



Summary of Comments and Responses to August 15, 2008 Notice of Changes to 2008 Qualified Allocation Plan

General comments about the 2008 Resubmittal Allocation Round

1. **Would ADOH consider deferring the deadline for application for the 2008 Resubmittal Allocation Round?**

Response. Yes, ADOH will defer the deadline for submitting application for the 2008 Resubmittal Allocation Round until Friday, October 17, 2008, at precisely 4:00 p.m. (MST).

2. **Why is ADOH accepting resubmittals of 2008 applications instead of proposing a 2009 Qualified Allocation Plan?**

Response. There are several reasons why ADOH cannot propose a new Qualified Allocation Plan in contemplation of receiving applications in March 2009 according to its traditional schedule. First, an unsuccessful applicant in the 2008 Annual Application Round filed a lawsuit challenging the 2008 QAP as an invalid state administrative rule. Although ADOH believed that it had a good chance to prevail in the lawsuit, a decision of the court in favor of the challenger would have called into question all allocations of tax credits under the 2008 QAP as well as any future allocations under a QAP adopted as ADOH has traditionally done. In order to protect the 2008 projects that have received tax credits, ADOH negotiated a dismissal of the lawsuit in a way that would permit ADOH to go forward with a resubmittal round to facilitate development of as many projects as possible in the near term.

Considering the vulnerability of the LIHTC program to a rules challenge, ADOH concluded that it would be unwise to accept applications for new projects while ADOH takes steps to revise and protect the program from similar challenges in the future.

Second, as stated in the Notice, going forward with a resubmittal round at this time is the appropriate response to other current unique circumstances. Current market conditions, combined with recent amendments to the LIHTC program through the *Housing and Economic Recovery Act of 2008*, Pub.L. 110-289 ("HERA"), also favor taking additional time to substantially rework the Qualified Allocation Plan.

Important Notice! ADOH intends to substantially revise the Qualified Allocation Plan. Prospective applicants should not assume that any element of 2008 Qualified Allocation Plan that is not mandated by I.R.C. § 42 as amended by the HERA will be part of a subsequent Qualified Allocation Plan. Prospective applicants who make business decisions including the purchase of land for a project on the basis of any provision of the 2008 QAP do so at their own risk.

3. **The 2008 Resubmittal Allocation Round favors projects that were not good enough to receive an allocation in the 2008 Annual Allocation Round over new and better projects.**

Response. ADOH disagrees with the comment. Projects submitted in the 2008 Resubmittal Allocation Round must meet threshold, eligibility, and underwriting requirements before they can compete for a reservation of tax credits. No undeserving application will receive tax credits. Furthermore, returning projects make up a substantial percentage of all projects competing for

tax credits in any allocation round. It is commonplace for an application to be submitted numerous times before it qualifies for a reservation of tax credits.

In addition, ADOH would like to take this opportunity to dispel the notion that a higher scoring project is necessarily a better project than a lower scoring project. Project point categories are incentives to facilitate development of projects that are more difficult or more expensive to build and operate. Developers chasing points take the risk that their projects may fail to demonstrate financial feasibility. ADOH reminds applicants that only one project failed to receive tax credits on the basis of points in the 2008 Annual Allocation Round. Almost all projects that met threshold, eligibility, and underwriting requirements received tax credits regardless of score in the 2008 Annual Allocation Round.

As provided in the August 15, 2008 Notice, in the event that there are sufficient unallocated credits available in 2009, ADOH will consider an open competitive round under a newly adopted and substantially revised QAP.

4. ADOH is allowing resubmittal of applications to correct an error in the 2008 Annual Allocation.

Response. This statement is not accurate. ADOH stands by its determinations for the 2008 Annual Allocation Round. The 2008 Resubmittal Allocation Round is not intended to correct any errors. Based on market conditions, and the HERA amendments, ADOH concluded that a resubmittal round was the most prudent course of action at this time.

5. How can ADOH go forward with a resubmittal round without a public hearing?

Response. The 2008 Resubmittal Allocation Round is going forward under the 2008 Qualified Allocation Plan which was vetted through public fora as well as a public hearing. I.R.C. § 42(m)(1)(A)(iv) permits the Department to make changes to an effective QAP through notice that is generally available to the public, which ADOH accomplished through the August 15, 2008 Notice of Changes to 2008 Qualified Allocation Plan.

