CCH Tax Briefing:

HOUSING ASSISTANCE TAX ACT OF 2008

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Highlights:

- ✔ *First-Time Homebuyer Tax Credit*
- ✔ *Additional Standard Deduction For Real Property Taxes*
- ✔ *Simplified/Enhanced Low-Income Housing Tax Credit*
- ✔ *Increased Mortgage Revenue Bonds*
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Congress Passes Housing Bill With $15.1 Billion In Tax Incentives; Includes Offsets

Reacting to the continuing slump in housing sales, along with rising unemployment numbers and weakness in the credit markets, Congress passed the *Housing and Economic Recovery Act of 2008* (H.R. 3221). Although the tax provisions are only one part of the larger housing bill, they make significant changes. The tax title, *The Housing Assistance Tax Act of 2008,* includes $15.1 billion in tax incentives that are fully offset by far-reaching revenue raisers. While the tax incentives are targeted principally to home ownership and affordable housing, the offsets are collected from a variety of sources. New provisions that require credit card purchase information reporting by merchants and close a home sale exclusion loophole for vacation and rental property are among the more prominent offsets that will require a shift in tax strategies.

Comment. *With time running out before Congress' month-long August recess, the housing act took on new life after amendments to shore-up Fannie Mae and Freddie Mac were added and the White House removed its veto threat over the inclusion of a $4 billion community block grant provision. The bill passed the House on July 23 by a vote of 272 to 152. After a procedural delay, the Senate approved it promptly on July 26 by a vote of 72-13. President Bush said he would sign the bill into law as soon as it reaches his desk.*

FIRST-TIME HOMEBUYER TAX CREDIT

The housing act gives first-time homebuyers nationwide a temporary refundable tax credit equal to 10 percent of the purchase price of a home, up to $7,500 ($3,750 for married individuals filing separately) The credit begins to phase out for taxpayers with adjusted gross income in excess of $75,000 ($150,000 in the case of a joint return).The credit is effective for homes purchased on or after April 9, 2008, and before July 1, 2009. Unlike other credits, however, the first-time homebuyer credit must be repaid in equal installments over 15 years, essentially making it an interest-free loan from the government for most qualifying homeowners.

Impact. *The first-time homebuyer credit is by far the biggest tax break in the new law, weighing in at an estimated cost of $4.8 billion over 10 years. However, that figure hides the credit's true immediate impact since new homeowners are predicted to take this credit to the tune of $13.6 billion in 2009.*

Income limitations. The new credit phases out for married couples filing jointly with modified AGI between $150,000 and $170,000 and for single taxpayers with modified AGI between $75,000 and $95,000.

Impact. *The IRS is not giving the $7,500 credit as cash at closing. The individual must claim the credit on a 2008 or 2009 tax return. However, a first-time buyer who purchases a principal residence in 2009 after filing a 2008 return has the option of filing an amended 2008 return to claim the credit. Purchasers also should investigate adjusting their wage withholdings or estimated tax payments for the balance of the year to account for the credit.*

First-time homebuyer. A person is considered a "first-time homebuyer" if he or she (or spouse) had no ownership interest in a principal residence during the three-year period before the new home is purchased.

Impact. *Renters who also own a vacation home may qualify for the credit since the three-year look back period for owning a home applies only to a principal residence.*

Planning Note. *Under the new law, two or more unmarried individuals may purchase a residence and qualify for the credit. They must allocate the amount of the credit between them as the IRS prescribes. However, the total amount of the credit allowed to the individuals jointly may not exceed $7,500.*

First-time Homebuyer Tax Credit

Filing Status	Maximum Amount of Credit
Single	$7,500
Married filing jointly	$7,500
Married filing separately	$3,750
Note: Income thresholds apply.	

