

Community Development
and Affordable Housing **ALERT**

September 2008

www.ssd.com**IRS Notice 2008-79 Provides Guidance on the Housing Assistance Tax Act of 2008**

On September 17, 2008 the Internal Revenue Service (IRS) issued [Notice 2008-79](#) to provide guidance with respect to the allocation, use, carryforward and information reporting applicable to the additional private activity bond volume cap made available under IRC §146 for qualified housing issues. Notice 2008-79 also provides guidance on the use of qualified mortgage revenue bonds to refinance certain subprime mortgage loans. In addition, Notice 2008-79 contains an initial list of the qualified military installations with respect to the exclusion from income of the military basic housing allowance for purposes of IRC §142. Notice 2008-79 clarifies that both new money and refunding bonds are eligible for guarantees by the Federal Home Loan Banks under the temporary authority granted for such guarantees under the 2008 Housing Act. The Notice is effective as of July 30, 2008, the date of enactment of the 2008 Housing Act. The details of the 2008 Housing Act were discussed in our July 2008 [Affordable Housing Alert](#).

2008 Housing Act Volume Cap Guidance

Allocation: The Notice sets forth a chart specifying the allocation of the additional US\$11 billion in volume cap authorized by the 2008 Housing Act to the states, District of Columbia and possessions of the United States. The allocations are based on the 2008 General Volume Cap, determined using population figures in Notice 2008-22 and reflecting Cost of Living Adjustments for 2008 contained in Rev. Proc. 2007-66.

Use and Carryforward: To afford issuers flexibility in using the 2008 Housing Act Volume Cap and coordinating with the 2008 General Volume Cap, the Notice states that the 2008 Housing Act Volume Cap should be accounted for separately from the 2008 General Volume Cap. In addition, for purposes of both initial allocations and carryforwards of the Volume Cap, including the "first-in, first-out" ordering rule for carryforwards of General Volume Cap, issuers may use the 2008 Housing Act Volume Cap or carryforwards of that Cap either before or after use of the General Volume

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Cap including carryforwards of General Volume Cap. For purposes of a carryforward election, issuers may simply identify the use of the 2008 Housing Act Volume Cap as "qualified housing issues," giving issuers maximum flexibility regarding the type of housing issues to which the carryforward is ultimately applied. Finally, an issuer who files a proper carryforward election for 2008 Housing Act Volume Cap may assign any portion of that Cap to another issuer in the state.

Refinancing of Qualified Subprime Loans

Determination of "Financial Hardship": For purposes of the 2008 Housing Act requirement that a "qualified subprime loan" be "an adjustable rate single-family residential mortgage loan made after December 31, 2001 and before January 1, 2008" that "the bond issuer determines would be **reasonably likely to cause financial hardship to the borrower if not refinanced,**" the Notice authorizes issuers to base such determination on "reasonable estimates made in good faith."

Use of 2008 Housing Bond Volume Cap and General Volume Cap: Issuers can use the proceeds of General Volume Cap for qualified subprime loan refinancings during the permitted 12-month origination period for such loans, and then either redeem bonds from unused proceeds or make such proceeds available for regular qualified mortgage loans under IRC §143 for the balance of the permitted 42-month origination period for such loans under the general rules for qualified mortgage bonds, prior to redemption of bonds from unused proceeds. However, qualified mortgage bonds that receive an allocation of 2008 Housing Act Volume Cap must apply all unused proceeds to the redemption of bonds after the 12-month origination period. For issues refinancing qualified subprime loans, whether from 2008 Housing Act Volume Cap or General Volume Cap, the issuer must attach a schedule to the IRS Form 8038 that indicates the amount of proceeds that are reasonably expected to be used to refinance qualified subprime loans, which expectation can be based on a reasonable good faith estimate of the amount of proceeds to be used for this purpose. Issuers who do not utilize the full amount indicated on the schedule to refinance qualified subprime loans may apply such unused amounts to the financing of mortgage loans otherwise eligible to be financed under §143.

Information Reporting and Carryforward Elections

Pending updated forms to be promulgated by the IRS, Notice 2008-79 sets forth certain changes to the Form 8038 Information Return pertaining to an issue that uses the 2008 Housing Act Volume Cap and Form 8328 relating to carryforward of unused 2008 Housing Act Volume Cap. The Notice also states that separate Carryforward Election forms should be filed for unused 2008 Housing Act Volume Cap and 2008 General Volume Cap.

Use of 2008 Housing Act Volume Cap With Respect to Mortgage Credit Certificates

For calendar years 2008 through 2010, an issuer may elect

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to exchange unused 2008 Housing Act Volume Cap authority for mortgage credit certificate authority under IRC §25, but only if the indebtedness to which the mortgage credit certificate relates is incurred within 12 months of the date of such election. In addition, an issuer may elect to issue mortgage credit certificates to refinance qualified subprime loans if it otherwise satisfies the requirements of IRC §143(k)(12) as added by Section 3021(b) of the 2008 Housing Act (relating to the special rules regarding the origination loan period, eligible borrowers and purchase price, for example). However, any qualified subprime loan refinancing must be incurred within 12 months after such election, and such election must be made by December 31, 2010.

Military Basic Housing Allowance

The Notice identifies nine military installations that are deemed to be "qualified military installations" located in a county that has experienced the 20 percent population increase required under the 2008 Housing Act such that qualified residential rental projects located in that county would be eligible for the exclusion from income of the military basic housing allowance. The list is not intended to be exclusive, and the IRS will update it as additional information becomes available. However, any installation that satisfies the requirements of the 2008 Housing Act for this exclusion from income would be eligible, regardless of whether the installation appears on a list promulgated by the IRS. The Notice observes that, under the 2008 Housing Act, the exclusion is available only to tax-exempt bonds for qualified residential rental projects issued under IRC §142 (a)(7) that also receive low income tax credits under IRC §42.

Temporary Authority for Federal Home Loan Banks to Guarantee Tax-Exempt Bonds

The 2008 Housing Act contains a temporary exception to the general restriction against Federal guarantees of tax-exempt bonds by authorizing certain guarantees by the Federal Home Loan Banks made in connection with the "original issuance" of a bond during the period beginning July 30, 2008 (date of enactment of the 2008 Housing Act) and ending December 31, 2010 (or a renewal or extension of a guarantee so made). The Notice clarifies that "original issuance" includes any tax-exempt bond, including a bond for new money purposes and a bond that is part of a refunding issue (as defined in §1.150-1(d) of the Income Tax Regulations), that is issued during the relevant period.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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