

NJ GOVERNOR'S CONFERENCE

Tax Credit and the Federal Economic Stimulus Provisions – Part I

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Legislative Initiatives

- Current Housing Initiatives Urged by Housing Industry
 - Relaxation of passive loss rule for Subchapter S and closely held C corporations
 - 5-year carry-back of LIHTC
 - Extension of 1602 Exchange and TCAP programs

Relaxation of Passive Loss Rules

Lift Passive Loss Rules for Sub-S and Closely held C Corporation that:

- Have at least 10 million in annual gross receipts
- Tax avoidance NOT principal purpose of formation
- Expectation of reasonable asset management

5-Year Carry Back of LIHTC

Allow 5-year carry-back of existing LIHTCs from 2008-10 tax year

- Must reinvest credit amounts received back into new affordable rental housing
- AMT relief to carry-backed credits
- 5-year carry-back of New LIHTCs claims beginning 2008 as they arise during 10-year credit period

Extension of 1602 Exchange Program

- Proposal to Extend Exchange Program 1 year through 2010.
- Modify program to include 4% housing credits that accompany tax-exempt multifamily housing bonds.

Details of 1602 Exchange Program

- The American Recovery and Reinvestment Act of 2009 (AARA) allows Housing Agencies to return a portion of their housing credits to the Treasury Department in exchange for cash grants.
- The grants are given to housing projects “Subawardees” to finance construction and acquisition/rehab of qualified low-income buildings with or without an allocation.

Grant Amount Formula

- Grant Election equals an amount that does not exceed 85% of:
 - 10 x 100% of:
 - The unused 2008 State housing credit ceiling and;
 - The amount of State housing credit ceiling returned in 2009
 - Plus 10 x 40% of:
 - The greater of \$2.30x State population (or \$2,665,000) and
 - The unused housing credit carryover allocated to State in the 2009 National Pool.

Disallowed Sources Grant Exchange

- May not exchange GO Zone, Midwestern and Hurricane Ike housing credits.

Qualifying Projects

- Section 42 Requirements
 - Projects must meet requirements of a qualified low-income housing project under Section 42 of the Internal Revenue Code.
 - Developer of qualified projects must demonstrate good faith efforts to obtain an investment from a tax credit investor.
- Binding Agreement
 - Developer must enter into legally binding agreement with Housing Agency for recapture of the subaward if project fails to comply with Section 42 requirements.
 - The binding agreement may include the extended low-income housing commitment.

Housing Agency Requirements

- Application Process
 - Housing agencies began applying for subawards in May, 2009 and may submit subsequent application.
 - Interim Rule allows Subawards through December 31, 2011 provided:
 - subaward is made by 12/31/2010,
 - subawardee has paid at least 30% of the subawardee's total adjusted basis in land and depreciable costs of low-income project by the end of 2010.
 - Funds not disbursed by 12/31/2011 must be returned to Treasury by 1/1/2012.

Housing Agency Requirements (cont'd)

- Asset Management
 - Housing agencies must perform asset management functions to assure project compliance with Section 42.
 - Housing agencies must submit 2 quarterly reports – a financial status report and a project performance report to Treasury within 10 days after the end of each quarter.

Updated 1602 Exchange Program Guidance Highlights

On July 9, and September 14, 2009, Treasury released a set of frequently asked questions and answers.

- 1602 Exchange Funds may be used in a development with tax-exempt bonds.
- State housing agencies may make subawards in the form of loans which is non-interest bearing and non repayable at any time except in the event of recapture.
- NEPA, Davis Bacon Prevailing Wages Rates do not apply to the 1602 program.
- State housing agencies may not charge an application fee. Only reasonable fees associated with the States' asset management responsibilities.

Updated 1602 Exchange Program Guidance Highlights (cont'd)

- When LIHTCs remain in a stalled building with 1602 funds, the placed in service date for the building does not change.
- State agencies are limited to a 1% or less ownership interest in a building with 1602 funds.
- 1602 funds may pay for costs to the same extent as equity raised from LIHTCs under Section 42.
- 1602 funds are subject to a 15-year compliance period and an extended use agreement must be in effect.
- States may in their discretion, provide a cure period (i.e., 90days) for a building to return to compliance.
- Treasury does not require a 1st lien on buildings with 1602 funds. Treasury does not require that the lien take procedure over other liens on such buildings.

Recapture of 1602 Exchange Grant

Recapture Formula

- Recapture occurs within the 15-yr compliance period when the applicable fraction $\left(\frac{\text{No. of low-income units}}{\text{Total units}} \right)$ of the building falls below the greater of the percentage of:

Section 1602 funds that comprise the eligible basis, or

- Below the minimum set-aside (20-50 or 40-60 test) selected for the building under Section 42 (g)(i).

Recapture (cont'd)

Recapture Amount

- The Recapture Amount is the full amount of the 1602 award minus 6.67% (1/15th) for each full year of the buildings 15-year compliance where a Section 1602 recapture event has not occurred.

Recapture (cont'd)

- The State Housing Agency will impose conditions or restrictions on a subawardee and any subsequent owner to assure compliance and is bound to enforce its provisions and return the recapture penalty to the Treasury.
- If State is unable to collect the recapture amount, the Treasury will not require the State to repay the recapture penalty provided the State took appropriate actions to collect the funds from the liable party.

Resources

- *Section 1602 Grants to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credit Allocations for 2009* (the “1602 Exchange Program”) under the American Recovery and Reinvestment Act of 2009, Public Law 111-5 (“ARRA”)
- Treasury Department Interim Final Rule: *Payments in Lieu of Low Income Housing Tax Credits* 74 Fed. Reg. 44751 (August 31, 2009)
- Treasury Department Section 1602 Exchange Program Frequently Asked Questions and Answers (September 14, 2009)
- Section 1602 Exchange Program Application and Terms and Conditions (May 2009)