Insights

New Congressional Bills Introduced to Promote Multifamily Housing and Reinstate Advance Refunding (Affordable Housing Credit Improvement Act of 2021 and Local Infrastructure Financing Tools Act)

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On April 15 and 16, 2021, two complimentary bills were introduced in Congress to address the country's shortage of affordable housing and expand bond financing opportunities for local governments and nonprofits. The bipartisan Affordable Housing Credit Improvement Act of 2021 (AHCIA) was introduced in the U.S. Senate by a number of co-sponsors, including Senator Todd Young (R-Indiana). The AHCIA is intended to increase affordable housing production by strengthening the Low Income Housing Tax Credit (LIHTC) program through programmatic changes including raising the housing credit volume cap by 50 percent and lowering the threshold of Private Activity Bond (PAB) financing that is required to trigger the 4 percent housing credits. A day later, the Local Infrastructure Financing Tools Act (LIFT Act) was introduced in the U.S. House of Representatives. The LIFT Act would provide a number of financing tools to assist local governments and nonprofits with infrastructure financing, including the restoration of tax-exempt advance refunding, which was eliminated by the Tax Cuts and Jobs Act of 2017 (TCJA).

The Affordable Housing Credit Improvement Act of 2021

The Affordable Housing Credit Improvement Act has been introduced in the past three sessions of Congress with broad bipartisan support. On April 15, the AHCIA was introduced, through identical bills in the House and Senate, by Senators Maria Cantwell (D-WA), Todd Young (R-IN), Ron Wyden (D-OR), and Rob Portman (R-OH), and Representatives Suzan DelBene (D-WA), Jackie Walorski (R-IN), Don Beyer (D-VA), and Brad Wenstrup (R-OH).

Background

The LIHTC program, created under the Tax Reform Act of 1986, is a public-private partnership program that provides a dollar-for-dollar tax credit for affordable housing investments in order to incentivize private equity investment in housing projects intended to benefit low-income Americans. The allowable amount of tax credits, commonly called "Section 42 credits" after Section 42 of the Internal Revenue Code (Code) under which these credits are contemplated and authorized for issuance, is equal to a percentage (either 9 percent or 4 percent) of the development costs incurred.

To utilize the LIHTC program, a developer will either propose a project to a state agency and win a competitive allocation of tax credits (for the 9 percent credit) or obtain approval and issuance of PABs to finance at least 50 percent of the project cost (for the 4 percent credit). The LIHTC program has a number of qualifications and ongoing compliance requirements to ensure that the benefits of affordable housing reach their intended

targets. For example, in order to avoid circumstances where affordable housing would be used for dormitory or transient housing (reducing availability for families and individuals with substantial needs), households entirely comprised of full-time students are generally prevented from leasing LIHTC properties. Owners of LIHTC properties and their management agents must be able to prove the tenants living in the low income units meet the eligibility requirements of the LIHTC program and the applicable required percentage of units have been set aside for such low income tenants. Compliance with these requirements can be jeopardized where unexpected or unusual events such as fires or floods render some or all of the units in a LIHTC property uninhabitable. When this occurs, the property owner must repair the damage within a reasonable period in order to avoid loss or recapture of tax credits.

Key provisions of AHCIA

The goal of the AHCIA is to preserve the nation's existing affordable housing inventory by simplifying the rules of the LIHTC program to enable it to better serve hard-to-reach communities including rural, Native American, high-poverty, and high-cost communities, as well as extremely low-income and formerly homeless tenants. The key provisions of the AHCIA include:

- Increasing housing credit allocations by 50 percent over current levels to help meet the vast and growing need for affordable housing.
- Lowering the threshold of PAB financing (from 50 to 25 percent) required to trigger the 4 percent housing credits. This lower threshold is intended to increase the amount of 4% credits that can be awarded, especially in states that are at or near their limits on bond issuances (i.e., the volume cap).
- Accelerate implementation of the allocation increase from the previous five years to two years, considering the increased and urgent need for affordable housing.
- Improve the housing credit student rule provision to clarify that formerly homeless youth and victims of human trafficking are eligible for affordable housing even if they are full-time students.
- Update the casualty loss provision to allow for a longer rebuilding period after natural disasters, if necessary, as determined by the state housing agency.

