



Update on LIHTC Proposals

Congress is scheduled to recess for its district and state work period on March 29, and will return to Washington on April 9. In the ramp-up to the recess, there have been some developments affecting our industry that we wanted to bring to your attention. Without going into detail, passage of the healthcare law removes a huge hurdle to potential progress on other legislative initiative we have and will continue to work on.

LIHTC Direct Payment for Bond-financed Low-Income Housing

On March 24, 2010, the House of Representatives passed H.R. 4849, the Small Business and Infrastructure Jobs Act of 2010, by a vote of 246-178. This legislation includes a provision that would allow owners, at their election, to receive a direct payment in lieu of the 4 percent LIHTC currently available for buildings financed with tax-exempt bonds. The direct payment would be equal to 25.5 percent of the qualified basis of such building, and is treated as a payment against federal income tax liability. Thus, to the extent the payment exceeds tax liability, the excess would be treated as an overpayment of taxes and is refundable just like any other overpayment of taxes. The direct payment is available with respect to buildings placed in service after the date of enactment through December 31, 2010.

Although some of the objectives seem to be similar, this “direct payment” approach is different than earlier proposals to simply expand the Exchange Program to the 4 percent LIHTC. H.R. 4849 keeps the 4 percent LIHTC clearly within the federal tax code and under the jurisdiction of the tax-writing committees. We are analyzing the impact of the provision and have raised the placed-in-service date and other issues with the Ways and Means Committee staff. We believe they are receptive to the concerns raised and are reviewing the provision for possible changes as the bill moves through Congress.

LIHTC Nine Percent Exchange Program

The 2009 stimulus act contained a one-year provision (the 9 percent Exchange Program) that allows state housing agencies to elect to receive a payment in lieu of a portion of the state’s allocation of low-income housing tax credits. Both the House and Senate have passed legislation that would extend this provision for one year, through 2010. This extension is included in H.R. 4213, commonly referred to as the extenders bill, which includes a number of other expiring tax provisions.

Because the House and Senate bills are different – primarily due to the differences in the revenue raising provisions used to offset the cost of each bill – the two bills will have to be reconciled before the bill can become law. One way to reconcile the bills is to have a formal conference between the House and Senate. Another approach is to reconcile the bills through a process commonly called “ping-pong,” which means one of the bills goes back and forth between the House and Senate until both chambers accept the bill.

House Ways and Means Committee Chairman Sander Levin (D-MI) recently said that a formal conference committee to settle differences might take a considerable amount of time to complete. We are told by senior Senate staff that there is a desire to move the extenders bill sooner rather than later, but with the focus on health care reform no decision has been made on how or when to reconcile the extenders package. Hopefully, that will change now that the health care bill has been completed.

Bingaman LIHTC Carryback Bill

On March 18, 2010, Senator Jeff Bingaman (D-NM), a senior member of the Senate Finance Committee and Chair of the Senate Energy and Natural Resources Committee, introduced legislation that would allow investors to carry back low-income housing tax credits for up to five years. This bill, the Low-Income Housing Tax Credit Recovery Act (S. 3141), would provide a five-year carryback for unusable existing low-income housing tax credits, as well as a five-year carryback for credits generated from future investments. In order to promote new investment in the program, the bill makes the five-year carryback election available only to the extent that carryback proceeds are entirely invested in new low-income housing credit investments. The bill also allows LIHTC to offset 100% of income tax liability.

In his floor statement, Senator Bingaman recognized the challenges the program is facing in attracting private investment, and noted the program’s 10-year credit stream and 15-year compliance period as one such hurdle. He also mentioned that many traditional investors cannot currently use the tax credits and have exited the market, as have Fannie Mae and Freddie Mac. Senator Bingaman said that the bill should encourage new investment, create tens of thousands of new affordable housing units and, in turn, thousands of construction jobs.

S. 3141 is cosponsored by five other Finance Committee members: Senators John Kerry (D-MA), Maria Cantwell (D-WA), Debbie Stabenow (D-MI), Charles Schumer (D-NY) and Robert Menendez (D-NJ).

The Senate has indicated that it will pass additional jobs-related legislation in the upcoming months. This could be a potential vehicle for the Bingaman bill, along with LIHTC legislation that Senator Maria Cantwell (D-WA) intends to introduce. We have also initiated conversations with Senate staff regarding the Small Business legislation passed out of the House, including our concerns with regard to the PIS date and other language within the 4 percent LIHTC proposal. We continue to work with our Senate champions to have these agenda items included in the next appropriate legislative vehicle. This will not be an easy lift because of the need to pay for any provisions that lose revenue. It also goes without saying that the political climate will only get more difficult as the mid-term elections grow nearer.

Stay tuned.

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