Caution. *The IRS will disallow the credit if the taxpayer disposes of the residence – or the residence ceases to be the taxpayer's principal residence – before the close of the tax year for which the credit would be allowed (either 2008 or 2009). The IRS will also disallow the credit if the taxpayer is a nonresident alien, takes the expired, but likely to be renewed, District of Columbia first-time homebuyer tax credit or the taxpayer's financing is from tax-exempt mortgage revenue bonds.*

Repayment. Unlike any other individual federal tax credit, taxpayers must repay the first-time homebuyer credit. They will have 15 years to repay the credit, interest free. Repayments start two years after the year in which the residence is purchased. Payments must be made in equal installments over those 15 years.

Example. *Eduardo and Trisha, a married couple, are new homebuyers. They have never owned any other real property as a residence. Their combined modified AGI is $66,400. Their first-time home purchase qualifies for the full $7,500 credit. They purchase their home in June 2009. They may file an amended 2008 return to claim the credit. Repayments of the $7,500 credit would begin at $500/year in 2010 and end in 2024.*

Accelerated recapture. If a taxpayer sells or no longer uses the home as his or her principal residence before repaying the credit, the unpaid balance becomes due in the year in which the residence is sold or is no longer used as the taxpayer's principal residence. However, the amount of recaptured credit may not exceed the amount of gain from the sale of the residence to an unrelated person.

Comment. *The credit does not have to be repaid if the taxpayer dies. Special rules also exist for an involuntary conversion and for a residence transferred in a divorce.*

Purchase. "Purchase" as used in the new law occurs when title closes. In addition, homebuyers claiming the credit may not acquire the property from certain related persons and they must satisfy certain basis rules.

PROPERTY TAX DEDUCTION FOR NON-ITEMIZERS

Currently, only individuals who itemize deductions may deduct real property taxes imposed by state and local governments. The new law gives non-itemizers a limited deduction for state and local real property taxes by increasing the amount of their standard deduction by the lesser of:

(1) The amount of real property taxes paid during the year, or
(2) $500 ($1,000 for a married couple filing jointly).

This temporary deduction is available only for 2008. Its cost over 10 years is $1.5 billion, all estimated to be incurred in 2009.

Impact. *Taxpayers most likely to benefit from this deduction include homeowners who have paid off their mortgage (and, therefore, no longer itemize interest payments) and lower-income homeowners (whose overall itemized deductions generally do not exceed their standard deduction).*

Comment. *For 2008, the $10,900 standard deduction for joint filers and surviving spouses would increase to a maximum of $11,900, while the $5,450 standard deduction for single individuals increases to a maximum $5,950 and the head-of-household amount from $8,000 to $8,500.*

Impact. *The new deduction is in addition to the standard deduction. It is not an above-the-line* *deduction that lowers the amount of a taxpayer's AGI.*

LOW-INCOME HOUSING TAX CREDIT

The housing act increases and simplifies the low-income housing tax credit (LIHTC).

The LIHTC program gives state and local housing agencies authority to issue tax credits for the acquisition, rehabilitation or construction of lower-income rental housing. Credits are awarded to developers of qualified projects. Developers sell these credits to investors to raise capital or equity for their projects, which reduces the amount that the developer would otherwise have to borrow. Certain expenses incurred in rehabilitating or purchasing an existing building can also qualify for the credit. The credit is claimed over a 10-year period. The changes to the LIHTC are estimated to cost $1 billion over 10 years and would take effect in 2008.

Comment. *The value of a LIHTC typically varies according to figures released monthly by the IRS. The new law temporarily maintains the credit at nine percent for nonsubsidized new construction.*

Impact. *Residents of projects funded by the LIHTC program receive no direct subsidy. They benefit from lower rents resulting from the LIHTC program.*

Comment. *Limited liability companies and limited partnerships are among the most widely used ownership entities for purposes of the LIHTC.*

Increase. Under the LIHTC program, each state receives an annual allocation of credits and each state's allocation is capped. The current cap is $2.00 per resident multiplied by the state's resident population, with a fixed minimum. The new law increases the cap to $2.20 per resident. There is also an increase in the small-state set aside. This temporary increase in the annual volume cap applies only to 2008 and 2009.

