

## Part III - Administrative, Procedural, and Miscellaneous

### Tax-Exempt Housing Bonds and 2008 Housing Legislation

#### **Notice 2008-79**

#### **SECTION 1. Purpose**

This Notice provides guidance regarding certain provisions affecting tax-exempt bonds and related matters under the Housing Assistance Tax Act of 2008, Division C of Pub. L. No. 110-289, enacted on July 30, 2008 (“2008 Housing Act”). Section 3021 of the 2008 Housing Act amends §§ 143 and 146 of the Internal Revenue Code (“Code”) to provide a temporary \$11 billion increase in the annual private activity bond volume cap under § 146 for qualified housing issues and to allow the use of qualified mortgage bonds to refinance certain subprime mortgage loans. (Except as otherwise provided, section references in this Notice are to the Code.) This Notice provides guidance on allocations, carryforwards, information reporting, and uses of this additional bond volume cap, and guidance on the use of qualified mortgage revenue bonds to refinance certain subprime mortgage loans. In addition, § 3005 of the 2008 Housing Act amends § 142(d)(2) of the Code to disregard basic housing allowance payments to military members at certain military bases for purposes of applicable low-income set-aside income limitations under § 42 and § 142. This Notice lists certain affected military bases. Section 3023 of the 2008 Housing Act provides temporary authority to Federal Home Loan Banks to guarantee certain tax-exempt bonds. This Notice provides guidance on tax-exempt bonds eligible for such guarantees.

#### **SECTION 2. Background**

Section 103(a) provides that interest on bonds issued by States or political subdivisions thereof is excluded from gross income upon satisfaction of certain requirements. Sections 142(a)(7) and 142(d) authorize the issuance of tax-exempt multifamily housing bonds to finance qualified residential rental projects with certain low-income set-aside limitations. Income determinations for purposes of compliance with these low-income set-aside limitations are made under § 142(d)(2)(B). Section 143 authorizes the issuance of tax-exempt qualified mortgage bonds to finance owner-occupied single-family housing mortgages upon satisfaction of a number of program requirements. Section 143(a)(2)(D) generally requires proceeds of qualified mortgage bonds to be used to originate loans within a 42-month period after the issue date of the bonds and unused proceeds remaining at the end of such 42-month period to be used to redeem bonds (the “42-month loan origination period”). Section 146 imposes an annual bond volume cap on most tax-exempt private activity bonds, including qualified mortgage bonds under § 143 and tax-exempt bonds for qualified residential rental

projects under § 142(a)(7). Section 25 allows an issuer to exchange tax-exempt bond volume cap under § 146 with respect to qualified mortgage bonds under § 143 for authority to issue certain mortgage credit certificates. Section 42 provides a low-income housing tax credit for certain projects which, among other things, meet low-income set-aside limitations similar to those applicable to tax-exempt bonds for qualified residential rental projects under § 142(d). Section 42(g)(4) provides that § 142(d)(2)(B) applies for purposes of determining whether a project qualifies for the low-income housing tax credit.

### **SECTION 3. Allocation, Carryforward, Use, and Reporting of Additional Bond Volume Cap under § 3021(a) of the 2008 Housing Act**

#### **3.1 General Volume Cap under § 146 of the Code**

Section 146 generally provides a unified annual state tax-exempt private activity bond volume cap for most private activity bonds and § 146(f) provides a three-year carryforward mechanism for unused bond volume cap. Section 146(d)(1) provides that the State ceiling applicable to any State for any calendar year is the greater of: (A) an amount equal to \$75 multiplied by the State population, or (B) \$225,000,000. Pursuant to § 103(c)(2), the term “State” includes the District of Columbia and any possession of the United States. Section 146(d)(2) provides for inflation adjustments to the amounts described in § 146(d)(1) for calendar years after 2002. Section 146(d)(4) provides for an adjustment to the bond volume cap for certain United States possessions. For purposes of this Notice, this general bond volume cap or State ceiling provided to States for private activity bonds under § 146(d)(1) is referred to as “General Volume Cap” to distinguish it from “2008 Housing Act Volume Cap,” as defined below.

