

**MULTIFAMILY FINANCE PRODUCTION DIVISION**

**BOARD ACTION REQUEST**

**March 12, 2009**

**Action Item**

Presentation, Discussion and Possible Approval of policy regarding use of the American Recovery and Reinvestment Act (ARRA) 2009 Exchange Program and HOME Partnership Tax Credit Gap Financing

**Requested Action**

Establish policy or provide direction for the use of ARRA programs with the Housing Tax Credit properties.

**Background**

On February 17<sup>th</sup> of this year, President Obama signed into law H.R. 1 the American Recovery and Reinvestment Act of 2009 (the "Act"). The Act has many elements that may impact the workings of TDHCA and provide additional funding. While the acceptance of the stimulus package is still being discussed between Governor Perry, the Legislature, and the public, TDHCA has reviewed the bill for potential program developments that may be required.

This Board item deals with two potentially related items involving the Housing Tax Credit Program, Section 1602 of the Act, commonly referred to as the Exchange Program, and Title IV Division A the Home Investment Partnership Program, commonly referred to as the Tax Credit Assistance Program, or TCAP. To place this new Act and these new programs in context it is important to remember that the Board already has taken extraordinary measures to attempt to stabilize 2007 and 2008 9% transactions financially by providing a 10% increase in credit allocation last November. This increase in credits was ineffective in strengthening many of the transactions due to the more significant decline in demand for tax credits nationwide and the broad stalling of financial markets and the national economy.

**The Tax Credit Exchange Program**

The exchange program permits State Housing Finance Agencies to exchange annual state credit ceiling for cash (at eight-five cents on the dollar) from the Treasury that can then be offered to development owners to supplement or replace tax credit and/or other sources of equity in the financing structure. Staff currently estimates the maximum available exchange to be approximately \$350,000,000. However, this amount could increase with additional return of prior year credits. (See the attached exhibit reflecting the total current status of tax credits available to the State of Texas for 2009.) The additional Hurricane Ike credits received in 2008 and 2009 and 4% tax credits associated with tax exempt bonds are not eligible to be exchanged though developments with those sources of funds may be eligible to receive supplemental assistance from the program. The final amount of any eligible credits to be exchanged is a discretionary item for the Board to determine. If the credits are exchanged, this would provide the Board a way to assure that a significant portion of the funding of a development is made in

cash rather than credits that would have to be sold in an unstable market. The certainty of a cash allocation would result in development with a fixed known amount of current dollars. The Department's General Counsel issued a legal opinion, on February 24, 2009, stating that due to state law only applicants that have applications in place for the 2009 application round would be eligible for this portion of the exchange program (a copy of the legal determination is included with this presentation). The 2009 application round deadline was February 27, 2009. All exchange funds must be used or returned by January 1, 2011. The enabling legislation for the exchange requires that Department develop a plan to ensure asset management using internal or external sources and establish a recapture mechanism for these funds if a building does not initially qualify or subsequently ceases to meet the requirements of the tax credit program. While potentially increasing the Department's liability, utilizing the exchange program in the current market environment will provide more affordable units than can be delivered in the coming year if no credits are exchanged as shown in the following example:

(\$52,589,636)	All Tax Credits	Maximum Exchange	Remaining Credits
% of 2009 Regular Cycle Funds	100%	40%	60%
10 Year value of the Credit	\$525,896,360	\$210,358,544	\$315,537,816
X Current Syndication or Exchange Rate	\$0.70/\$1.00	\$0.85/\$1.00	\$0.70/\$1.00
= Proceeds from Syndication or Exchange	\$368,127,452	\$178,804,762	\$220,876,471
÷ Estimated Subsidy per Unit	\$79,000	\$79,000	\$79,000
Estimated Number of Units	4,660	2,263	2,796
Total Estimated Units	4,660	5,059	

