

## Summary of Tax Credit Exchange (“1602”) Guidance and TCAP Notice

Prepared by Citizens’ Housing and Planning Association

HUD and the Treasury Department issued guidance on the Tax Credit Assistance Program (TCAP) and the Low Income Housing Tax Credit Exchange Program (“Section 1602”) on May 4, 2009. They held a joint webcast on May 6 to discuss the programs and issues that will be addressed through further guidance and/or “Q and A” websites. *Both agencies emphasized the importance of meeting commitment and spending deadlines.* Treasury was represented on the webcast by Jean Whaley and HUD by Marcia Sigal. HUD has a [TCAP Q&A](#) website and Treasury is accepting questions by email at [1602Questions@do.treas.gov](mailto:1602Questions@do.treas.gov).

**LIHTC Exchange (“Section 1602”)** The Treasury [guidance](#) consists of an application state credit agencies must use and a “Terms and Conditions” agreement they must sign.

### State Applications for Grant Funds (Multiple elections)

- State tax-credit allocating agencies may begin electronically submitting initial applications for grants this month (but are not required to do so). Treasury will review applications for completeness within 10 days and then send a notice of award and a grant agreement. The funds are essentially an entitlement (i.e. projects to be funded do not have to be specified).
- States can submit subsequent applications through 2010, as additional information becomes available on the amount of credit returned and unused credit carryover.

Amounts Available The amounts available to each state will be:

- a) 10 times 100% of its unused credit ceiling for 2008 (if any)
- b) 10 times 100% of the credit ceiling returned in 2009
- c) 10 times 40% of the 2009 new credit allocation (\$2.30 per capita)
- d) 10 times 40% of unused housing credit carryover allocated to the state from the national pool

The notice lists the amount each state is eligible to receive based on factors (a) and (c) - 100% of the unused credits for 2008 as reported to Treasury in March plus 40% of the new 2009 allocation -and shows Massachusetts as eligible to receive \$50.8 million. It notes that the amounts are likely to rise as information on (b) and (d) becomes available. States are responsible for tracking amounts available and used. Go Zone and Disaster Area LIHTC are not eligible for exchange. *It is silent on whether amount (a) can change.*

Disbursement/Deadlines *All funds must be disbursed to subawardees (project entities) by December 31, 2010. No funds can be disbursed after that date.*

- States cannot disburse funds to owners in advance of need (e.g. cannot put in escrow or advance lump sums). They must disburse funds to subawardee within 3 days of drawdown from Treasury. Any amounts returned by the subawardee must be returned to the Grant Account and spent first.

Grant Agreements Once Treasury has sent a grant agreement to the state credit allocating agency, it will make funds available for agencies to draw down as needed to make subawards. As subsequent State applications are approved, it will amend the grant agreement accordingly. A state housing credit agency may transfer grant funds to other state credit allocating agencies pursuant to a written agreement but the initial agency is responsible for all compliance matters.

Awards to Eligible Projects (“Subawards”) All of the grant funds must be used for subawards or for transfers to other agencies to make subawards. Funds will not have to be repaid to Treasury unless a recapture event occurs. *Awards must be grants, not loans* according to the webcast.

Administrative Fees States cannot use 1602 funds for their administrative costs but can charge “reasonable” fees to the subawardee (“amounts customarily charged for the same or similar services and in no event to exceed costs”). Treasury does not intend to further define reasonable. States will also be responsible for asset management.

Good Faith Effort Housing agencies must establish a written process for determining that subawardees have made a good faith effort to obtain investment commitments for tax credits in lieu of the subaward and make a determination of that effort for each project.

Increase in Total Funds Available The guidance is silent regarding the requirement in ARRA requiring a finding of an increase in “total funds available to the state” before exchange funds can be awarded to a Section 42-compliant project that does not have an LIHTC allocation.

