restriction on lessees described in paragraph (d)(5)(iii)(B) of this section applies to qualified low-income community investments made on or after June 22, 2005.

(3) *Targeted populations.* The rules in paragraph (d)(9) of this section and the last sentence in paragraph (d)(4)(iv)(A) of this section apply to taxable years ending on or after December 5, 2011. A taxpayer may apply the rules in paragraph (d)(9) of this section to taxable years ending before December 5, 2011 for designations made by the Secretary after October 22, 2004.

[T.D. 9171, 69 FR 77627, Dec. 28, 2004; 70 FR 4012, Jan. 28, 2005, as amended by T.D. 9560, 76 FR 75778, Dec. 5, 2011]

### § 1.45G-0 Table of contents for the railroad track maintenance credit rules.

This section lists the table of contents for § 1.45G-1.

§ 1.45G-1 Railroad track maintenance credit.

(a) In general.

(b) Definitions.

(1) Class II railroad and Class III railroad.