6. What ADOH gap financing is available for projects submitting for the 2008 Resubmittal Allocation Round?

Response. As the Department stated in advance of the 2008 Annual Allocation Round, it has very limited resources available for gap financing. The Department suggests that applicants propose projects that are financially feasible without ADOH gap financing.

7. What is the purpose of the \$3.0 million of unallocated credit ceiling?

Response. ADOH will not allocate \$3.0 million of the 2009 allocation ceiling in the 2008 Resubmittal Allocation Round so that funds will be available for the Supplemental Set-aside and as a contingency for determinations on appeal.

8. How come ADOH will not allocate tax credits in the 2008 Resubmittal Allocation Round according to set-asides?

Response. ADOH is administering the 2008 Resubmittal Allocation Round under the 2008 QAP. With the exception of the Urban Set-aside, ADOH has already allocated tax credits according to set-asides under the 2008 QAP. Also, because the tax credit program is becoming increasingly litigious, ADOH finds that it must reserve a substantial portion of the 2009 annual allocation ceiling as a contingency for determinations on appeal. Under the circumstances, ADOH cannot reserve tax credits according to the set-asides described in the 2008 QAP.

9. **Why must applications meet the eligibility requirements for the set-aside category chosen in the 2008 Annual Allocation Round even though tax credits will not be allocated according to the set-asides described in the 2008 QAP?**

Response. The 2008 Resubmittal Allocation Round is a resubmittal round. As explained in the August 15, 2008 Notice, the intent is that opportunity for resubmittal be limited to projects with characteristics that are materially and substantially identical to the project described in the application for 2008 Annual Allocation Round. Accordingly, projects that applied for tax credits in the 2008 Annual Allocation Round in a particular set-aside must continue to meet the requirements of that set-aside in the 2008 Resubmittal Allocation Round.

10. **Refusing to allocate tax credits through set-aside categories disfavors special needs projects that do not score as high as family projects.**

Response. ADOH disagrees. First, it goes without saying that ADOH published the detailed August 15, 2008 Notice so that 2008 Annual Allocation Round applicants can evaluate the merits of correcting and resubmitting their applications for the 2008 Resubmittal Allocation Round.

When making your evaluation, consider that depending on the characteristics of a particular application, applying for tax credits through a set-aside category may not be the best strategy for receiving tax credits. For example, many projects that qualify for the tribal set-aside elect to compete in the rural set-aside.

Although twenty points are available to “family projects”, qualifying projects must propose a unit mix containing at least 40% three- and four-bedroom units with two bathrooms. Given the difficulty in developing a project that qualifies for points as a family project, it is highly unlikely that there will be so many applications for family projects that a special needs project would have no chance to compete for tax credits. Also, keep in mind that special needs projects are also eligible for ten points.

Comments about eligibility for 9% credits

11. **What should an applicant submit to claim the full 9% credit?**

Response. The full 9% credit will be reserved to all eligible applications. As described in the Notice, applicants for the full 9% credit should follow the applicable procedures for applying for credits through the Supplemental Set-aside, 2008 QAP section 2.8(C). Specifically, applicants should submit a cover letter explaining the claim for 9% credits along with an updated 2008 QAP Form 3, and along with an application fee of \$500.00.

12. What are the eligibility criteria for 9% credits?

Response. The total amount of tax credits recalculated at the full 9% rate cannot exceed the maximum credit limit as provided in the relevant Qualified Allocation Plan (\$900,000 in 2007, and \$1,000,000 for 2008). The amount of tax credits cannot exceed qualified eligible basis. Applicants who exercised their I.R.C. § 42(b) election to lock in the credit rate are not eligible for 9% credits. With the exception of projects in which “low interest” federal loans have been excluded from eligible basis, projects for which loan documents have been executed but have not been placed in service are not eligible for the full 9% credit.

13. How come projects that locked in an applicable fraction are not eligible to claim the full 9% credit?

Response. It is not clear that the HERA changes establishing the temporary full 9% credit trumps a taxpayer’s decision to lock in a credit amount pursuant to I.R.C. § 42(b) through the carryover agreement. ADOH believes that the mandatory language in Section 3004(b) of the HERA applies to the Internal Revenue Service and not to allocating agencies. ADOH believes that the statutory changes do not nullify the provisions of a valid contract. ADOH’s position is consistent with the 2008 QAP. ADOH may reconsider its position upon guidance from the IRS. In any event, ADOH may consider granting the full 9% credit to projects that can demonstrate the need for the tax credits in the 2009 Supplemental Set-aside.