Simplification. The LIHTC is extremely technical. The new law simplifies many provisions, including the determination of area median gross income for purposes of the credit and annual recertification requirements. The new law also modifies the definition of federally-subsidized housing, adds a third type of high-cost area eligible for the LIHTC and increases certain minimum expenditure requirements for rehabilitations.

"Unlike any other individual federal tax credit, taxpayers must repay the first-time homebuyer credit."

TAX-EXEMPT HOUSING BONDS

Tax-exempt housing bonds issued by state and local governments fund the acquisition, construction and rehabilitation of affordable housing. The interest earned by the bondholder is exempt from federal tax. The new law simplifies the rules for tax-exempt housing bonds and ,in many cases, aligns the rules to the ones governing the LIHTC. The new law also clarifies the tenant-income and rent-restriction tests as well as the rules for student housing and single-room occupancy units. The estimated cost of the changes to tax-exempt housing bonds is roughly $519 million over 10 years.

Comment. *While income from private activity bonds is exempt from federal income tax, it may be subject to state income tax.*

Comment. *Complex formulas govern whether a project qualifies for qualified private activity financing. Generally, no fewer than 20 percent of the units in a multi-family dwelling must be occupied by households earning 50 percent or less of the area median income, or no fewer than 40 percent of the units must be occupied by households earning 60 percent or less of the area median income.*

MORTGAGE REVENUE BONDS

State and local government housing finance agencies (HFAs) sell mortgage revenue bonds and use the proceeds to finance below-market mortgages for qualifying first-time homebuyers. Income limits and purchase price restrictions apply. The new law temporarily expands the mortgage revenue bond program to permit the refinancing of existing subprime loans. The new law also authorizes states to issue an additional $11 billion in mortgage revenue bonds for 2008 with a limited carry forward. The estimated cost of the changes to mortgage revenue bonds is $1.475 billion over 10 years.

Impact. *Many subprime borrowers are looking at an interest rate reset on their loans. Under the new law, subprime borrowers may be able to use their state's mortgage revenue bond program to refinance into a loan with a more favorable rate. A qualified subprime loan for purposes of the new law is an adjustable rate single-family 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.*

Planning Note. *Expansion of mortgage revenue bonds to cover subprime loans would not apply to bonds issued after December 31, 2010.*

Comment. *Generally, a first-time homebuyer for a state or local HFA program is an individual who has not had an ownership interest in a principal residence for the past three years. However, individuals who purchase homes in "targeted areas" may be treated as first-time homebuyers even if they have had an ownership interest in a principal residence in the past three years. Additionally, the new law waives the first-time homebuyer requirement for residences in Presidentially-declared disaster areas and treats these disaster areas as "targeted areas."*

REIT REFORMS

The new law includes a package of real estate investment trust (REIT) reforms. A REIT is a corporation or trust created under state law that elects to be taxed as a REIT. A REIT holds passive investments in real property and mortgages. An entity electing to be a REIT must satisfy complex organizational, distribution and record-keeping requirements, along with source of income and asset holding tests. The REIT reforms are estimated to cost $359 million over 10 years.

Impact. *The majority of the new REIT provisions were proposed in 2007, before the real estate market collapse. While current economics now make the argument even more compelling for these REIT changes, they also are needed to maintain the REIT as a viable investment vehicle. U.S. REITs have seen their market capitalization grow to over $300 billion over the past several years and are an essential part of the revitalization of the housing market.*

Income tests. To qualify as a REIT for a tax year, at least 95 percent of the entity's gross income must be "derived from" the types of income listed in Code Sec. 856(c)(2) and at least 75 percent of its gross income must be "derived from" the types of income listed in Code Sec. 856(c)(3), which include real estate-related income. However, gains from foreign currency exchanges are not specifically enumerated in these sections. Under the new law, specified foreign currency gains would be treated as qualified income for purposes of the income tests.

The new law also clarifies when Code Sec. 987 currency gain recognized by a REIT from a qualified business unit (QBU) of the REIT is treated as qualifying income and makes other changes to the rules governing foreign currency gains or losses.

