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## US Department of Housing and Urban Development Issues Guidance on the Tax Credit Assistance Program

The American Recovery and Reinvestment Act of 2009 (the Act or ARRA), generally referred to as the Economic Stimulus Act, appropriated US\$2.25 billion to the HOME Program to establish a grant program, known as the Tax Credit Assistance Program (TCAP), for capital improvements in Low Income Housing Tax Credit (LIHTC) projects. On May 4, 2009, HUD issued a notice fleshing out certain program requirements for the TCAP. Specifically, the notice provides information regarding the process for disbursement of TCAP funds, eligibility requirements at the project level and the applicability of federal grant requirements to projects receiving a TCAP award.

### How do state housing credit allocation agencies receive TCAP funds from HUD?

The Act requires TCAP funds to be distributed to each state LIHTC allocating agency based on the percentage of the FY 2008 HOME Program appropriation received by the state. In order for a LIHTC allocating agency to receive the formula distribution of TCAP grant proceeds, it must submit certain information to HUD within 30 days of the published notice. The information submitted to HUD is to include a statement of intent to accept the TCAP funds, a description of the competitive process that the credit agency will employ to distribute the grant proceeds, and the procedures that the agency will use to ensure that the TCAP grant funds will be committed and expended within the deadlines established by the Act. After HUD receives and reviews the agency's submission, HUD will enter into a grant agreement with the agency.

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## **Which low-income housing projects are eligible to receive TCAP funds?**

LIHTC projects eligible to receive TCAP grant funds are those that have or will receive an award of LIHTC under §42(h) of the Internal Revenue Code (the Code). The LIHTC project must have received an allocation of credit between October 1, 2006 and September 30, 2009. Projects awarded LIHTCs that will also receive tax-exempt bond financing are eligible to receive TCAP funds.

If the only source of tax credits for a project is the Gulf Opportunity Zone or the Midwestern Disaster Area Housing Credit programs, the project is not eligible to receive TCAP funds because these credits are not awarded under §42(h) of the Code. However, the state agency is able to allocate a nominal amount of §42(h) LIHTCs up until September 30, 2009 to make the project eligible to receive TCAP funds.

## **How will state LIHTC allocating agencies award the TCAP funds to eligible projects?**

State LIHTC allocating agencies must award the TCAP funds on a competitive basis and in accordance with the agency's qualified allocation plan. Though agencies are free to establish their own competitive process and selection criteria, the process must give priority to those LIHTC projects expected to be completed by February 16, 2012.

Each state LIHTC allocating agency must commit 75 percent of its TCAP grant by February 16, 2010 and be able to show that all project owners have spent 75 percent of TCAP funds by February 16, 2011. The agency must spend its entire TCAP grant by February 16, 2012. Funds not spent by this date will be recaptured by HUD. The state agency will enter into a written agreement with the project owner setting forth these and other requirements. This agreement will be recorded and binding on all owners and successors to the real property. If the project owner fails to comply with the schedule for expenditure, the TCAP funds will be recaptured by HUD.

## **How will TCAP awards be provided to the project?**

The state agency has discretion to determine whether to provide TCAP funds to eligible projects as loans or grants. If the agency opts to treat the TCAP funds as loans, then the repayment of principal and interest by a project owner prior to February 16, 2012 is TCAP program income. Any TCAP program income must be spent by the state agency before the state agency is able to use its appropriated TCAP funds.

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After the state agency and the project owner have executed a written agreement, TCAP funds can be disbursed from the US Treasury to pay eligible project costs. However, the TCAP funds cannot be drawn by the state agency before the need to pay the eligible costs arises. Once the funds are drawn from the state agency's Treasury account, they must be spent on an eligible cost within three days.

### **What is the state's role with respect to asset management?**

The state LIHTC allocating agencies must either act as an asset manager for projects that have been awarded TCAP funds, or contract for the asset management services at the project owner's expense. The purpose of the asset management function is to ensure compliance with the requirements of §42 of the Code and the long-term viability of projects that have received TCAP awards. Because costs associated with asset management are administrative rather than capital improvements includable on an eligible basis, the TCAP funds cannot be used to pay for them.

### **What federal grant requirements are applicable to projects receiving a TCAP award?**

Though the Act appropriates the TCAP funds to the HOME Program, HOME statutory and regulatory requirements do not apply to TCAP funds, with the exception of the environmental review requirements, as more fully discussed below. However, projects using TCAP awards must comply with the Fair Housing Act, Title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975 and the Davis-Bacon Act. For projects already under construction at the time the TCAP funds are awarded, the project owner may be able to obtain a determination letter that the Davis-Bacon wage requirements are applicable prospectively as of the date of the TCAP award. Labor Relations Specialists in the HUD Field Offices are able to provide guidance pertaining to this requirement.

Section 504 of the Rehabilitation Act of 1973 applies to projects that have received TCAP funds, requiring those that are either new construction or substantial rehabilitation to make 5 percent of housing units accessible to persons who have mobility impairments and 2 percent accessible to persons with hearing or vision impairments.

The Act applies §288 of the HOME statute to projects using TCAP funds. This requires that the state assume responsibility for environmental review under the National Environmental Policy Act. The applicability of this section will have substantial impact on the timing of

decisions and actions in the development of a project that will accept TCAP funds. A project owner cannot undertake a "choice-limiting activity" after committing to TCAP funds before successful completion of the environmental review. A choice-limiting activity is one resulting in any physical change, acquisition or disposition of real property. Performing a choice-limiting action prior to completion of the environmental review could result in disqualification from the TCAP. If federal environmental review has already been completed for a project, additional environmental review may not be necessary.

For further information on the TCAP, please contact one of the lawyers listed in this Alert or your primary Squire Sanders lawyer.

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