Comments about review of applications

14. Will ADOH confirm that a project is eligible for points claimed that were not identified as points disallowed in the July 25, 2008 final determination letter?

Response. ADOH will not confirm or comment on the eligibility, scoring, or underwriting status of a specific application before it is submitted to the Department. It is the responsibility of the applicant to make sure that the application complies with all threshold, eligibility, underwriting, and point requirements and criteria. Reservation of tax credits to a project will be through the process described in the Notice of Changes to the 2008 QAP.

15. Will ADOH confirm that a project submitting for the 2008 Resubmittal Allocation Round is eligible for Project Readiness points?

Response. ADOH cannot confirm that a project is “eligible” for readiness points. As explained in Section 6(c) of the August 15, 2008 Notice of Changes to the 2008 QAP, the 2008 Annual Allocation Round shall be considered by the Department as “the previous allocation round” for the purpose of claims of project readiness points in the 2008 Resubmittal Allocation Round. See QAP Section 2.9(F)(16).

16. What documents must be updated for Tab 29, Project Readiness points?

Response. As for updating information contained in Tab 29, Readiness Points, the notice expressly lists what information need not be updated. Applicants should be careful to update all information that is not expressly exempt from updating requirements as provided by the August 15, 2008 Notice.

17. **Will ADOH provide a revised form of legal opinion letter for the 2008 Resubmittal Allocation Round that reflects the HERA changes?**

Response. No. ADOH will consider the opinion of legal counsel as to whether the project described in an application submitted in the 2008 Resubmittal Allocation Round describes a project that conforms to the requirements of I.R.C. Section 42 as amended by the HERA. ADOH does not intend to revise the form of Legal Opinion Letter for the recent changes to the LIHTC program. Legal counsel are free to deviate from the form of legal opinion letter if they believe that representations in the letter are inconsistent with the I.R.C. Section 42 as amended by the HERA.

18. **Section 8(d)(i) of the Notice provides, “Proposals for residential development costs in excess of 125.0% but less than 200.0% of the Department of HUD’s most recent 221(d)(3) base mortgage limit must be justified with an appropriate narrative explanation as provided in QAP Section 7.1.” Please provide clarification on what the Department needs by way of a “narrative explanation.”**

Response. As stated in QAP Section 7.1, ADOH leverages tax credits to facilitate as many affordable units as possible, so project costs must be reasonable. An applicant proposing a project with costs that exceed the 221(d)(3)-based limit by more than 25% must explain why tax credits should be reserved to a project with high per-unit project construction costs. If the explanation is not sufficient, ADOH will deduct the excess costs from eligible basis. ADOH will allow project costs that exceed the 221(d)(3)-based limit from 25% to 100% for unusual and well documented projects if the cost is supported by an appropriate narrative explanation of how characteristics of the project justify the higher per-unit project cost. The narrative should describe the specific high-cost items in the total project budget, and provide justifications for each.

The specific justifications for higher project costs will depend on the project. Examples of project characteristics that may be considered by ADOH under the circumstances of a particular application include but are not limited to: the types of projects listed in the second paragraph of 2008 QAP Section 7.1; projects with average affordable unit to bedroom ratios above 2.25; construction and material costs associated with historical preservation projects; construction and material costs attributable to special needs amenities; projects located in remote areas with unusually high labor and material costs; and, projects with high land acquisition costs that must demonstrate that the project substantially satisfies specific and identifiable housing needs.

ADOH in its discretion may refuse to approve projects with per-unit costs that exceed the HUD 221(d)(3)-based limit by more than 100%. Only in extraordinary and well documented cases will ADOH consider an application proposing per unit costs that exceed the HUD 221(d)(3)-based limit by more than 100%. Such projects must target and address specific and identifiable, critical housing needs.