#### **3.2 2008 Housing Act Volume Cap**

Section 3021(a)(1) of the 2008 Housing Act adds new § 146(d)(5) which authorizes a temporary increase in the annual State private activity bond volume cap for 2008 (“2008 Housing Act Volume Cap”) for use only for bonds for “qualified housing issues” as defined below, that are issued after the date of enactment of the 2008 Housing Act and by the end of calendar year 2010. Section 146(d)(5)(A) provides that, for calendar year 2008, the State ceiling for each State shall be increased by an amount equal to \$11,000,000,000 multiplied by a fraction: (i) the numerator of which is the State ceiling for the State for calendar year 2008 (determined without regard to the increase in § 146(d)(5)(A)), and (ii) the denominator of which is the sum of the State ceilings determined under clause (i) for all States. Section 146(d)(5)(B)(i) provides that the 2008 Housing Act Volume Cap may be allocated only to finance “qualified housing issues.” Section 146(d)(5)(B)(ii) defines the term “qualified housing issue” as: (I) an issue for qualified residential rental projects under § 142(a)(7), or (II) a qualified mortgage issue (determined by substituting a 12-month origination period for the 42-month origination

period under § 143(a)(2)(D)(i)).

### **3.3 Allocation of 2008 Housing Act Volume Cap**

Interpretative questions have arisen regarding allocations of the 2008 Housing Act Volume Cap to each of the States and whether and to what extent the District of Columbia and possessions of the United States receive allocations of the 2008 Housing Act Volume Cap. In this regard, § 103(c)(2) defines a “State” for purposes of the tax-exempt bond provisions of the Code, including § 146, as amended by the 2008 Housing Act, to include the District of Columbia and any possession of the United States. Further, in determining 2008 General Volume Cap for this purpose, although § 146(d)(4) provides an adjustment for certain possessions, this adjustment only affects the amount determined under § 146(d)(1)(A).

The following list provides the allocations of 2008 Housing Act Volume Cap to the States, the District of Columbia, and possessions of the United States. These allocations are based on the 2008 General Volume Cap, determined using the population figures provided in Notice 2008-22, 2008-8 I.R.B. 465, and reflecting the Cost-of-Living Adjustments for 2008 contained in Rev. Proc. 2007-66, 2007-45 I.R.B. 970.

<b><u>Area</u></b>	<b><u>Allocation</u></b>
Alabama	144,908,544
Alaska	96,550,479
American Samoa	96,550,479
Arizona	198,480,840
Arkansas	96,550,479
California	1,144,564,324
Colorado	152,225,095
Connecticut	109,665,263
Delaware	96,550,479
D.C.	96,550,479
Florida	571,487,942
Georgia	298,867,838
Guam	96,550,479
Hawaii	96,550,479
Idaho	96,550,479
Illinois	402,442,519
Indiana	198,685,435
Iowa	96,550,479

Kansas	96,550,479
Kentucky	132,810,201
Louisiana	134,429,985
Maine	96,550,479
Maryland	175,923,133
Massachusetts	201,956,503
Michigan	315,371,661
Minnesota	162,749,339
Mississippi	96,550,479
Missouri	184,066,548
Montana	96,550,479
Nebraska	96,550,479
Nevada	96,550,479
New Hampshire	96,550,479
New Jersey	271,975,917
New Mexico	96,550,479
New York	604,255,799
North Carolina	283,721,527
North Dakota	96,550,479
Northern Mariana Islands	96,550,479
Ohio	359,055,260
Oklahoma	113,266,394
Oregon	117,341,342
Pennsylvania	389,299,003
Puerto Rico	123,416,049
Rhode Island	96,550,479
South Carolina	138,015,397
South Dakota	96,550,479
Tennessee	192,780,879
Texas	748,500,523
U.S. Virgin Islands	96,550,479
Utah	96,550,479
Vermont	96,550,479
Virginia	241,483,115
Washington	202,541,072
West Virginia	96,550,479
Wisconsin	175,400,093
Wyoming	96,550,479
<hr/> Total	<hr/> 11,000,000,000

### **3.4 Use and Carryforward of 2008 Housing Act Volume Cap**

New § 146(f)(6), added by § 3021(a)(2) of the 2008 Housing Act, provides that any carryforwards of 2008 Housing Act Volume Cap may be used only for qualified housing issues that are issued by the end of calendar year 2010. Certain interpretive questions have arisen about allocations and carryforwards of 2008 Housing Act Volume Cap in relation to General Volume Cap.

