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Choosing an Issuer of Multifamily Housing Revenue Bonds: Post Closing Considerations

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Part two of two

In our previous article on this topic, we discussed factors for developers of multifamily rental housing projects to consider when choosing potential conduit issuers of tax-exempt bonds for their projects. We focused in that article primarily on how one's choice of bond issuer affects what it takes to get a bond deal closed. Of course, closing is only the beginning of the story for a bond financing. In this article, we illustrate some of the ways that issuers differ after bonds are issued, and offer up front some suggestions for evaluating these differences.

Refinancing / Restructuring

Relatively few multifamily housing revenue bond transactions make it to maturity without being refunded or restructured in some way. Early on, deals are often restructured or refinanced because interest rates change or credit structures change, or because the underlying project performs differently than originally expected. Later, tax credit investors typically transfer their interest in the project to the developer, at which point bringing in new financing becomes particularly attractive to the developer. The terms of some of the popular credit enhancement programs, such as those offered by Fannie Mae and Freddie Mac, seem to contemplate refinancing after 15 to 20 years.

When a project is refinanced or restructured the issuer is almost always involved. Developers should find out, before choosing an issuer, what this involvement will entail. For example, if a deal is refunded, does the developer still have to pay all or a portion of the issuer's annual fee on the retired bonds? Will the issuer charge a new one-time fee for issuing the refunding bonds? Some issuers may charge a one-time fee for any sort of restructuring or amendment to bond documents, even if no new bonds are issued. This may not seem too burdensome for a major restructuring of a deal, but paying a hefty one-time fee for simple letters of credit substitution can get costly.

Another "cost" of refunding or restructuring that some issuers have imposed is additional qualified project period or affordability requirements. By definition, issuers are government agencies interested in providing affordable housing to their constituents. In transactions with projects that are not 100 percent low-income or do not already have very long required compliance periods, issuers may ask for tenant concessions rather than (or possibly in addition to) collecting fees.

In addition to charging fees or negotiating for other concessions, the issuer will likely have to approve and sign documents in connection with any restructuring or refinancing. Some issuers make this easy by delegating to their officers the authority to sign documents for relatively minor or technical amendments. With other issuers, however, it may be necessary to go to the whole governing board to get approval for even a minor amendment. Whenever approval of the governing board is involved, developers will have to contend with the usual requirements about meeting dates, lead times for documents, and so forth, all of which can vary greatly from issuer to issuer, not to mention possibly having to address the governing board all over again about the merits of the project.

(continued on page two)

Choosing an Issuer

(continued from page one)

Evaluating or possibly limiting these risks is difficult to do with any real level of certainty. Many issuers have established policies and practices that they can easily describe to prospective conduit borrowers, and these policies and practices tend to change very slowly. Policies and practices, however, can and do change, and current issuer officials typically will not be willing to bind, or will not legally be able to bind, future officials to adhere to current policies and practices. The only real advice we can give is that more active and established issuers will act in a more predictable fashion and that a healthy discussion of these issues before closing is likely to result in less change in an issuer's policies and practices in the future.

Issuers as Project Administrators

Issuers of tax-exempt bonds used to finance multifamily rental housing projects will always be interested in ensuring that the projects they finance comply on an ongoing basis with the minimum legal requirements of state law and the tax code. Typically, issuers also have some interest, for policy reasons or otherwise, in ensuring that the projects comply with various, and much more vague, habitability, public safety and neighborhood compatibility standards. No issuers want the projects they finance to be out of legal compliance, to be in financial trouble or to otherwise be a problem for their constituents. The real question is what steps will an issuer take to make sure these desires are satisfied.

In many cases, the issuer signs a Regulatory or Land Use Agreement that imposes certain monitoring responsibilities on it for the life of the bonds. Even if the regulatory agreement does not contain any such administrative responsibilities, state law may impose monitoring duties on the issuer. The tax code is silent as to an issuer's monitoring responsibilities in its capacity as issuer of tax-exempt bonds, but where tax credits are involved, it may be a different matter (see below). In addition to these legal and policy reasons for monitoring project compliance, an issuer (such as a city, county or state housing agency) that puts money into the project, whether as primary lender or as a subordinate lender, is likely to undertake a certain degree of monitoring if only to protect the value of its security interest.

How much and the type of monitoring issuers undertake varies greatly. There are issuers that do almost nothing, while others make site visits at least annually and require frequent status reports, formal or informal. Of the more engaged issuers, some undertake monitoring themselves, while others hire professional staff to do the work on their behalf. Developers may want to consider whether they prefer working directly with a governmental entity or with hired staff who are independent contractors.

(continued on page three)

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Choosing an Issuer

(continued from page two)

In addition to serving as issuers of bonds, some potential bond issuers may also be charged with allocating tax credits to multifamily rental housing projects. Since many housing projects are financed with a combination of 4 percent tax credits and tax-exempt bonds, developers may find that the issuer for their project is the same entity that awards the project tax credits. In this case, the tax code imposes very specific monitoring requirements on the tax credit allocating entity. For example, the entity must perform a site visit at least once every three years.

Before choosing a conduit issuer, developers should consider all the factors discussed above to get an idea of how involved the issuer is likely to be in monitoring the project. An issuer that abdicates all responsibility may be a bad choice, if only because there are disadvantages to contracting with a party that does not take its legal requirements seriously. At the other end of the spectrum, there are issuers that make site visits to check up on such attributes as the energy efficiency of the project or the state of the project from a cosmetic perspective. Developers may reasonably wish to avoid this sort of close relationship with their conduit issuer.

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