### The Tax Credit Assistance Program

The Tax Credit Assistance Program (TCAP) is different from the exchange program. Assuming the Governor accepts the assistance provided for in the Act, these additional funds will come to the Department under the Act in the amount of \$148,354,769. These funds may only be used in assisting existing 2007, 2008, and new 2009 tax credit developments that have a shortfall, including the difference from changes in underwriting giving effect to lowered bond credit purchase price. These funds are being distributed only through the state Housing Finance Agencies rather than HOME participating jurisdictions and therefore may be used in all areas of Texas including participating jurisdictions and non-participating jurisdictions. The Department's General Counsel has issued an opinion that this program is not subject to the 95/5 rule for HOME funds but must be distributed according to the distribution pattern in the QAP. In this case, these funds will be regionally allocated with at risk and rural set asides in place. The Department will need to develop a new competitive

process for distribution of these funds. The Department is still awaiting word from the HUD Secretary as to the final guidelines and requirements of the program. However, the Secretary has said these are not traditional HOME funds and many, if not most, HOME requirements are not anticipated to apply.

In both programs, staff believes Davis Bacon (labor standards), fair housing, affirmative marketing, and environmental clearance review apply. Also both programs require a new asset management responsibility for the Department that may be operated either internally or externally to ensure long term viability of each development.

A public roundtable has held on March 2, 2009, to solicit comment and suggestions of how the Department should use the funds provided through the Act. The general and most frequent comment was the difficulty of syndication in rural Texas. This was followed by the need to assist the 2007 and 2008 developments that were previously awarded credits. Other comments indicated that developments proposing rehabilitation were also difficult to syndicate. Some suggested that there would be other urban deals that would not be able to be syndicated either. Three syndicators represented at the roundtable reinforced the comments about the difficulties of rural transactions and limited investor interest in rural development. In addition, they supported the use of the exchange program in rural areas and for rehabilitation developments. They all agreed to participate with the Department and the development teams to work through the financing structures on individual transactions. Concerns were voiced about the Department's establishment of a mechanism for recapture in the event of non-compliance. There were comments made in support and opposition to modifying the underwriting rules. There was also comment made to ensure that the Ike credits that were swapped with regular credits last year and carried forward to 2009, continue to be dedicated to the Ike impacted areas and separate from the regional pool if they are exchanged for cash in the exchange program. In summary, there appears to be need with the rural, rehabilitation and 2007/2008 developments.

In order to move forward with the 2009 competitive application round and assist deals quickly, staff will be developing additional guidelines to bring forward for consideration at the April Board meeting, however to do so there are a number of basic direction issues that should be addressed today. Staff has already begun the process of evaluating the 2009 applications which have been submitted without much or any foreknowledge of the two new program options provided in the Act. To the extent that the Board sets policy to utilize either or both programs and the State accepts the programs under the Act, the degree to which the programs will be utilized must be resolved to allow Staff to prepare adequately and underwrite the deals based on any revised deal structure. If the exchange funds are used, the applicants need to know in what structure they will be used so that they can provide the appropriate information (i.e. sources and uses of funds, revised commitment letters, etc.) so that any necessary prioritization changes or changes to the financial structure can be solidified. A chart reflecting some of the key aspects for the two programs is attached.

#### Combinations of the two programs

The programs may be used in combination or separately. Staff has identified at least five different ways that Exchange Funds and Tax Credit Assistance Program (TCAP) funds could be utilized on any particular property.

- Option One: Exchange Funds replacing existing Housing Tax Credits entirely
- Option Two: Exchange Funds plus all or a portion of existing Housing Tax Credits
- Option Three: Exchange Funds plus all or a portion of housing tax credits plus TCAP
- Option Four: Exchange Funds replacing HTCs entirely plus TCAP
- Option Five: All or a portion of existing Housing Tax Credits plus TCAP

While it may be difficult for the Board to determine what level of investment will help make a deal viable and what level will simply provide the limited partner the opportunity to increase yield, requiring a higher syndication price as a condition of receiving blended funds may be prudent requirement.