19. **Please confirm the amount of the 221(d)(3) mortgage limitation by providing the source of the current HUD 221(d)(3) mortgage limits.**

Response. The reference to the HUD 221(d)(3) mortgage limits in Section 7.1 of the 2008 QAP means the Basic Statutory Mortgage Limits for Section 221(d)(3) Moderate Income Housing as reported in the *Annual Indexing of Basic Statutory Mortgage Limits for Multifamily Housing Programs*, 71 Fed. Reg. 25855, May 2, 2006. However, HUD has revised the Section 221(d)(3) mortgage limits since the 2008 QAP was adopted in December 2007. See, *Annual Indexing of Basic Statutory*

Mortgage Limits for Multifamily Housing Programs, 73 Fed. Reg. 7316, February 7, 2008. Pursuant to Section 7.1 of the QAP and the February 7, 2008 HUD Notice, the per-unit cost limit shall be \$100,672 per unit for the 2008 Resubmittal Allocation Round and not the \$94,795 amount identified in the 2008 QAP.

For the purposes of the 2008 Resubmittal Allocation Round, an amount in excess of 125% of the 221(d)(3)-base mortgage limit means \$125,163 per-unit project cost, 200% in excess of the 221(d)(3)-based limit means \$201,344 per-unit project cost.

20. **Although paragraph 6(a) of the Notice states that for certain point categories ADOH shall not credit any application with a claim for points under QAP Section 2.9(F) that were not claimed in the 2008 Annual Allocation Round, it is unclear how this prohibition affects an applicant's options if it did previously apply for points under the listed categories. In other words, can an applicant apply for more points under a category which was included in the original application?**

Response. The prohibition against claiming points that were not claimed in the 2008 Annual Allocation Round described in ¶6(a) of the Notice was intended to support the general requirement that applications for the 2008 Resubmittal Allocation Round describe projects with identical project characteristics to the project described in the 2008 Annual Allocation Round application. Applicants may apply for more or less points in a category than claimed in the 2008 Annual Allocation Round application as long as the project characteristics described on page 4 of Form 3 remain unchanged.

21. **What do you mean by sources meeting uses?**

Response. An application must describe a project that is financially feasible throughout the compliance period. One aspect of financial feasibility is that the sources of funding reasonably exceed the uses of funding for the project. Project cashflows must be sufficient to repay all operating expenses of the project, hard-loan debt service, soft-loan debt service, deferred-developer-fee debt service and all subordinate cashflow obligations such as syndicator management fees and incentive fees.

ADOH expects that project cashflows be sufficient to meet soft-loan debt service for cashflow loans. In extraordinary circumstances, ADOH will consider the equity available at the end of the compliance period as a means to repay unpaid loan obligations. In no event will ADOH reserve tax credits to a project in which a conservative estimate of the equity available at the end of the compliance period is less than the unpaid principle and interest of all financial obligations of the project.

Applications must be supported by commitment letters for each source of funding. ADOH may favor applications that demonstrate firm commitments for sources of funding.

22. **How does ADOH make waiver determinations?**

Response. ADOH suggests that applicants limit waiver requests to issues for which such requests are expressly invited by the 2008 QAP. As provided in QAP Section 2.6(B)(2)(4):

Waiver of Requirements - Applicants may request that ADOH waive specific requirements of this QAP. Waiver requests shall be supported by a detailed narrative explanation sufficient to permit ADOH to determine: 1) waiver of the requirement is consistent with Section 42 of the Internal Revenue Code and its implementing regulations, and IRS guidance, 2) that waiver of the requirement accomplishes the purposes and objectives of this QAP; and, 3) that the waiver will not adversely affect the feasibility of the project.

Waiver requests touching a critical competitive component of the program such as firm commitments for sources of funds or relaxation of debt service requirements are unlikely to be granted. ADOH's response to a waiver request may be determined from the decision on an application.

23. Why does paragraph 7(k) of the Notice require that the legal opinion letter be inserted at Tab 9?

Response. The reference to Tab 9 is an error. The legal opinion letter should be inserted at Tab 4. See 2008 QAP Section 2.7(B)(9).

24. Need applicants update status or conditions of title reports?

Response. Yes, as provided by paragraph 7(a) of the Notice, all documents submitted with an application must be updated unless they are specifically exempted as provided in paragraph 7. So, status or commitments for title reports must be updated.

25. How can an applicant be sure that a letter updating a document submitted in the March 2008 Annual Allocation Round contains any deficiencies?

Response. As stated in advance of the March 2008 Annual Allocation Round, the Department will not pass on the sufficiency of any particular element of a tax credit application in advance of submittal of the application. It is impossible for the Department to judge the sufficiency of any particular submittal outside the context of a complete application.

