



## BUSINESS BRIEF

### Final Targeted Populations Rule Released

The American Jobs Creation Act of 2004 amended the New Markets Tax Credit program (“NMTC”) to provide that certain targeted populations may be treated as low-income communities. The Internal Revenue Service provided some guidance on the topic in Notice 2006-60 and in proposed regulations that were issued in 2008. Following a lengthy comment period, final regulations were released in December of 2011.

Under the final regulations, the term “targeted populations” means individuals, or an identifiable group of individuals, including an Indian tribe, who (a) are low-income persons; or (b) otherwise lack adequate access to loans or equity investments. An individual is considered to be low-income if the individual’s family income, adjusted for family size, is not more than (a) 80% of the metropolitan area median family income or (b) the greater of 80% of the non-metropolitan area median family income or 80% of the statewide non-metropolitan area median family income.

In order for an entity to be treated as a qualified active low-income community business for targeted populations, it must satisfy one of the following criteria: (1) at least 50% 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 (the gross income requirement); (2) at least 40% of the entity’s employees are individuals who are low-income persons (the employee requirement); or (3) at least 50% of the entity is owned by individuals who are low-income persons (the ownership requirement). The determination of whether an employee is a low-income person is made at the time of the hire and is effective throughout the time of employment, without regard to any increase in the employee’s income after the time of hire. The determination of whether an owner is a low-income person is made at the time the qualified low-income community investment is made, or at the time the ownership interest is acquired, whichever is later, and is effective throughout the time the ownership interest is held by that owner.

Unfortunately, the regulations only address the low-income aspect of targeted populations. With respect to individuals or groups that lack adequate access to loans or equity investments, the IRS invited taxpayers to submit additional comments identifying individuals or groups that may be considered to lack such access along with the reasons for the classification. The IRS further requested suggestions for ways to limit additional targeted population rules so that the purposes of the targeted populations provisions are not abused.

The final regulations became effective December 5, 2011 and can be found in Vol. 76, No. 233 of the Federal Register.



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## Advantages and Disadvantages of Arbitration

Alternative Dispute Resolutions (“ADR”), such as arbitration or mediation, have become popular methods for settling disputes among parties today. Entities and individuals are more frequently choosing to forego the process of the traditional court system for the resolution of disputes by entering into agreements containing arbitration provisions. Arbitration is a method of resolving disputes outside of court whereby an arbitrator employed by the parties will listen to the arguments of the parties, review the evidence and issue a decision that is generally final and binding on the parties. Considering the prevalence of arbitration clauses in contracts today, it is imperative that parties consider the advantages and disadvantages of arbitration proceedings and make an informed decision before entering into such an agreement.

### Advantages

**Cost.** Generally, arbitration proceedings will result in quicker dispute resolution than in the court system. This, in turn, results in lower overall costs. In addition, only limited discovery is allowed in arbitration, which greatly helps to reduce the costs of reaching a resolution.

**Informality.** Arbitration proceedings are far less formal than a trial. Unlike trials, which must be held in a courtroom, parties can agree to have arbitrations in any convenient setting of their choosing. Also, the rules of procedure and evidence are greatly relaxed and simplified, making the overall process much less formal than a typical trial and giving the parties more control.

**Privacy.** Arbitration proceedings are generally held in private, and parties can agree to keep the final resolution confidential. This is especially appealing if the subject matter of the dispute involves private or embarrassing information.

**Control.** Parties have the ability to maintain greater control over the dispute resolution process through arbitration. The arbitrator is selected by the parties. Unlike in a trial, where the judge or jury may know very little about the subject matter of the dispute, the parties to arbitration have the ability to select an arbitrator with expertise in a certain area, which may lend to a more equitable and informed decision. Additionally, the parties can generally select and stipulate as to the legal and procedural rules that will govern the process.

### Disadvantages

**Inability to Appeal.** As a general and practical rule, the arbitrator’s decision cannot be appealed. Only in certain limited situations, such as when the arbitrator exceeded his or her authority or upon proof of corruption, fraud or undue influence, will an arbitrator’s decision be reviewed by a district court. This can be especially troubling given that an arbitrator generally has more discretionary and decision-making power than a judge or jury. Therefore, the binding nature of the decision and the general lack of ability to seek recourse from an incorrect decision make the consequences of the arbitration more profound.

**Lack of Formal Discovery.** Although the lack of a full fledge formal discovery process in arbitration proceedings may result in decreased costs, it can also mean that the parties (or one party in particular) may not have all of the information necessary to fully evaluate the case. Therefore, a party may present its case to an arbitrator without being privy to all of the pertinent facts that could have been revealed had more formal discovery, such as interrogatories, requests for production and depositions, been conducted.

**Discretion of the Arbitrator.** An arbitrator may make his or her decision without issuing any written opinion or explanatory statement. Furthermore, since arbitrations are private and so infrequently reviewed by courts, the lack of transparency in the decision-making process may leave room for bias in arbitration proceedings.



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**Rising Costs.** Although arbitrations are typically going to be less expensive than litigation, the cost of arbitration is on the rise, making arbitration often more expensive than other ADR proceedings.

Arbitration, along with other methods of ADR, can provide an attractive alternative to the traditional legal system when resolving disagreements. However, the pros and cons of arbitration, the particular transaction and the needs of the parties should all be carefully considered before agreeing to arbitrate a dispute. Furthermore, since the arbitrator is greatly governed and guided by what the parties state in their ADR provision, any issues or concerns with the process can largely be addressed through a well-drafted agreement to ensure a more fair and efficient resolution for all parties involved.