[Division B, §1602(c)(1) *A subaward under this section may be made to finance a qualified low-income building with or without an allocation under section 42 of the Internal Revenue Code of 1986, except that a State housing credit agency may make subawards to finance qualified low-income buildings without an allocation only if it makes a determination that such use will increase the total funds available to the State to build and rehabilitate affordable housing.*]

Written Agreement with Subawardees States must execute a legally binding agreement with the entity receiving the grant before any 1602 funds are disbursed. It must include a requirement for recapture for noncompliance during the 15 year compliance period and may include the extended commitment. It must also require the subawardee to provide the necessary information for the State to meet its reporting requirements.

Recapture State agencies must develop recapture requirements and recapture amounts will be treated as a debt payable to the U.S. Treasury and enforceable by “all available means against any assets of the recipient entity.” The form of the recapture agreement is not specified. It may include the Section 42(h)(6)(B) extended use agreement. *Treasury is still working on guidance on recapture and monitoring.*

Can states impose recourse obligations on the Sponsor entity [e.g., by making the award to that entity for a sub-subaward to the project entity?]

Davis Bacon There is no reference to Davis Bacon wages, in conformity with a strict reading of the limitation in ARRA to funds appropriated under Division A.

Reporting States must submit quarterly financial status reports and performance reports due 10 days after the end of the quarter (March 31, June 30, September 30, December 31). The performance report will describe each project receiving a subaward during the quarter, the number of construction jobs retained and the number created as well as the number of non-construction jobs retained and the number created. *Treasury has not yet issued the report forms. OMB, Treasury and HUD will issue “synchronized” guidance shortly.*

Q&A Treasury, in the webcast, confirmed that 1602 grants are not taxable income to the recipients

Buy American The webcast stated that this does not apply to either 1602 or TCAP.

### **Tax Credit Assistance Program (TCAP )**

HUD [Notice](#) CPD-09-03 outlines TCAP program requirements (no regulations will be issued). Every state's housing credit agency has received a formula allocation based on their pro-rata share of 2008 HOME funds (Massachusetts will receive \$59.6 million). TCAP will not be subject to HOME regulations but most other federal requirements will apply (e.g. environmental review, Davis Bacon).

Eligible Projects TCAP can assist projects that received or will (simultaneously with a TCAP award) receive a LIHTC award between October 1, 2006 and September 30, 2009, including projects that received bond financing, and need additional funds to be completed and placed into service. Projects awarded 2010 credits by 9/30/2009 are eligible. Projects that have returned their awards are not eligible unless they receive a new award within the dates above.

- The notice allows states to define "award of LIHTCs" and notes that it can be as early as the date of public notice of the funding decision. States must use the same definition for all projects when determining eligibility for TCAP funds. *It is not clear whether this means each state is able to define "award" for purposes of 4% LIHTC-tax-exempt bond deals.*

Eligible project costs TCAP can only be used for "capital investment" in LIHTC projects – costs that are included in the Section 42 eligible basis except swimming pools. They cannot be used for administrative costs. TCAP assistance to a project must be made in the same manner and subject to the same limitations (including rent, income, use restrictions and compliance monitoring) as the state agency requires with respect to an award of LIHTC to a project. Funds can only be spent by the project entity (i.e. state can't use it to write down bond costs).

State "Submission Packet" to HUD State credit agencies that wish to accept some or all of their TCAP funds must submit a one-time application to HUD by **June 3**. The packet must describe:

- the amount of TCAP funds the agency intends to accept (if an agency declines any of its allocation, the unused funds will be reallocated using the same HOME formula as before).
  - the process it will use to award TCAP funds and proof that it posted its selection criteria and process online and accepted public comments (for at least 5 days) before submitting the packet
  - how it will meet expenditure deadlines and redistribute funds if projects do not meet TCAP spending deadlines, and how it will meet ARRA transparency and accountability requirements
- Once HUD determines the application is complete, it will sign a grant agreement with the credit agency (it will notify agencies within 10 days if the application is incomplete and how to cure).

State Selection of Projects Credit agencies must set up a competitive process to distribute TCAP that is consistent with their *existing* QAP (they're not required or expected to amend the QAP).

