From: Joel Rubenzahl
Sent: Thursday, May 07, 2009 4:40 PM
To: Lucas, Eric
Subject: Section 1602

Thanks for speaking with me about the problems with Treasury guidance in the implementation of Section 1602. As I indicated on the phone, I was the person who brought the idea of the exchange to Congressman Rangel and Congressman Frank and worked closely with both of their offices on the creation of the exchange program. Here are my comments:

1. Section 1602(d) states that funds "not used to make subawards under this section before January 1 2011, shall be returned..." The language in the Grantee Terms and Conditions 4© states that the grantee may not disburse grant funds after 12/31/2010. These are materially different statements.
Making an award is not the same as disbursing the funds. Between the time of award and receipt of funds, owners will need to complete the predevelopment process and close all of the financing required to build the project. This typically takes several months at a minimum. In addition, projects receiving a subaward in 2009 for a credit ceiling project is not required to place the project in service until 12/31/2011. The guidance effectively makes the placed-in-service date several months prior to 12/31/2010. Even a project finished by 12/31/2010 may not be eligible to receive the balance of any 1602 funding remaining. There will likely not yet be a cost certification justifying any balance of funds held back pending the cost certification.

2. Section 1602© (I) states: "A State housing credit agency receiving a grant under this section shall use such grant to make subawards to finance the construction..."

In my mind, "finance" means loan or grant. Banks and government agencies finance all sorts of things by making loans. A subaward doesn't mean grant only, just the idea that there is a subaward entity that ultimately receives funds to construct the LIHTC project.

The repercussions of the Treasury interpretation are numerous. For example, in California, it appears that the exchange grant will trigger state prevailing wages. In California that means an increase in cost of approximately 20% to 30%. I know in some other states that may not be the case.

A grant from Treasury may trigger state income taxation. That will dramatically reduce the effectiveness of the entire exchange program.

Enforcement of State requirements are much easier if they are a lender and have a deed of trust. Without a loan structure, enforcement becomes much more difficult. There are other negative consequences.

In addition, I have concerns with the implementation of the TCAP program. I have the following comments:

1. In the yesterday's webcast it was stated that a project that does not hold a credit allocation is not eligible for TCAP funds. In the California regulations already adopted, projects seeking to exchange credits for cash in lieu of investor equity (which could include TCAP or 1602 cash) must return their credits in order to compete. This was designed to discourage developers from trying to get the exchange but if unsuccessful, going back to seeking an investor. HUD should amend its position to allow projects that returned credit for the purpose of seeking TCAP or 1602 cash pursuant to the QAP, be allowed to receive TCAP and/or 1602 cash. If required to meet the requirements of the webcast, states will allow projects to return all of the credit except for $i so they still have credits and therefore are eligible for the TCAP funds.

2. HUD published guidance and yesterday's webcast confirmed that TCAP can only be used for basis eligible items. This means that marketing, interest post completion, land acquisition, deposits to reserves, some off-site costs, audit, syndication costs, mortgage financing costs, allocating agency fees, and others are not eligible for TCAP funds. This is completely at odds with the typical use of investor equity which can be used for anything from predevelopment expenses through deposits to reserves. I don't see any rationale for HUD's position. The effect will be to significantly increase administrative costs and probably make many projects infeasible because there may not be another source of funds to pay the non basis eligible items.

3. Finally, the webcast indicated that TCAP funds must be used as gap financing and can not completely replace equity. This is very puzzling because TCAP and exchange funds should be fungible. We had anticipated that some exchange projects would have already had HOME or CDBG or other federal financing triggering federal requirements such as NEPA, federal relocation, 504 disabled rules, etc. These projects would have been given TCAP funds and the exchange funds could have gone as gap financing to projects not meeting these additional federal requirements. HUD seems to want to preclude this flexibility. The result will be more expensive projects and more administrative costs to implement the additional federal requirements on many more projects.

Thank you for taking the time to consider these comments. I would be happy to continue our dialogue if you need any additional information or have any questions.

Sincerely,

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