If the Board chooses to utilize these provisions in ARRA to exchange credits or provide supplemental TCAP funding, these considerations of long term responsibility verses front end uncertainty will be important considerations. These considerations will need to be made in conjunction with other questions about whether blended transactions may even be possible in areas of the state where investor interest is extremely limited and whether there are other methods of involving or engaging the syndicator community in these transactions.

### **Initial Policy Decisions Needed**

1. Do we utilize the exchange program or the TCAP and if so to what levels of funding does the State want to access and what levels of funding should the Department allow for specific developments?

Accessing the maximum funds for both programs would potentially lead to the development of the most units of affordable housing in the state of Texas.

2. Should the Department provide grants or loans or become an equity investor in the developments?

- Grant: Department could provide a grant but retain some form of performance structure requirement that allows the department to sue either the developer in a recourse type situation or the property for non-performance. This may also be accomplished with a performance bond but such a bond may be cost prohibitive.
- Loan: Deferred Forgivable Loan structure would place the funds in the deal and allow a monitoring through the 15 year period under a deed of trust that would allow us to foreclose and sell the property (depending on lien position and net value of the property at the time of sale) to recapture funds.
- Equity Owner: With the funds placed in the deal, the Department takes an ownership position that would provide the ability to distribute profits, loses and depreciation as well as control the sale of the property. Some elevated risk and some question as to whether the state can be in a partnership. The partnership could be done with two or three parties if a syndicator is in the limited partnership.

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### 3. Where or how to distribute the exchange funds.

- Even distribution: While an overall allocation in accordance with the regional allocation formula (RAF) is statutorily required, the blind use of the RAF to distribute these funds evenly across the State would be fair and consistent and eliminate potential judgment in the allocation.
- Impaired Market Distribution: There was some indication at the round table from syndicators and developers that there was little to no market for rural credits at any price. Also, there was discussion that there was not much of a market for tax credits involving rehab transactions unless they were doing deep rehab and generally in the major markets. Thus a determination on the lack of a market exists could be made while still ensuring that funds overall are regional allocated.

### Other considerations

- Using exchange or TCAP for additional support for 2007 transactions still in the program (and not requiring a placed in service extension due to disaster delays) may be suspect. Owners and developers already received potential additional credits in last November's Board action and moved forward with a deal structure that presumably was locked in. These transactions must be completed by the end of this year and therefore should be well underway. Development risks and gap amounts were determined and accepted. Staff has no evidence that additional increases in costs have materialized and it is likely that costs will be stable if not receding over the course of the next year. Additional soft financing may be requested but will only serve to allow a retrade of the deal and or a reduction of previously acceptable level of deferred developer fee.
- Using TCAP in conjunction with exchange funds may be inadvisable. Since the funds can be used in similar ways structuring them to do the same thing and then layering them on top of each other only unnecessarily adds to the complexity of the transaction and potentially overlapping regulatory requirements.
- Should exchange funds be focused on the most distressed tax credit markets (rural, rehab, and small projects) in a full replacement of existing tax credits?

## Current Tax Credit Allocation And Maximum Exchange Amounts

	Total Allocation	Maximum Exchange	Remaining Credits
State Annual Credit Ceiling* (Based On Population)	\$ 47,808,760		
H.R. 3221 Addition Credit* (HERA Credits)	\$ 4,780,876		
National Pool (To Be Determined)			
Total Regular Allocation Credits (Exchange 40% / Credit 60%)	<u>\$ 52,589,636</u>	\$ 21,035,854	\$ 31,553,782
2009 Ike Credits* (Not Eligible For Exchange)	\$ 14,906,160		\$ 14,906,160
2008 Allocation Carried Forward to 2009 (Exchange 100%)	\$ 16,639,664	\$ 16,639,664	
Returned Credits Thus Far In 2009 (Exchange 100%)	<u>\$ 3,624,148</u>	<u>\$ 3,624,148</u>	
Total	\$ 87,759,608	\$ 41,299,666	\$ 46,459,942
		X 10	
		<u>\$ 412,996,664</u>	
		X .85	
Total Credit/\$ Value Of Exchange Available	<u>\$ 87,759,608</u>	<u>\$ 351,047,164</u>	<u>\$ 46,459,942</u>
Ike Area Dedicated*	\$ 29,812,320	\$ 126,702,360	\$ 14,906,160
2009 Credits Forward Committed In November 2008**	\$ 20,294,514		\$ 20,294,514
Remaining Available To Regionally Allocate	\$ 37,652,774	\$ 224,344,801	\$ 11,259,268