- Projects that can be completed (have drawn down all funds) by February 16, 2012 must receive priority. Other than that, states can set their own selection criteria. ***HUD urges states to consider the TCAP spending deadlines (e.g. when will environment review be completed).***
- States can decide whether to provide the funds as a grant or loan but loan repayments are treated as program income if received within three years and must be tracked and re-used prior to disbursing other TCAP funds. HUD notes that this might make it difficult to meet TCAP spending deadlines. Program income covers all income received by the state credit agency that was generated by the use of TCAP such as fees received from project owners.

TCAP Commitment and Spending Deadlines State housing credit agencies must:

- commit at least 75% of their TCAP funds by February 16, 2010,
- demonstrate that all project owners have spent 75% of the TCAP funds by 2/16/2011, and
- spend 100% of the TCAP grant by 2/16/2012.

HUD will measure 2011 spending compliance program-wide by state, but states can set project-by-project requirements if they wish.

#### HUD-State Grant Agreements and Transparency and Reporting Requirements

- States will have to submit quarterly financial reports 10 days after the end of each quarter (March 31, June 30, September 30 and December 31).
- Each state housing credit agency will also have to post information on all projects selected for funding and the amount of each TCAP award on its website
- HUD will prescribe the report formats and deadlines.

State-Project Owner Grant Agreements (“TCAP Written Agreement”) State housing credit agencies will be requirement to execute a legally binding written agreement that sets out all the TCAP program requirements and makes them enforceable and binding on all owners and successors. *HUD will issue further guidance of the required content of the agreement.*

- The agreement cannot be signed until the environmental review process has been completed and HUD has approved a request for release of funds.
- States cannot disburse funds until the written agreement has been signed.
- *Funds cannot be drawn down until needed* (they can not be provided in advance to the owner or placed in escrow) and when drawn down must be expended within 3 days.
- The agreement must specify a schedule for expenditure of the TCAP funds and outline the circumstances under which the funds will be recaptured if the project owner fails to meet the spending schedule. States must monitor the progress of each project to meet TCAP spending deadlines since failure to meet deadlines will result in HUD recapture of funds.

Federal Cross Cutting Requirements generally apply (the Uniform Relocation Act and Section 3 do not). HUD has posted more detailed guidance on the key requirements at

<http://www.hud.gov/recovery/tax-credit.cfm> and will offer training and technical assistance.

The Notice advises state grantees and project owners to retain technical assistance as well and notes that TA costs *of project owners* are eligible TCAP costs. Key requirements include:

- Environmental review Environmental review must be completed before a project’s TCAP assistance agreement can be executed. Once an owner applies for TCAP funds, committing TCAP or any other funds to or undertaking any “choice-limiting” activity prior to successful completion of the environmental clearance review is prohibited. This includes any activity that will result in a physical change and/or acquisition, including leasing, or disposition of real property. If a project has already had a completed review and the TCAP doesn’t change anything, no new review is required.
- Davis Bacon: Projects will be subject to prevailing wage requirements, though HUD indicated through both the notice and webcast that they looking at limiting its applicability to the date of funding approval. Jade Banks of HUD addressed this in the webcast and noted that *general federal guidance on Davis-Bacon’s applicability to ARRA will be forthcoming shortly.*
  - HUD expects it to apply to projects that have not yet started, even if the construction contract has been awarded but not to projects that have already been completed. For projects where construction is underway, it is expected to apply going forward from date of owner’s 1602 application. HUD’s Office of Labor Relations will handle waiver requests to the Department of Labor. Questions can be emailed to <mailto:Jade.M.Banks@hud.gov>.
- Lead Based Paint assessment, clearance and work safe practices apply.
- Fair Housing Act, Affirmatively Furthering Fair Housing, Title VI of the Civil Rights Act of 1964 and the Age Discrimination Act of 1975, and Section 504 apply.

GO Zone and Midwest Disaster Areas A project cannot get TCAP If the *only* source of credits for a project is GO Opportunity Zone or Midwestern Disaster Area Housing Credits unless the project has also been awarded at least a nominal amount of “standard” credits under §42(h).