

**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.