"Under the new law, subprime borrowers may be able to use their state's mortgage revenue bond program to refinance into a loan with a more favorable rate."

REIT subsidiaries. A REIT may avoid disqualified rents by using taxable REIT subsidiaries to conduct certain activities. With two exceptions, amounts paid by a taxable REIT subsidiary to a REIT will be disqualified if the REIT owns 10 percent or more of the subsidiary. One exception involves qualified lodging facilities. The new law extends this exception to health care facilities operated by an independent contractor on behalf of the taxable REIT subsidiary.

The new law also increases the percentage of assets that can be held in securities of the taxable REIT subsidiary from 20 percent to 25 percent.

Safe harbors. If a REIT realizes net income from a prohibited transaction, a tax equal to 100 percent of the net income is imposed. Under an existing safe harbor, the sale of property that is held for sale to customers is not a prohibited transaction if, among other things, the property has been held by the REIT for a minimum of four years. The new law shortens this period from four to two years and further refines the safe harbor concerning the maximum number of sales within a tax year. This is the only revenue raiser in the group of REIT reforms, forecast to take in $54 million over the next 10 years.

Comment. *The changes in the new law impacting REITs would be generally effective for tax years beginning after the date of enactment.*

MORE INCENTIVES/TAX BREAKS

AMT/R&D credits. The new law allows corporations to use accumulated alternative minimum tax (AMT) and research and development (R&D) credits by electing not to claim the special 50-percent bonus depreciation allowed under the *Economic Stimulus Act of 2008 (P.L. 110-185).* The amount of unused credits that may be claimed are limited to 20 percent of the difference between depreciation allowed if the bonus deduction is claimed and depreciation without the bonus deduction. The increased credits are refundable. The amount claimed is limited to the lesser of $30 million or six percent of the total credits accumulated from 2005 and earlier years. The bonus depreciation must be based on property that is originally used, purchased, and placed in service after March 31, 2008, and before January 1, 2009 (January 1, 2010 for certain longer-lived and transportation property).

Impact. *The Economic Stimulus Act included two business tax incentives: enhanced Code Sec. 179 expensing and special bonus depreciation. Unlike previous stimulus packages, it did not give taxpayers an extended loss carryback, which would give companies in a loss position an immediate cash infusion. Moreover, companies in a loss* *position cannot take advantage of special bonus depreciation because they do not have any taxable income against which to take the deductions.*

Impact. *Forgoing 50-percent bonus depreciation on property acquired after March 31, 2008, does not mean that depreciation over the life of the asset will be any less. Bonus depreciation simply accelerates depreciation and forgoing it, therefore, only delays the depreciation of that asset. However, if a corporation makes this election, the MACRS straight-line depreciation method must be used.*

Tax-exempt bonds. More than 20 years ago, Congress prohibited federal guarantees of tax-exempt bonds issued by state and local governments, with exceptions for Fannie Mae, Freddie Mac and other specified entities. The new law extends this exception to federal home loan banks at an estimated cost of $126 million over 10 years.

Impact. *The change should lower borrowing costs and make more financing available for state and local government infrastructure projects.*

AMT limitations. The new law excludes tax-exempt interest on certain housing bonds from being a preference item for AMT purposes. It also allows taxpayers to use the LIHTC and the rehabilitation tax credit to offset AMT liability.

Rehabilitation tax credit. The rehabilitation tax credit is a two-tier credit. Generally, the credit is 20 percent for qualified rehabilitation expenditures of certified historic structures and 10 percent for buildings placed in service before 1936. If more than 35 percent of a rehabilitated building is leased to a state or local government, the credit is unavailable. The new law increases this threshold to 50 percent.

Comment. *The amounts are temporarily higher for qualifying property in the Gulf Opportunity (GO) Zone to help restoration efforts after Hurricane Katrina.*

Social Security numbers. The *Foreign Investment in Real Property Tax Act (FIRPTA)* requires sellers of real property to sign an affidavit stating they are not nonresident aliens or they must be subject to withholding. The affidavit includes the seller's taxpayer identification number (TIN) - which for most individuals is their Social Security number. Under the new law, sellers may provide the affidavit to the title or escrow company facilitating the closing of the sale to protect the privacy of their Social Security number.