Consistent with the Notice, and based on reasonableness in the context of a particular submittal, the Department will accept an "update" letter in lieu of a new original. Please note however, that a blanket update letter may not be sufficient to establish a claim for points or compliance with threshold, eligibility, or underwriting requirements, if other information in the application or otherwise available to the Department raises a question of whether specific information in the original submittal has materially and substantially changed between the 2008 Annual Allocation Round and the 2008 Resubmittal Allocation Round.

26. How should an applicant update a document submitted in the March 2008 Annual Allocation Round?

Response. As stated in the Notice, an application for the 2008 Resubmittal Allocation Round should be complete and should stand on its own. If an applicant chooses to submit a blanket or generic update letter in 2008 Resubmittal Allocation Round lieu of a complete, revised, original document, then the applicant should include the original document that was included in the March 2008 Application with the update letter at the appropriate tab.

Comments and Responses Questions added after Monday, September 8, 2008

27. **Should applicants submit Forms 8-2 Authorization for Release of Information even if they do not have tax credit projects in other states?**

Response. Yes.

28. **Does the developer have to file a Form 8-2?**

A Form 8-2, Authorization for Release of Information is required for each state, including Arizona, in which a project sponsor “has an ownership interest in a tax credit assisted project.” Forms 8-2 must also be submitted for the property management company that is listed in the application.

In most cases the developer is a project sponsor that owns or has an equity position in the general partner of the limited partnership that owns the tax credit project. In such cases a developer should complete a Form 8-2 for each state where there is located a tax credit assisted project in which the developer has an ownership interest. The developer should check the “owner” box on Form 8-2.

Likewise, if the developer controls one or more entities that manage tax credit assisted properties, then the developer should complete a Form 8-2 for each state in where there is located a tax credit assisted project in which the property managing entity is controlled by the developer. In such cases the developer should check the “management company” box on Form 8-2.

It would be helpful to the Department if an applicant that claims points for development team experience fully explains why a developer that is listed as a development team member has not filed a Form 8-2. Care should be taken at all times to inform the Department that a particular document has not been omitted in error.

If an applicant is unsure whether a developer has an ownership interest in a tax credit assisted project, then ADOH will accept a Form 8-2 in which the word “owner” appearing after a check box is crossed out and replaced by the word “developer.”

29. **Are the application fees and reservation fees included in the calculation of whether a project meets the 221(d)(3)-based cost limit described in QAP Section 7.1?**

Response. Yes. The Department calculates the 221(d)(3)-based cost limit by dividing the total in the “Development Cost” column of the Form 3 project budget by the total number of project units. You will see that the Development Cost column includes a line item for “Department Fees.” “Department Fees” include application fees, the reservation fee, and the allocation fee.

30. **May an applicant who proposed supportive services through a particular provider in the 2008 Annual Allocation Round propose a new provider in the 2008 Resubmittal Allocation Round?**

Response. Paragraph 7(n) of the Notice provides that applicants may resubmit copies of the materials included in Tabs 13 and 14. So applicants submitting applications proposing the same supportive services provider need not update those documents.

However, the Department strongly suggests that applicants avoid submitting resubmittal applications that propose a new supportive service provider. The resubmittal round makes no provision for obtaining an updated supportive services provider approval letter from the Department. Given the compressed time frame for the resubmittal round the Department is unable to consider new service providers before the application deadline. Applications proposing a supportive services provider that was not previously approved by the Department for the type of services contemplated by the application may be denied.

31. Is it acceptable to leave tab sections blank because the relevant information has not changed since the application was submitted for the 2008 Annual Allocation Round on March 17, 2008?

Response. No. To facilitate the Department's review of the application, applicants should submit a complete application in the 2008 Resubmittal Allocation Round. ADOH Information Bulletin 16-08, the August 15, 2008 Notice of Changes to the 2008 Qualified Allocation Plan, Paragraph 7(a) requires that resubmittal applicants submit a "complete, corrected, and updated application to ADOH." In addition, paragraph 7(e) of the Notice requires that new originals of all documents requiring a signature must be submitted except when the Notice specifically permits submittal of a copy of the document that was submitted in the 2008 Annual Allocation Round.

The Department may deny an application for resubmittal tax credits if a tab space is left blank. Applicants should always be careful to explain any instance in which the material included in a tab space deviates from what is required by the 2008 QAP and the Notice.