House Tax Bill May Have Domino Effect On Affordable Housing

By **Andrew McIntyre**

Law360, Minneapolis (November 30, 2017, 1:00 PM EST) -- The tax bill in the U.S. House of Representatives would eliminate the tax-exempt bonds that have been crucial to getting affordable housing financed, and the change could also have a broader domino effect that lawmakers may not have been aware of when they drafted the bill, lawyers say.

At issue is the elimination of so-called tax-exempt private activity bonds, or PABs, which state and local governments issue not only for affordable housing but also for infrastructure projects.

And while those bonds have been a key component of the complex financing fabric of affordable housing, lawyers say eliminating such bonds would ostensibly also eliminate certain Low-Income Housing Tax Credits, since one of those credits requires that at least half of a project be financed with PABs.

"It may have been kind of a misunderstanding or oversight. A lack of understanding about how the tax credit program is affected by the private activity bond," said Jon Goetz of Meyers Nave Riback Silver & Wilson PLC.

"If the private activity bond authority is eliminated, that also effectively eliminates the 4 percent Low Income-Housing Tax Credit program," Goetz added, speaking about one of two such tax credits, the other being a 9 percent credit.

Indeed, lawyers say lawmakers may not have fully understood that in this case, if one goes, essentially so does the other.

LIHTCs are designed for new construction or renovation of affordable housing.

The 4 percent credit by definition subsidizes 30 percent of costs while the 9 percent subsidizes

70 percent of the cost. The actual interest rates that arrive at those 30 percent and 70 percent figures fluctuate around 4 percent and 9 percent.

"Almost all of the new affordable housing that's being built is being done with the Low-Income Housing Tax Credits," said Kenneth Lore of Katten Muchin Rosenman LLP.

And eliminating that common 4 percent LIHTC as well as state and local bonds could have a chilling effect on affordable housing, which has to be funded through a complex patchwork of sources, lawyers say.

"It would end up eliminating two different sources of funding for affordable housing. Most projects are financed by 4, 5, 6, 7, sometimes in the double digits of funding sources," Goetz said. "By eliminating any of those funding sources you make the project difficult to construct and finance. ... There's tremendous concern about this."

It's not only affordable housing, though, that would be hit by the change.

Infrastructure, which President Donald Trump has said he's making a priority, would see a reduction of funding, lawyers say.

The White House couldn't be immediately reached for comment for this article.

"Getting rid of the tax exemption for private activity bonds is certainly not going to achieve the goal of improving the infrastructure. It's sort of counter to the president's position, that he's going to restore or improve the infrastructure as it's aging out," said Steve Hochberg of Stempel Bennett Claman & Hochberg PC.

"It's doing everything that the government, president, says he wants to do, yet not pushing the right buttons to get it done," Hochberg added.

Hochberg noted that at stake is not just the development of affordable housing, but also creation of jobs for people to build the housing, which will generate more revenue for the government in income taxes.

Of course, LIHTCs face other uncertainties, since their attractiveness is linked to the corporate tax rate.

If the corporate rate is lowered, it's likely that fewer corporations will invest in those credits, since the tax liability offset is lower when the corporate rate is lower, said Frank Petrilli of Arent Fox LLP.

The provision for tax-exempt private activity bonds remains in the Senate bill.

"The fact that the authority for the bonds remained in the Senate bill makes us feel that this is not necessarily a partisan issue," Goetz said. "There's pretty strong bipartisan support for use of the private activity bonds and the LIHTC for affordable housing. It's not been a partisan issue, and infrastructure also tends to have bipartisan support."

And lawyers say they hope the House bill will either be changed or some plan will be hatched to at least allow for LIHTCs to be used if the bonds do end up going.

Goetz said there has been a nationwide effort underway to inform members of Congress what the implications are.

"We're hoping that during the process ... of revising the bill that some changes will be made to fix what I think may have been unintended consequences," Goetz said. "Everyone's expecting that this will be worked out if there's a conference committee for the bill."

Lawyers point to the tax reform of the 1980s as a potential template for change. Lawmakers in that decade realized they needed to create a mechanism for funneling money to affordable housing, and thus came up with LIHTC.

Indeed, Hochberg said the LIHTC program, which came about under President Ronald Reagan, has been a "very successful program" and has been an efficient means for building affordable housing.

But if the House plan goes ahead as planned, the affordable housing community would take a major hit, with the elimination of both the private activity bonds and, indirectly, the 4 percent LIHTC.

"If those bonds are no longer tax-exempt, people are not going to subscribe to the bonds. The bonds are not going to have as much appeal as an investment vehicle for those people looking to buy bonds," Hochberg said.

--Editing by Rebecca Flanagan and Emily Kokoll.

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111 West 19th Street
5th Floor
New York, NY 10011
www.law360.com