\*All Amounts Are Estimated Based On 2008 Population

\*\*Estimated Based Original Requested Amount - Pending Completion Of All Underwriting

**TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS**  
**LEGAL DETERMINATION**

**TO:** Interested parties  
FILE

**FROM:** Kevin Hamby  
General Counsel

**DATE:** February 24, 2009

**RE:** Harmonizing H.R.1 American Recovery and Reinvestment Act of 2009 (ARRA) Subtitle G Section 1602 (The Tax Credit Exchange Program) and Texas Government Code Chapter 2306

**QUESTION PRESENTED:**

How will the above referenced ARRA section apply during the tax credit award process in Texas considering the statutory limitations on the tax credit program?

**SHORT ANSWER:**

Applications submitted in the 2009 Tax Allocation round will be eligible for consideration by the Governing Board for the possible award of grant dollars in exchange for allocated tax credits. Only applications submitted by February 27, 2009 may be considered in this round. No other awards would be available unless following the allocation round there are remaining unexpended funds.

**FACTS:**

The ARRA was passed by Congress and signed into law by President Obama on February 17, 2009. This law contains many provisions designed to stimulate the economy. One section of the bill, Section 1602 of Subtitle G, provided "Grants to States for Low Income Housing Projects in Lieu of Low Income Housing Credit Allocations for 2009." This section is commonly referred to as the "Tax Credit Exchange Program" (hereinafter "Exchange Program"). It provides that a state may, at its discretion, convert for cash from the Federal government, a portion of its returned credits, carry forward credits, and annual allocation of credits under Internal Revenue Code §42, based on the exchange formula set forth in Section 1602 of the ARRA . This program is voluntary and can be used for developments that have credits or developments can be fully funded with the exchanged cash based on the "same manner" and "subject to the same limitations" as the tax credit allocation award method used by the state.

**LEGAL ANALYSIS:**

The tax credit program in Texas is governed by the Texas Government Code Chapter 2306 and 26 USC §42, the IRS Code. Other than providing notice that the section referenced in ARRA §1602(c)(2) of §42(h)(3)(J) does not exist and therefore does not distinguish any of the tax credit allocation decisions referenced in any of the other paragraphs of that section, 26 USC §42 is in

complete harmony with the ARRA and therefore most of this analysis will be devoted to applications of state law and only apply to the State of Texas. The direction provided within the bill that the funds will be distributed in the “same manner” as the credits creates a requirement that a state electing to make an exchange follow the state’s distribution process for making the awards of the grant dollars received in the exchange.

As a short summary of statutory analysis, if statutes can be read in harmony, a federal law will not be read as to preempt or replace state law. The test for this is not whether there was an intent to have a particular course of action taken, but rather whether there is a logical manner in which the two statutes could work together so as to allow both to be given effect. One of the tests for this is whether the Federal statute directs a state to take certain actions. This language is often accompanied by words like “the state shall” take some particular course of action.

In this case when reading the relevant language of the ARRA and holding clarifying conversations with our outside tax credit counsel, Anthony Freedman of Holland and Knight, ARRA §1602 does not appear to be intended to preempt state law. Given this interpretation, the next test would be to determine if the federal and state statute could be read in harmony, thereby effectuating the language of both.