GO Zone incentives. After Hurricane Katrina devastated the Gulf Coast, Congress passed a package of tax incentives to help individuals and businesses rebuild. The new law enhances and extends some of those incentives.

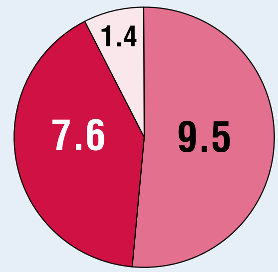
Economic stimulus payments. The new law includes a housekeeping provision authorizing the Treasury Department to transfer funds among different accounts to carry out the 2008 economic stimulus payments.

Down payment assistance programs. The new law bans seller-funded down payment assistance programs (DAPs). DAPs have been criticized for contributing to the record-high number of foreclosures. In 2006, the IRS announced that organizations providing seller-financed down payment assistance to homebuyers do not qualify as tax-exempt charities (Rev. Rul. 2006-27).

Military personnel. The new law temporarily enhances certain protections against foreclosure under the *Servicemembers Civil Relief Act,* along with special interest rate caps. Mortgage lenders must, at the request of the service member, reduce the interest rate to no more than six percent per year during the period of active military service and recalculate the payments to reflect the lower rate.

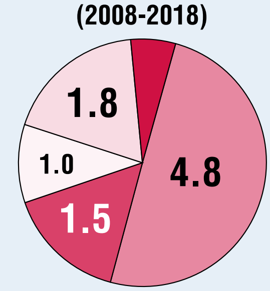
"Housing Act Tax Relief" Ten-Year Revenue ScoreCard

Major Revenue Raisers (2008-2018)



Merchant Payment Reporting
($9.5 billion)
Worldwide Interest Allocation
($7.6 billion)
Home Sale Exclusion
($1.4 billion)

"Housing Act Tax Relief" (2008-2018)



First Time Homebuyers Credit:
$4.8 billion
Nonitemizer Property Tax Deduction:
$1.5 billion
Low-Income Housing Credit:
$1 billion
Housing/Mortgage Bonds:
$1.8 billion
REIT Reform:
$359 million
Other:
$5.7 billion

OFFSETS

Congress had to find a way to pay for the new tax incentives. The largest offset in the housing act requires information reporting on merchant payment card transactions. Other offsets include: new limits on the home sale exclusion, a delay in the worldwide interest allocation rules and an acceleration of estimated tax payments for large corporations.

CREDIT CARD INFORMATION REPORTING

Under the new law, banks and other processors of merchant payment card transactions (credit and debit cards) will be required to report a merchant's annual gross payment card receipts to the IRS (and to the merchant). The new law also requires reporting on third-party network transactions (such as ones used by many online retailers). Merchants and payment card processors have time to prepare. The new treatment is effective for sales made on or after January 1, 2011.

Impact. *The "paper trail" created by payment cards is currently unavailable to the IRS except on a case-by-case basis. The new law changes this. According to the Treasury Department, expanded information reporting will assist the IRS in increasing the compliance rate among merchants. It plans to compare the merchant's overall volume of payment card sales in relation to expenses claimed and cash transactions reported. The new reporting is estimated to raise more than $9.5 billion.*

Impact. *Many small businesses were opposed to expanded payment card information reporting, warning that the high costs of credit and debit transactions are already driving many merchants away from these transactions.*

De minimis exception. The new law creates an exception from information reporting if the aggregate value of third party network transactions does not exceed $20,000 for the calendar year or the aggregate number of these transactions does not exceed 200.

