

## New Housing Law Represents Victory, Challenge to LIHTC Professionals

By Michael J. Novogradac, CPA

The Housing and Economic Recovery Act of 2008 (H.R. 3221) that President George W. Bush signed into law on July 30 represents some of the most sweeping changes to the Low-Income Housing Tax Credit (LIHTC) program since its inception in 1986.

Among the affordable housing provisions of H.R. 3221 are several investor incentives that include allowing credits to offset the alternative minimum tax (AMT) and the elimination of the recapture bond posting requirement; greater project financial feasibility that includes a 10 percent increase in credits for 2007 and 2008, an additional \$11 billion in tax-exempt housing bonds in 2008, and a temporary 9 percent minimum credit rate; and other LIHTC changes that include a provision that increases the substantial rehabilitation threshold.

Among the more unique aspects of the bill are its effective dates. In general, when the low-income housing tax credit is changed, the provisions are usually effective for allocations in future years. In H.R. 3221 many provisions apply to properties placed in service after the enactment of the bill, some apply to buildings placed-in-service in 2008 or later, while others' apply to buildings placed-in-service before, during or after enactment. A handful of provisions apply to projects that will receive allocations in 2009 or later.

The new bill includes a significant number of positive changes but it also leaves some lingering questions and concerns on several of its LIHTC aspects. Novogradac and Company is convening an LIHTC Working Group that will identify areas that require additional guidance and will work with the Internal Revenue Service (IRS) to solicit and receive that guidance.

### Work to be Done

The new legislation opens for further discussion and guidance those areas in which the statute's intent is unclear and begs answers to questions on the implementation of certain provisions. Some of these issues relate to the 9 percent floor (see related article on page 20) and greater clarity on which rehabilitation projects might be entitled to generate credits that offset the alternative minimum tax (AMT).

This month's Washington Wire will address investor incentives as well as the provision for an increased substantial rehabilitation threshold.

### Investor Incentives

#### *LIHTC AMT Offset*

One of the key provisions of the new housing bill allows investors to use the LIHTC to offset the AMT, effective with any building placed in service this year and in future years. The effect of this provision on investor pricing in the short run is not expected to be tremendous but indications are it certainly will have a positive effect in the longer term. As corporations turn away from investments because of AMT issues, the affordable housing industry could see a return of investors and a beneficial impact on investor pricing. The IRS will also have to develop an updated Form K-1 to allow for reporting pre-2008 credits and post-2007 credits.

#### *Historic Tax Credit – AMT Offset*

The historic tax credit is also available to offset AMT to the extent attributable to qualified rehabilitation expenditures properly taken into account for periods after December 31, 2007 (see related article in the September 2008 issue of

*(continued on page 2)*

# New Housing Law

(continued from page 1)

the *New Markets Tax Credit Report*). The industry needs guidance on this issue because the effective date is not the placed-in-service date, but effective for credits "to the extent attributable to qualified rehabilitation expenditures properly taken into account for periods after December 31, 2007." The industry will need clarification on what "properly taken into account" means. We hope to receive IRS guidance to add clarity on which projects being placed in service might be entitled to generate credits to offset AMT.

## Housing Bond – AMT Offset

H.R. 3221 also provides that housing bond interest is not subject to AMT for bonds issued after July 30, 2008. In a traditional interest rate environment, we could expect to see 10 to 15 basis points lower interest rate for bonds not subject to AMT. In current environments that 10 to 15 basis points gets lost in risk assessment and a host of other factors. In the coming year or years we can expect to see a more traditional basis point advantage in borrowing rates based on this very useful provision

## Recapture Bond Posting

The requirement to post an LIHTC recapture bond to avoid tax credit recapture on disposition of an interest in a LIHTC building has been eliminated in the new housing bill. Effective for buildings disposed of after July 30, 2008, posting a recapture bond is no longer required if investors dispose of their interest in a tax credit investment. In order to forego the bond posting, investors must agree to extend the statute of limitations for recapture. It appears that the statute of limitations is extended indefinitely because the statute specifies that the IRS has a three-year period in which to reassess recapture penalties once notified of noncompliance. So, if investors are not aware of noncompliance and the IRS is never notified, there will be no beginning of the statute of limitations.