Key provisions of the Texas Government Code Chapter 2306 govern aspects of the implementation of the tax credit program in Texas. For purposes of this discussion, one of the most directed provisions deals with how an application may be considered for an award. The Texas legislature has prescribed hard deadlines that must be met by the Department for awarding tax credits during an allocation round.

The deadlines for the Low Income Housing Tax Credit Application Round are found in Texas Government Code §2306.6724. That section in its entirety impacts the use of the Exchange Program in Texas. It reads:

- Sec. 2306.6724. DEADLINES FOR ALLOCATION OF LOW INCOME HOUSING TAX CREDITS. (a) Not later than September 30 of each year, the department shall prepare and submit to the board for adoption the qualified allocation plan required by federal law for use by the department in setting criteria and priorities for the allocation of tax credits under the low income housing tax credit program.
- (b) The board shall adopt and submit to the governor the qualified allocation plan not later than November 15.
- (c) The governor shall approve, reject, or modify and approve the qualified allocation plan not later than December 1.
- (d) An applicant for a low income housing tax credit to be issued a commitment during the initial allocation cycle in a calendar year must submit an application to the department not later than March 1.
- (e) The board shall review the recommendations of department staff regarding applications and shall issue a list of approved applications each year in accordance with the qualified allocation plan not later than June 30.
- (f) The board shall issue final commitments for allocations of housing tax credits each year in accordance with the qualified allocation plan not later than July 31.

Different discussions have developed on the application of Texas Government Code §2306.6724 to the Exchange Program. One train of thought has dealt with a modification to the Qualified Allocation Plan (QAP) to allow this program to be included within the plan. Two issues arise with this discussion. §2306.6724 (a)–(c) specifies steps that must be completed in the development of the QAP. Each of these dates is a hard date and must be met for the entire application round. There is no provision for amendment of the QAP.

In discussions with staff and the office of the Attorney General, the QAP was amended once during the application round when the Attorney General opined (GA-208) that the QAP had not legally been created. In this case, the state was forced with either enforcing a QAP that had been found in violation of the enabling legislation or to redraft a QAP and ignore procedural guidance on amending the QAP, a Hobson's choice that provided no completely statutory way to proceed and therefore it appears that the substance of the enabling legislation was selected over the procedural guidance found in §2306.6724.

No such conflict exists here. While it might not be an ideal situation, it is possible to make awards under both the substantive and procedural situations following the Code so there is not a statutorily permissible reason to amend the QAP.

In the same manner, subsection (d) can be achieved by awarding either credits or exchanged dollars to applicants who are competing in the existing 2009 application round that have completed an application by the February 27, 2009, deadline required in the QAP and under the Code (last working day prior to the mandatory March 1 of application year deadline). In order to be considered for paragraphs (e) and (f) of Section Texas Government Code 2306.6724, you must have filed an application on or before February 27, 2009.

These are statutory provision that cannot be waived by the TDHCA Governing Board but may only be altered by the legislative enactment.

A second argument is that since this is additional funding, not anticipated by the legislature, that Texas Government Code §2306.6724 should not apply. The legal difficulty with this argument is that this is, in fact, a program that exchanges the state's allocation of tax credits for dollars. Under Texas Government Code §2306.111 and §2306.1115 the state is instructed as to how to distribute its allocated housing tax credits. Neither of these provisions allows TDHCA to "sell the credits" and not provide tax credits, or to reduce the amount of the credits allocated to and available for award under the 2009 Application Round. In effect, the credits are assigned to the state subject to federally mandated set asides and a regional distribution formula. Once assigned in these areas, the deadlines in Texas Government Code §2306.6724 and the scoring in Texas Government Code §2306.6710 are mandatory and binding on the Department and reflected in the Board approved and Governor signed QAP controlling the 2009 application round.