In order to facilitate prompt and flexible use of the 2008 Housing Act Volume Cap to address challenges in the housing market within the limited time-frame provided for this purpose, the Internal Revenue Service will afford issuers flexibility in their use of 2008 Housing Act Volume Cap and in coordinating the use of this volume cap with their General Volume Cap. Accordingly, the 2008 Housing Act Volume Cap should be tracked and accounted for separately from General Volume Cap. Further, in this regard, for purposes of both initial allocations and carryforwards of 2008 Housing Act Volume Cap and General Volume Cap, including, without limitation, the “first-in, first-out” ordering rule for carryforwards of General Volume Cap under § 146(f)(3)(B), an issuer may in its discretion utilize 2008 Housing Act Volume Cap or carryforwards of 2008 Housing Act Volume Cap either before or after the use of General Volume Cap or carryforwards of General Volume Cap.

In applying § 146(f)(2) regarding identification of carryforward purposes for 2008 Housing Act Volume Cap, it is sufficient to identify such carryforwards for use for “qualified housing issues.” Thus, issuers retain the flexibility to use such carryforwards for the different types of qualified housing issues as needs dictate.

Further, in order to provide flexibility, an issuer who files a proper carryforward election for 2008 Housing Act Volume Cap may assign any portion of that 2008 Housing Act Volume Cap to another eligible issuer in the state.

### **3.5 Refinancing of Qualified Subprime Loans under the 2008 Housing Act**

Section 3021(b) of the 2008 Housing Act provides temporary authority under new § 143(k)(12) to refinance qualified subprime loans with qualified mortgage bonds under § 143 that are issued by the end of calendar year 2010. This provision applies to qualified mortgage bonds issued pursuant to General Volume Cap as well as 2008 Housing Act Volume Cap. Section 143(k)(12)(A) provides an exception to the new mortgage requirement under § 143(i)(1) to allow such refinancings. Section 143(k)(12)(B) provides the following special rules for such refinancings: (i) the general 42-month loan origination period under § 143(a)(2)(D)(i) is shortened to 12 months; (ii) the rule under § 143(d) limiting borrowers to those who had no ownership interest in a home in the preceding three years is inapplicable; and (iii) the purchase price limitation

under § 143(e) applies based on the market value of the residence at the time of refinancing in lieu of the acquisition cost.

Section 143(k)(12)(C) defines the term “qualified subprime loan” to mean 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. For this purpose, issuers may base determinations with respect to likely financial hardship to borrowers on reasonable estimates made in good faith.

For qualified subprime loan refinancings to be funded from qualified mortgage bonds that have received an allocation of General Volume Cap (as opposed to 2008 Housing Act Volume Cap), an issuer may make proceeds of such bonds available for use 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 § 143 for the balance of the permitted 42-month origination period for such loans under the general rules for qualified mortgage bonds under § 143(a)(2)(D) before redemption of bonds from unused proceeds. 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 period as provided in § 146(d)(5)(B)(ii)(II), as added by § 3021(a) of the 2008 Housing Act.

### **3.6 Information Reporting and Carryforward Elections for Use of 2008 Housing Act Volume Cap**

Subject to updated IRS information reporting forms or procedures, an issuer of a qualified housing issue that uses 2008 Housing Act Volume Cap should make the following modifications to the IRS Information Return for Tax-exempt Private Activity Bond Issues on Form 8038 filed with respect to the issue:

- 1) Report the bond issue on Line 20c of IRS Form 8038;
- 2) If the bond issue is an issue described in § 142(a)(7) (relating to qualified residential rental projects), enter the following description: “2008 Housing Act Qualified Housing Issue under 142”;
- 3) If the bond issue is a qualified mortgage issue (determined by substituting “12-month period” for “42-month period” each place it appears in § 143(a)(2)(D)(i)), enter the following description: “2008 Housing Act Qualified Housing Issue under 143”;
- 4) Issuers of qualified housing issues that use a carryforward of 2008 Housing Act Volume Cap should complete line 44b by attaching a copy of the IRS Carryforward Election of Unused Private Activity Bond Volume Cap on Form 8328 filed in accordance with the procedures described in

this Notice for the carryforward of such unused 2008 Housing Act Volume Cap.

