

Public Finance Advisory: Bush Signs 2008 Housing Act, Providing Relief to Housing Finance Markets

7/31/2008

On July 30, 2008, President Bush signed into law the provisions of the Housing and Economic Recovery Act of 2008 (the "2008 Housing Act"). The legislation contains sweeping provisions to safeguard Fannie Mae and Freddie Mac, to assist struggling homeowners at risk of losing their homes, and to generally support the housing finance markets.

This advisory focuses on the provisions relating primarily to multifamily residential developments financed with tax-exempt bonds under Section 142(a)(7) of the Internal Revenue Code of 1986, as amended (the "Code"). However, as noted below, some of these changes will also benefit qualified mortgage bond and qualified veterans' mortgage bond financings under Section 143 of the Code.

Repeal of Alternative Minimum Tax Limitations on Tax-Exempt Housing Bonds

Since 1986, interest on private activity bonds has generally been treated as a preference item in the calculation of alternative minimum taxes imposed on individuals and corporations under Section 57 of the Code. Section 57 of the Code is amended by the 2008 Housing Act to exclude bonds for qualified residential rental projects, qualified mortgage bonds, and qualified veterans' mortgage bonds. In addition, Section 56 of the Code is amended to prevent interest on such bonds from being included in the calculation of adjusted current earnings for purposes of determining the alternative minimum tax (AMT) liability of certain corporations providing these bonds better treatment than other non-AMT bonds. The repeal applies only to bonds originally issued after enactment of the 2008 Housing Act and to refundings of such bonds.

Volume Cap

The 2008 Housing Act amends Section 146(d) of the Code to increase the volume cap for 2008 by \$10 billion nationwide. This additional volume cap is required to be allocated among the states based upon population and must be used for qualified housing issues, which include financings for qualified residential rental projects under Section 142 of the Code and qualified mortgage issues under Section 143(a) of the Code with a shortened origination period. Such additional volume cap may be carried forward until 2010 for qualified housing issues.

Coordination of Certain Low-Income Housing Credit and Qualified Residential Rental Project Exempt Facility Bond Rules

Under the 2008 Housing Act, certain rules under Section 142 of the Code for bond-financed developments have been modified to conform to similar requirements under Section 42 of the Code for tax-credit developments. The rules with respect to students and single-room occupancy units under Section 142(d) of the Code have been amended to track the requirements of Section 42 of the Code. In addition, the determination of "next available unit" under Section 142(d) of the Code is now required to be done on a building-by-building basis rather than over an entire project. These changes will apply to determinations of qualified status for periods beginning after the date of enactment of the 2008 Housing Act, with respect to bonds issued before, on, or after such date.

Recycling of Tax-Exempt Bond Proceeds to Finance Residential Rental Projects

The 2008 Housing Act amends Sections 146 and 42 of the Code to explicitly authorize the recycling of bond proceeds used to fund construction of a residential rental project receiving tax credits to fund another residential rental project, without the need to obtain new volume cap. The basic requirements for such recycling are:

- the second loan must be funded, and refunding bonds issued, within six months of the date of repayment of the first loan;
- the refunding bonds must be issued within four years of the date of issuance of the original bonds;
- the refunding bonds may not mature later than 34 years after the date of issuance of the original bonds;
- the refunding bonds shall not be entitled to any as-of-right tax credits; and
- the refunding bonds, and the second project, shall be subject to TEFRA approval prior to the issuance of the refunding bonds. The recycling provisions apply to any loan repayments made after the date of enactment of the 2008 Housing Act.

If you wish to discuss the contents of this advisory, or for assistance with issues raised by the legal developments that are the subject of this advisory, please contact any of the members of Mintz Levin's Public Finance section listed below.

Charles E. Carey
(212) 692-6266
CECarey@mintz.com

Jeremy A. Spector
(212) 692-6283
JASpector@mintz.com

Mike Solet
(617) 348-1739
MDSolet@mintz.com

Jon Ballan
(212) 692-6772
JABallan@mintz.com

Katie Bench
(617) 348-1658
KPBench@mintz.com

Meghan Burke
(617) 348-1663
MBBurke@mintz.com

Mark Dutkewych
(617) 348-3035

MYDutkewych@mintz.com

Elissa Flynn-Poppey

(617) 348-1868

EFlynn-Poppey@mintz.com

Ann-Ellen Hornidge

(617) 348-1657

AHornidge@mintz.com

Colin McNiece

(617) 348-1788

CMcNiece@mintz.com

Rich Moche

(617) 348-1696

RMoche@mintz.com

Colleen Murphy

(617) 348-1836

CAMurphy@mintz.com

Poonam Patidar

(617) 348-3083

PPatidar@mintz.com

Linda Port

(617) 348-1718

LPort@mintz.com

John Regier

(617) 348-1720

JRRegier@mintz.com

Greg Sandomirsky

(617) 348-1730

Gasandomirsky@mintz.com

Miyoko Sato

(617) 348-1896

PMsato@mintz.com

Rob Senzer

(212) 692-6738

ROSenzer@mintz.com

Len Weiser-Varon

(617) 348-1758

LWeiser-Varon@mintz.com

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