The trading of dollars for credits once allocated under Texas Governemnt Code §2306.111 and §2306.1115 can be read in harmony with the requirements of those sections as there is not a direction that only a certain type of funding may be exchanged for credits. This is also consistent with the Exchange Program, provided the federal test that "efforts have been made to obtain

investment commitments” have been met and the state can determine that “such use will increase the total funds available to build and rehabilitate affordable housing.”

One other question that has arisen is the language found in §2306.6724 that says the March 1 deadline for that application deadline refers to an “initial round.” Exactly what constitutes an “initial round” is unknown since the tax credit program has been oversubscribed and statute requires funding of the approved waiting list with any additional credits available. Since passage of this controlling language in the Texas Government Code, Texas has only carried forward de minimis amounts forward to the next year until the “Ike trade out” of credits in the Ike impacted counties that carried forward into 2009, and therefore only one round has been conducted in Texas. This means that in Texas the initial round has been the only round.

The Office of the Attorney was not asked to endorse this legal determination and has issued no formal or informal opinion on this issue. In preparing this legal determination, the department discussed the application of the Texas Government Code to ARRA §1602 with The Office of the Attorney General in reaching the conclusion made in this memo. There was agreement that no federal preemption existed and the ARRA and the Texas Government Code Chapter 2306 could be read in harmony by requiring that if an Exchange Program purchase of tax credits from the 2009 were approved by the TDHCA Governing Board, it would be only be available to applicants in the 2009 application round that closes February 27, 2009.

**ANSWER:**

If a policy is approved by the Board approving some form of exchange as provided for under ARRA §1602, only applicants in the 2009 Application Round will be eligible for this program. Texas Government Code §2306.111 distributes the 2009 Tax Credit Allocation in required set asides and in conjunction with Texas Government Code §2306.1115, and the selling of tax credits to generate other funds is not a permissible use of the credits that would alter the credit disbursement.

Note that there are other issues that may require legal determinations regarding this program, this determination only attempts to address the issue of who will be eligible for credits/exchange funding if the program is approved by the TDHCA Governing Board.

**TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS**  
**LEGAL DETERMINATION**

**TO:** Interested parties  
FILE

**FROM:** Kevin Hamby  
General Counsel

**DATE:** February 24, 2009

**RE:** Harmonizing H.R.1 American Recovery and Reinvestment Act of 2009 (ARRA) Title XII Captioned HOME Investment Partnerships Program (Gap Financing for Tax Credit Properties) and Texas Government Code Chapter 2306

**QUESTION PRESENTED:**

Does the Texas Government Code §2306.111(c) regarding the 95/5 allocation apply to the funds made available for tax credit properties in ARRA HOME Investment Partnerships Program?

**SHORT ANSWER:**

No. Federal law preempts state law on this issue, and, as specified in ARRA, the funds must be distributed according to the tax credit set asides and regional allocation formula called for under Texas statutes and the QAP.

**FACTS:**

The ARRA was passed by Congress and signed into law by President Obama on February 17, 2009. This law contains many provisions designed to stimulate the economy. One section of the bill, found in Title XII, relates supplemental funds to provide gap financing for tax credit properties being delivered to the local Housing Finance Agencies in charge of tax credits. This section is titled Home Investment Partnerships Program (at pp. H.R. 1-106-107). The funds are delivered based on the Home Investment Partnerships Program (“HOME”) formula, but rather than the usual delivery method, these funds are to be delivered to the State Housing Finance Agency in charge of tax credits. In many states the housing finance agency does not administer the HOME program. Usually, HOME funds are provide to the local HUD office for distribution to participating jurisdictions, and in the case of Texas, a percentage of these are provided to the state for non-participating jurisdictions. This program is new funding not previously available or committed in the Consolidated Plan by the Department. This makes it different than the grant funds made available in §1602 of ARRA, also related to tax credit properties.