Subject to updated IRS information reporting forms or procedures, an issuer that has unused 2008 Housing Act Volume Cap at the end of calendar year 2008 should elect this carryforward amount by filing a separate IRS Form 8328 Carryforward Election of Unused Private Activity Bond Volume Cap on Form 8328 for such carryforward as modified by the following instructions:

- 1) Write across the top of the IRS Form 8328 the following: "Carryforward of 2008 Housing Act Volume Cap";
- 2) Complete Part I in accordance with the instructions on the form, except that, on line 9, under Report Number, enter "99" after the preprinted "9";
- 3) Complete Part II by entering the following amounts:
  - a. Line 1: Indicate total 2008 Housing Act Volume Cap of the issuer as provided in this Notice.
  - b. Line 2: Enter the aggregate amount of qualified housing issues issued in 2008 that were taken into account for purposes of the 2008 Housing Act Volume Cap.
  - c. Line 3: Enter the total amount of 2008 Housing Act Volume Cap exchanged for authority to issue mortgage credit certificates.
  - d. Line 4: Skip this line.
  - e. Line 5: Add lines 2 and 3.
  - f. Line 6: Enter unused 2008 Housing Act Volume Cap (line 1 minus line 5).
  - g. Skip lines 7 through 10j.
  - h. Line 11: Enter the total carryforward amount of 2008 Housing Act Volume Cap (not to exceed line 6).
  - i. Under "Purpose of Form" in the instructions, ignore references to the use of the carryforward for three calendar years. Carryforwards of 2008 Housing Act Volume Cap may only be used for bonds issued by December 31, 2010.
  - j. File the IRS Form 8328 by the due date provided in the instructions.

Issuers who have both unused General Volume Cap and 2008 Housing Act Volume Cap should file separate carryforward elections for each of those carryforwards. A carryforward election for General Volume Cap should follow the instructions on IRS Form 8328 and a carryforward election for 2008 Housing Act Volume Cap should follow the instructions on IRS Form 8328 with the modifications provided in this Notice.

#### **SECTION 4. Use of 2008 Housing Act Volume Cap for Mortgage Credit Certificates**

In general, mortgage credit certificates under § 25 provide Federal subsidies to borrowers in the form of Federal tax credits with respect to eligible home mortgage loans that are similar to the Federal subsidies provided through qualified mortgage loans at subsidized interest rates financed with tax-exempt qualified mortgage bonds under § 143. The program restrictions on mortgage credit certificates under § 25 are substantially identical to the program restrictions on qualified mortgage bonds under § 143. Section 25(a) allows a taxpayer a credit against income tax for any taxable year in an amount equal to the product of the certificate credit rate and the interest paid or accrued by the taxpayer during the taxable year on the remaining principal of the certified indebtedness amount.

In addition, § 25(c)(2) basically allows an issuer to elect to exchange unused tax-exempt private activity bond volume cap authority under § 146 with respect to qualified mortgage bonds under § 143 for a prescribed amount of mortgage certificate issuance authority. Section 146(n) provides that the applicable private activity bond volume cap authority of any issuer for any calendar year is reduced by the sum of the amount of qualified mortgage bonds that such issuer elects not to issue under § 25(c)(2)(A)(ii) during such year, plus the amount of any reduction in such ceiling under § 25(f) for noncompliance of such issuer for such year.

