

LIHTC: 4% Credit Updates

On December 1, 2021, the IRS released Revenue Ruling 2021-20 and Revenue Procedure 21-43 relating to the low-income housing tax credit (“LIHTC”). The following provides a brief overview of the guidance.

Enacted on December 27, 2020, the “Taxpayer Certainty and Disaster Tax Relief Act of 2020” (“Act”) added a new § 42(b)(3) to the Internal Revenue Code of 1986 (the “Code”). Section 42(b)(3) fixed the rate for the 30% present value low-income housing tax credit (“LIHTC”) at 4% (the “4% Floor”). To qualify for the 4% Floor under the Act, buildings must be placed in service after December 31, 2020 and either: (1) receive an allocation of LIHTC after December 31, 2020, or (2) be financed by a tax-exempt obligation issued after December 31, 2020 that is subject to the applicable volume cap. It was unclear under the Act whether the 4% Floor could apply to any LIHTC projects financed with tax-exempt bonds in 2020. In particular, industry participants debated whether the 4% Floor could apply to projects financed with draw-down bonds receiving volume cap in 2020 but having one or more post-2020 draws, or projects financed with an initial bond issuance in 2020 and an additional post-2020 bond issuance.

Revenue Ruling 2021-20 and Revenue Procedure 21-43 address these questions on the 4% Floor.

In Revenue Ruling 2021-20, the IRS concludes that for a draw-down bond that is issued prior to 2021 with draws occurring in a subsequent year, a *de minimis* § 42(h)(4)(A) obligation (tax-exempt bond) issued after December 31, 2020, or a *de minimis* allocation of low-income housing credit dollar amount occurring after December 31, 2020, do not cause a building to be subject to the minimum 4% floor under § 42(b)(3).

The IRS considered three fact patterns to illustrate whether the 4% floor applies under the Act.

- In Situation 1, a state agency issued a draw-down bond that qualifies as an issue of exempt facility bonds prior to 2021 with draws occurring in a subsequent year. Under Treasury Regulation 1.150-1(c)(4)(i), bonds issued pursuant to a draw-down loan are treated as part of a single issue. The IRS concluded that the 4% Floor does not apply to the building.
- In Situation 2, the state agency issued exempt facility bonds in 2020 to finance the construction of a qualified low-income building. In a subsequent year, the agency issued a different issue of exempt facility bonds in a *de minimis* amount. The IRS held that the 4% Floor does not apply to the building in Situation 2.
- In Situation 3, the state agency entered into a binding agreement to allocate LIHTCs in 2020 for the acquisition of an existing building and for the rehabilitation of the building into a qualified low-income building. The state agency also allocated a *de minimis* amount of LIHTCs after December 31, 2020. The IRS concluded that the 4% floor does not apply to the building in Situation 3.

Revenue Procedure 21-43 provides safe harbors for when an obligation described in § 42(h)(4)(A) of the Internal Revenue Code or an allocation of LIHTCs is more than *de minimis* for purposes of Situations 2 and 3 described in Revenue Ruling 2020-43. Under the Revenue Procedure, an issuance of obligations is not deemed *de minimis* if the aggregate amount of the post-2020 obligations is at least 10% of the total amount of all obligations that finance the building, and a post-2020 allocation of LIHTCs is not deemed



de minimis if the allocation is at least 10% of the total allocations to the building that have been made on or before the date of the allocation in question.

If you have any questions regarding the Act, the Revenue Ruling and Revenue Procedure, please contact any member of our housing finance team.

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