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MEMORANDUM

August 21, 2024

TO: TRIBAL HOUSING CLIENTS

FROM: EDMUND CLAY GOODMAN
HOBBS, STRAUS, DEAN AND WALKER, LLP

RE: ***Low Income Housing Tax Credit Change in Tribal Tax Investment and Reform Act of 2024***

This memo is to provide you with an update on some pending legislation that will benefit tribes and tribally designated housing entities (TDHEs) who seek to use Low Income Housing Tax Credits (LIHTC) to finance the development of affordable housing.

On May 9, 2024, Representatives Gwen Moore (D-WI) and David Schweikert (R-AZ) announced the introduction of H.R. 8318, the Tribal Tax and Investment Reform Act of 2024 (the "Bill"). The Bill is the newest iteration of legislative efforts to make tribe-specific revisions to the Internal Revenue Code ("Code") previously led by the now-retired Representative Ron Kind (D-WI). One of the Bill provisions – Section 9 – would revise certain calculations to be used under LIHTC to benefit tribal projects.

The LIHTC provides a dollar-for-dollar tax credit to eligible non-profit entities to encourage the construction and/or rehabilitation of affordable rental housing. The LIHTC provides a tax credit – distributed by the states – which may be used against federal income taxes over a 10 year period. The LIHTC is commonly used to finance low-income housing by partnering with an investor who contributes funds to the project in exchange for the tax credits.

Under the Code, the amount of the LIHTC is calculated by multiplying two components of a qualified low-income building: the "applicable percentage" and the "qualified basis". In general, the amount of the available LIHTC will be increased if a project has a high "applicable percentage" and "qualified basis". The "applicable percentage" of a qualified low-income building depends on whether federal funds are used in the project. Projects that do not use federal funds will have a higher available tax credit (with an "applicable percentage" equal to 70%) compared to those projects that use federal funds (which have an "applicable percentage" equal to 30%). *See* Code Section 42(b). Although further specified in Code Section 42, certain buildings which are located in a "difficult development area" are eligible for an increased tax credit through a higher "qualified basis" (equal to 130% of the project costs).

Section 9 of the Bill would modify the LIHTC – Code Section 42 – to include certain buildings in Indian areas within the definition of a "difficult development area." To qualify for the increased tax credit, the Bill requires a building to either: (1) be assisted or financed under the Native American Housing Assistance and Self Determination Act of 1996 ("NAHASDA"), or (2) sponsored by an Indian tribe, a TDHE, or wholly owned or controlled by an Indian tribe or TDHE. By being included within the definition of a "difficult development area," projects in Indian areas could qualify for an increased tax credit because the qualified basis upon which the credit is calculated would be increased to 130% of the amounts expended on the project.

As an illustrative example, a qualifying housing project that costs a Tribe $10 million to complete and did not use federal funds could be eligible for a potential tax credit of $9.1 million under the Bill. The qualified basis for calculating the tax credit would be $13 million (130% of basis) while the applicable percentage would be 70%. Multiplying the applicable percentage (70%) against the qualified basis ($13 million) produces a potential tax credit of $9.1 million. The Bill's contemplated changes would make Tribal housing projects more economically feasible and improve financing opportunities.

Conclusion

If you have any additional questions or concerns about the issues discussed in this memorandum, please contact Ed Clay Goodman at egoodman@hobbsstraus.com or by telephone at 503-242-1745.