An interpretive question has arisen regarding whether an issuer may elect to exchange unused authority to issue private activity bonds with the 2008 Housing Act Volume Cap under § 146 for authority to issue mortgage credit certificates under § 25. For calendar years 2008 through 2010, in determining the amount of private activity bonds that an issuer may otherwise issue in such years, § 25(c)(2)(A)(ii) is applied by taking into account any 2008 Housing Act Volume Cap authority or carryforward of such 2008 Housing Act Volume Cap authority allocated to such issuer. Consequently, for calendar years 2008 through 2010 an issuer may elect to exchange such unused 2008 Housing Act Volume Cap authority under § 146 for mortgage credit certificate authority under § 25. Consistent with the requirements of new § 146(d)(5)(B)(ii)(II) added by § 3021(a) of the 2008 Housing Act, an issuer may elect to exchange 2008 Housing Act Volume Cap authority for mortgage credit certificate authority only if the indebtedness to which the mortgage credit certificate relates is incurred within 12 months of the date of the election under § 25(c)(2)(A)(ii) not to issue an amount of private activity bonds which it may otherwise issue during the calendar year under § 146.

In addition, an issuer may elect to issue mortgage credit certificates to refinance qualified subprime loans if it otherwise satisfies the requirements of § 143(k)(12), as added by § 3021(b) of the 2008 Housing Act. Any such qualified subprime loan refinancing must be incurred within 12 months after such election. Further, an issuer must make any such election with respect to such mortgage credit certificates by December 31, 2010.

## **SECTION 5. Information Reporting of Subprime Refinancing Loans**

Issuers who issue bonds under § 143 of the Code and expect to use the proceeds for the refinancing of qualified subprime loans under § 143(k)(12), as added by § 3021 of the 2008 Housing Act, should attach a schedule to the IRS Form 8038 filed with respect to the issue that indicates the amount of proceeds that are reasonably expected to be used to refinance qualified subprime loans. An issuer must comply with this information reporting requirement regardless of whether the bonds are being issued using General Volume Cap or 2008 Housing Act Volume Cap. The issuer may determine the amount of bond proceeds that it expects to use to refinance qualified subprime loans under § 143(k) based on a reasonable good faith estimate of the amount of bond proceeds expected to be used for this purpose. Issuers who do not in fact utilize the full amount indicated on the schedule to refinance qualified subprime loans are permitted to apply such unused amounts to the financing of mortgage loans otherwise eligible to be financed under § 143.

## **SECTION 6. Exclusion of Military Basic Housing Allowances from Income for Certain Purposes Under § 142 and § 42**

In general, §§ 142(d) and 42(g) impose similar low-income set-aside restrictions on incomes of eligible residents of prescribed numbers of housing units in qualified residential rental projects and qualified low-income housing projects for purposes of eligibility for tax-exempt private activity bond financing under § 142(a)(7) and for low-income housing tax credits under § 42, respectively. In addition, § 142(d)(2)(B) applies to determinations of income both for § 142 and § 42 purposes.

Section 3005(a) of the 2008 Housing Act renumbered § 142(d)(2)(B) as § 142(d)(2)(B)(i) and added new § 142(d)(2)(B)(ii), (iii) and (iv) to the Code. Section 142(d)(2)(B)(ii) excludes military basic allowance payments under § 403 of title 37, United States Code, from income for purposes of income limitations under § 142(d)(2)(B) for certain qualified buildings. Section 142(d)(2)(B)(iii) defines a “qualified building” to mean a building located: (I) in any county in which is located a qualified military installation to which the number of members of the Armed Forces of the United States assigned to units based out of such qualified military installation, as of June 1, 2008, has increased by not less than 20 percent, as compared to such number on December 31, 2005, or (II) in any county adjacent to a county described in subclause (I). Section 142(d)(2)(B)(iv) defines a “qualified military installation” to mean any military installation or facility that has at least one thousand members of the Armed Forces of the United States assigned to it as of June 1, 2008.