Eliminating the bond posting requirement might have a marginal impact on increasing investor demand and it does make it a little easier for investors to leave the market if they find they don't want to hold their investment for the full compliance period.

(continued on page 3)

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ISSN 1940-4980

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# New Housing Law

*(continued from page 2)*

Before this provision, owners of LIHTC properties that were transferred shortly after being placed in service usually did not undertake the difficulty of posting a bond. Now that the bond posting requirement has been lifted, the transferor in the year of transfer should be able to claim the credit, even for a partial year – a real advantage for an initial owner of an LIHTC property.

The industry will need additional IRS guidance on whether taxpayers that disposed of tax credit properties in 2006 or 2007, did not claim the credits and took a lower credit amount can go back and amend their returns, apply this provision and reclaim the credits. I suspect the IRS will say taxpayers are not eligible to amend prior year returns but we will need guidance.

For those taxpayers who have previously posted a recapture bond, there is no guidance on how to elect to apply these new rules. Many tax attorneys think it satisfactory for investors to simply prepare a statement and file it where they file their bond disposition forms. Other attorneys say investors should complete a Form 8693, but rather than listing the bonding company attach an election and file that. Guidance from the IRS is needed in this area.

## Other LIHTC Changes

Considered new buildings, substantial rehabilitations that qualify for the 9 percent credit will see their minimum rehabilitation threshold increased to the greater of \$6,000 per unit or 20 percent of the adjusted basis of existing buildings, adjusted annually for inflation. This provision is effective for buildings allocated credits after July 30, 2008. This will apply to projects that have been awarded tax credits but will not receive their allocations until the carryover later this year. There is a cost of living adjustment based on when the building is placed in service so it's crucial to not be too close to \$6,000 minimum.

The greater applicability will likely be to tax-exempt bond projects. Tax-exempt bond projects originally had an effective date based on placements in service after July 30, 2008. That meant there could have been a potential issue

with tax-exempt bond projects that had their awards and had been placed in service only to fail the new rehabilitation threshold test. Congress attempted to correct the effective date language but the wording is still not clear.

According to the statute, the provision “applies to buildings financed with bonds issued pursuant to allocations made after the date of enactment of this act.” It appears to be saying that the provision applies to a building financed with tax-exempt bonds where the tax credits are allocated after the effective date. The Committee Report appears to make it clear that Congress actually meant to say tax-exempt bond allocations, not tax credit allocations. There is some confusion here on the placed-in-service date for substantial rehabs so developers doing a substantial rehab that uses tax-exempt bonds, with a placed-in-service date this year, and is not going to meet the new minimum threshold, should review the rules very closely.

One of the new provisions in the bill is the General Public Use rule that addresses the narrow definitions contained in the IRS's Guide for Completing Form 8823: Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition (8823 Guide). The 8823 Guide regulations specified that no tax credits could be received unless the credits were applied to uses that were made available to the general public. The projects that had set-asides for special needs populations such as migrant workers, those with AIDS, the homeless or pregnant teens, faced running afoul of the rules, non-compliance and credit recapture. This provision specifies buildings placed in service before, on or after July 30, 2008. Some additional guidance may be needed on this issue but the statute is clear enough that the industry can move forward on these types of projects.

## Going Forward

The LIHTC provisions in the Housing and Economic Recovery Act of 2008 represent a year and a half of effort on the part of the industry and its friends in Congress, among them Sens. Gordon Smith, R-Ore., and Maria Cantwell, D-Wash., and Rep. Charles Rangel, D-N.Y. We especially want to thank the National Council of

*(continued on page 4)*

# New Housing Law

*(continued from page 3)*

State Housing Agencies and its members, as well as the Affordable Housing Tax Credit Coalition, the Housing Advisory Group and the National Association of Home Builders Housing Credit Group, all of which led the way in securing this major win for the affordable housing industry.

We will continue for the next couple of months to bring readers of the *Journal of Tax Credit Housing* and *Property Compliance Report*, as well as those who tune into our weekly podcast at [www.novoco.com](http://www.novoco.com), more details on the various provisions in the bill. Next month I will address some of the financial feasibility changes in the new bill. ❖

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*This article first appeared in the September 2008 issue of the Novogradac Journal of Tax Credit Housing.*

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