Comment. *Among the issues that the IRS will have to address in regulations are charge-backs (where a merchant is debited for the amount that a credit card company refunded to a customer when the customer returns a purchase) and transactions in which the customer receives "cash back" as well as merchandise.*

Comment. *The new law requires the reporting party to provide the IRS with the merchant's TIN. If the reporting party cannot provide this information, it would be required to withhold at 28 percent the payments to the merchant. Typically, backup withholding is imposed on income, such as interest or dividends, with no offsetting deductions. Here, it would apply before the merchant deducts any offsetting expenses.*

REDUCED HOME SALE EXCLUSION

Gain from the sale of a principal residence home will no longer be excluded from gross income under Code Sec. 121 for periods that the home was not used as the principal residence ("non-qualifying use"). This new income inclusion rule applies to home sales after December 31, 2008, and, under a generous transition rule, is based only on nonqualified use periods that begin on or after January 1, 2009. In further relief from this new loophole closer, a period of absence generally counts as qualifying use if it occurs after the home was used as the principal residence.

Impact. *The rule prevents use of Code Sec. 121's exclusion of gain from the sale of a principal residence of up to $250,000 ($500,000 for joint filers) for appreciation attributable to periods after 2008 during which a residence was used as a vacation home or as rental property before its use as the principal residence.*

Comment. *Rather than require a valuation of the property on January 1, 2009, or at the time use is converted into a principal residence, however, the new law determines excluded appreciation on a pro-rata basis.*

The amount of gain allocated to periods of nonqualified use is the amount of gain multiplied by a fraction, the numerator of which is the aggregate period of nonqualified use during which the property was owned by the taxpayer and the denominator of which is the period the taxpayer owned the property. "Nonqualified use" for this computation does not include any use prior to 2009.

Example. *Adam buys property on January 1, 2009, for $400,000 and rents it for two years, claiming $20,000 of depreciation. On January 1, 2011, Adam begins to use the property as his home. Adam moves out of the house on January 1, 2013, and sells it for $700,000 on January 1, 2014. The period 2009-2010 is non-qualifying use. The year 2013, after Adam moved out, is treated as qualifying use. Of the $300,000 gain, 40 percent (two years out of five years owned), or $120,000 is not eligible for the exclusion. The balance of the gain, $180,000, may be excluded. The $20,000 gain attributable to depreciation is recaptured, as required under current law.*

WORLDWIDE INTEREST ALLOCATION

The *American Jobs Creation Act of 2004* (P.L. 108-357) allows an affiliated group of corporations to elect global interest expense allocation starting in 2009. The election applies to future years unless it is revoked with

IRS consent. An affiliated group may make a one-time election to determine foreign-source taxable income of the group by allocating and apportioning interest expense of the domestic members of a worldwide affiliated group on a worldwide group basis, as if all members of the worldwide group were a single corporation. The new law delays the worldwide interest allocation rules in the *2004 Jobs Act* until tax years beginning after December 31, 2010. This change is effective as of the date of enactment of the new law. A transition rule reduces the benefit in 2011, the first year of the change.

Impact. *The global interest allocation results in more interest being allocated to U.S.-source income under the foreign tax credit formula, increasing the credit limitation.*

CORPORATE ESTIMATED TAX PAYMENTS

Like recent tax bills, the new law accelerates certain corporate estimated tax payments for corporations with assets of at least $1 billion. Payments due in July, August and September 2013 are increased by 16.75 percent. Payments due in October, November and December 2013 would be reduced by an offsetting amount. However, accelerated payments scheduled for July, August and September 2012 by previous tax legislation are repealed.

Impact. *The change would maximize the five-year revenue impact of the increased payments.*

MORE LEGISLATION

The urgency with which lawmakers acted on the housing bill has not yet carried over to other pending tax legislation, especially the extenders bill (a package of popular but temporary tax incentives, such as the state and local sales tax deduction, teachers' classroom expense deduction, research tax credit, and employer tax credits). Lawmakers also appear unable at press time to break the current deadlock over how to pay for this year's alternative minimum tax (AMT) "patch," especially now that a major candidate for offsetting the cost of a patch – merchant payment card information reporting – has been included in the Housing Assistance Tax Act.