The following list identifies military installations that are deemed to be qualified military installations that satisfy the 20 percent population increase requirement under § 142(d)(2)(B)(iii)(I) for purposes of the exclusion of basic housing allowance payments

to military members in determining income under § 142(d)(2)(B). The Internal Revenue Service will update this list if it receives additional information indicating that other military installations should receive the same treatment. Issuers may rely on this list for income determinations made after the date of enactment of the 2008 Housing Act and before any successor list is published. The following list is not meant to be exclusive and any qualified military installation within the meaning of § 142(d)(2)(B)(iv) which satisfies the percentage requirements of § 142(d)(2)(B)(iii)(I) would be eligible to receive similar treatment regardless of its failure to be included in this list or in any future updates.

<b><u>Name of Military Installation</u></b>	<b><u>State</u></b>
U.S. Air Force Academy	Colorado
Fort Shafter	Hawaii
Fort Riley	Kansas
Annapolis Naval Station (including U.S. Naval Academy)	Maryland
Fort Jackson	South Carolina
Fort Bliss	Texas
Fort Hood	Texas
Dam Neck Training Center Atlantic	Virginia
Naval Station Bremerton	Washington

Section 3005(b) of the 2008 Housing Act limits the scope of application of this exclusion of basic housing allowances from income under § 142(d)(2) in a number of significant technical respects, as described therein. Further, this exclusion is inapplicable to tax-exempt bonds for qualified residential rental projects issued under § 142(a)(7) unless the project also receives low-income housing tax credits under § 42.

### **SECTION 7. Temporary Authority for Federal Home Loan Banks to Guarantee Tax-Exempt Bonds**

Section 3023 of the 2008 Housing Act added new § 149(b)(3)(A)(iv) to provide a temporary exception to the general restriction against Federal guarantees of tax-exempt bonds under § 149(b) for certain guarantees made by Federal Home Loan Banks. In particular, new § 149(b)(3)(A)(iv) provides that this Federal guarantee restriction is inapplicable to a guarantee by a Federal Home Loan Bank made in connection with the “*original issuance*” (emphasis added) of a bond during the period beginning on the date of enactment of the 2008 Housing Act and ending on December 31, 2010 (or a renewal or extension of a guarantee so made). Section 3023(b) of the 2008 Housing Act also adds new § 149(b)(3)(E) which requires guarantees by a Federal Home Loan Bank to meet certain safety and soundness collateral requirements as described therein.

An interpretive question has arisen regarding the meaning of an “original

issuance” during the relevant period and whether both bonds for new money purposes (e.g., to finance construction or acquisition costs in the first instance) and refunding bonds for refinancing purposes may be treated as originally issued during the relevant period and thereby be eligible for Federal Home Loan Bank guarantees. For this purpose, 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 may be eligible for Federal Home Loan Bank guarantees under new § 149(b)(3)(A)(iv).

## **SECTION 8. Effective Date**

This Notice is effective as of the date of enactment of the 2008 Housing Act on July 30, 2008.

## **SECTION 9. Effect on Other Documents**

Notice 88-80, 1988-2 C.B. 396, is modified to the extent provided by Section 6 of this Notice for the periods applicable under section 3005 of the 2008 Housing Act.

## **SECTION 10. Paperwork Reduction Act**

The information collection contained in this Notice has been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35) under control number 1545-2119. Under the Paperwork Reduction Act, an agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a valid OMB control number.

The collections of information in this Notice are in Section 3.6 and Section 5. The information is required in order to report tax-exempt bond issues that receive allocations of the 2008 Housing Act Volume Cap, to report the carryforward of unused amounts of 2008 Housing Act Volume Cap, and to report the estimated amount of proceeds expected to be used to refinance qualified subprime loans. This information will be used to quantify the use and carryforward of 2008 Housing Act Volume Cap and the refinancing of qualified subprime loans. The collections of information are mandatory. The likely respondents are state or local governmental issuers of tax-exempt housing bonds.

We estimate the total number of respondents to be 100 and the total annual responses to be 150. We estimate it will take 2 hours to comply. Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

Books or records relating to a collection of information must be retained as long

as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

#### **SECTION 11. Drafting Information**

The principal authors of this Notice are Aviva M. Roth and Carla Young of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this Notice contact Aviva M. Roth or Carla Young at (202) 622-3980 (not a toll-free call).