**LEGAL ANALYSIS:**

The Texas Government Code in §2306.111 provides that funds under the Cranston-Gonzales national Affordable Housing Act (42 U.S.C. §12704 et seq.) will be provided to the TDHCA for

distribution according to this section. The legislature has directed the allocation of the HOME funds in the following section of the Texas code:

(c) In administering federal housing funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. Section 12701 et seq.), the department shall expend:

- (1) 95 percent of these funds for the benefit of non-participating small cities and rural areas that do not qualify to receive funds under the Cranston-Gonzalez National Affordable Housing Act directly from the United States Department of Housing and Urban Development; and
- (2) five percent of these funds for the benefit of persons with disabilities who live in any area of this state.

(c-1) The following entities are eligible to apply for set-aside funds under Subsection (c):

- (1) nonprofit providers of affordable housing, including community housing development organizations; and
- (2) for-profit providers of affordable housing.

(c-2) In allocating set-aside funds under Subsection (c), the department may not give preference to nonprofit providers of affordable housing, except as required by federal law.

This section is commonly referred to as the “95/5 rule.” This provision requires that 95% of all HOME funds received by the state go to non-participating jurisdictions, which are usually more rural in nature.

The ARRA, however, directs the state on how to spend these funds and removes the discretion and other distribution criteria normally associated with HOME funds. The ARRA states the funds are to be used exclusively for tax credit properties and “each State shall distribute these funds competitively under this heading and **pursuant to their qualified allocation plan** (emphasis added).” This language preempts any other state provisions regarding the distribution of these funds. The ARRA also provides “that projects awarded low income housing tax credits under section 42(h) of the IRC of 1986 in fiscal years 2007, 2008 or 2009 shall be eligible for funding under this heading. . .”

The TDHCA also administers the Low Income Housing Tax Credit program on behalf of the State of Texas. This program is governed by Texas Government Code Chapter 2306. Part of this Chapter requires the development of a Qualified Allocation Plan (“QAP”) or process for awarding tax credits. Plans have been approved in accordance with the statutory requirements and agreed to by the Governor for the years 2007, 2008, and 2009.

The QAP takes into account several statutory requirements for the distribution of funds. Specifically, Texas Government Code §2306.111 states:

(d) The department shall allocate housing funds provided to the state under the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. Section 12701 et seq.), housing trust funds administered by the department under Sections 2306.201-2306.206, and commitments issued under the federal low income housing tax credit program administered by the department under Subchapter DD to all urban areas and rural areas of each uniform state service region based on a formula developed by the department under Section 2306.1115. If the department determines under the formula that an insufficient number of eligible applications for assistance out of funds or credits allocable under this subsection are submitted to the

department from a particular uniform state service region, the department shall use the unused funds or credits allocated to that region for all urban areas and rural areas in other uniform state service regions based on identified need and financial feasibility.

(d-1) In allocating low income housing tax credit commitments under Subchapter DD, the department shall, before applying the regional allocation formula prescribed by Section 2306.1115, set aside for at-risk developments, as defined by Section 2306.6702, not less than the minimum amount of housing tax credits required under Section 2306.6714. Funds or credits are not required to be allocated according to the regional allocation formula under Subsection (d) if:

(1) the funds or credits are reserved for contract-for-deed conversions or for set-asides mandated by state or federal law and each contract-for-deed allocation or set-aside allocation equals not more than 10 percent of the total allocation of funds or credits for the applicable program;

(2) the funds or credits are allocated by the department primarily to serve persons with disabilities; or

(3) the funds are housing trust funds administered by the department under Sections 2306.201-2306.206 that are not otherwise required to be set aside under state or federal law and do not exceed \$3 million during each application cycle.

(d-2) In allocating low income housing tax credit commitments under Subchapter DD, the department shall allocate five percent of the housing tax credits in each application cycle to developments that receive federal financial assistance through the Texas Rural Development Office of the United States Department of Agriculture. Any funds allocated to developments under this subsection that involve rehabilitation must come from the funds set aside for at-risk developments under Section 2306.6714 and any additional funds set aside for those developments under Subsection (d-1). This subsection does not apply to a development financed wholly or partly under Section 538 of the Housing Act of 1949 (42 U.S.C. Section 1490p-2).