The Local Infrastructure Financial Tools Act

The LIFT Act was introduced on April 16, 2021 by U.S. Representative Terri Sewell (D-AL) in an effort to expand financing options for local governments and nonprofits in advance of President Joe Biden's infrastructure plan roll out.

Background

The LIFT Act contains three provisions, each aimed at increasing the options of tax-exempt issuers tasked with financing local infrastructure investment. The three prongs of the LIFT Act relate to the following:

- In 2009, on the heels of the 2008 financial crisis, the American Recovery and Reinvestment Act (ARRA) introduced Build America Bonds (BABs) to provide local municipalities with much needed capital during the recession. The BABs were taxable municipal bonds that featured federal tax credits or subsidies for bondholders or state and local government bond issuers. The BABs program expired in 2010.

- Prior to the TCJA, the Code provided for the limited refinancing of outstanding tax-exempt bonds with proceeds of a new tax-exempt issue. After the TCJA, these “advance refundings,” which were often undertaken to obtain interest rate savings or to escape unfavorable covenants on existing debt, could only be accomplished using taxable debt.
- In general, under the Code, commercial banks may only deduct interest expense from investments in tax-exempt bonds that are “bank qualified.” To be “Bank qualified” bonds certain criteria must be met, including a limitation on the issuer to issue no more than $10 million in tax-exempt bonds during a calendar year (the Qualified Small Issuer rule). Selling directly to commercial banks allows governments and nonprofits to bypass the traditional underwriting process, resulting in cost savings. The $10 million limit has been in place since 1986, except for a two-year period in 2009-2010 when the ARRA raised the limit to $30 million. The limitation is imposed at the issuer-level, meaning that a 501(c)(3) borrower (i.e., a conduit borrower) seeking bank qualified financing must utilize an issuer that does not reasonably expect to issue more than $10 million in tax-exempt bonds during the calendar year.

Key provisions of LIFT Act

According to its sponsor, Representative Sewell, the LIFT Act was introduced to restore and expand proven tools to lower borrowing costs, expand investor pools, and provide long-term, efficient financing for critical investments in U.S. infrastructure[1]. Specifically, the LIFT Act would:

- **Authorize American Infrastructure Bonds:** The LIFT Act would restore the use of taxable direct pay bonds (i.e., BABs) under a new name. With American Infrastructure Bonds (AIBs), the bond issuer would receive a direct payment from the federal government to cover a percentage of the interest costs associated with the issuance. As with the BABs introduced under the ARRA, AIBs should lower the cost of borrowing for local governments and nonprofits and attract additional investors who may not otherwise invest in tax-exempt municipal bonds.
- **Restore Advance Refunding of Municipal Bonds:** The LIFT Act would restore the ability of states and municipalities to refinance existing debt through advance refunding. This cost-saving tool is intended to reduce the cost of borrowing for infrastructure projects and allow local governments to take advantage of the low interest rate environment. The advance refunding option would not be extended to 501(c)(3) bonds.
- **Expand Bank-Qualified Debt for Small Municipalities and Nonprofits:** The LIFT Act would expand the cap under the Qualified Small Issuer rule from $10 million to $30 million per year. In addition, it would apply the limit at the conduit borrower level rather than aggregating the bonds of certain conduit issuers.

If you have any questions regarding the AHCIA, the LIFT Act, or any other issue impacting low-income housing projects or tax-exempt financing, please contact **Kendall A. Schnurpel**, **David E. Corbitt**, Chair of Kreig DeVault’s **Public Finance and Municipal Law Practice**, or your regular Krieg DeVault attorney.

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[1] See https://sewell.house.gov/media-center/press-releases/rep-sewell-introduces-legislation-boost-investment-local-infrastructure