(d-3) In allocating low income tax credit commitments under Subchapter DD, the department shall allocate to developments in rural areas 20 percent or more of the housing tax credits in the state in the application cycle, with \$500,000 or more in housing tax credits being reserved for each uniform state service region under this subsection. Any amount of housing tax credits set aside for developments in a rural area in a specific uniform state service region under this subsection that remains after the initial allocation of housing tax credits is available for allocation to developments in any other rural area first, and then is available to developments in urban areas of any uniform state service region.

(e) The department shall include in its annual low income housing plan under Section 2306.0721:

(1) the formula developed by the department under Section 2306.1115 ;and

(2) the allocation targets established under the formula for the urban areas and rural areas of each uniform state service region.

This language requires and the QAP reflects that there is a minimum amount to set aside for at risk properties—including USDA properties and a set aside for rural properties equal to 20% of the total amount or \$500,000 per rural region. All funds should be made available first on the Regional Allocation Formula (formula approved by TDHCA in accordance with Texas Government Code §2306.1115) for the 26 regions, as set forth in the QAP. A statewide collapse

would occur only if the funds are not requested in any one region. It should be noted that before there can be a statewide collapse the rural set aside must still be met if applications are available whereby any rural deal will get funded first out of the rural set aside before a statewide collapse.

**ANSWER:**

Federal law directs that these funds shall be distributed according to the state QAP for the purpose of supporting tax credit properties. The distribution by the QAP formula preempts the distribution method described in Texas Government Code §2306.111(c). Therefore the distribution method, regardless whether these funds are characterized as HOME program funds, must follow the distribution called for in §2306.111(d-1) - (e) and in a similar format to the QAP. This effectively distributes the funds as if they were tax credits rather than HOME funds.

Note that there are other issues that may require legal determinations regarding this program, and this determination only attempts to address the issue of who will be eligible for the supplemental HOME funding if the program is approved by the TDHCA Governing Board.

# Key Attributes Of The Tax Credit Exchange Program And The Tax Credit Assistance Program

## Exchange

## TCAP

<b>Potential Amount of Funds:</b>	\$350,000,000	\$148,000,000
<b>Source of Funds:</b>	Existing Tax Credit Authority Is Returned To The IRS By the State In Exchange For Cash (\$0.85/\$1.00 Of Ten Year Credit) Which granted To The State With Broad Discretionary Use And Recapture Provisions.	New "HOME" Money From HUD granted To The State With Recapture Provisions Unknown At This Time.
<b>Federal Deadlines For Use:</b>	Must Exchange And Allocate By End Of 2009 And Return Any Unused Funds By 1/1/2011.	Must Allocate/Commit 75% By 2/17/2010 Expend 75% By 2/17/2011 And Return Any Unused Funds By 2/17/2012.
<b>Application Deadline For Developer:</b>	February 27, 2009	To Be Determined (TBD)
<b>Eligibility:</b>	Currently Limited by State Statute to Applicants in 2009 Competitive HTC Round.	2007, 2008, 2009 HTC New & Current Applicants.
<b>Distribution of funds:</b>	TBD Subject To 2009 RAF And Forwards Awarded In November Of 2008.	Subject to RAF? With Or Without Considering Forwards?
<b>Prioritizing Funding:</b>	QAP Scoring	New Policy
<b>Federal Requirements of Funds:</b>	All Crosscutting Federal Requirements Including Labor Standards (Davis-Bacon), Environmental, Fair Housing, Affirmative Marketing Apply Regardless Of Development Size. In Addition, New Asset Management Requirements Must Be Established To Ensure Long Term Feasibility Of Developments Funded With These Programs.	
<b>Structure of Financing:</b>	Can Be: Equity With Major or Minor Ownership Control, Grant or Forgivable Loan, Soft Subordinate Loan, Hard Priority Loan Or Any Combination Of These.	