



May 18 2009 DRAFT TCAP GUIDANCE FOR PUBLIC COMMENT

**WISCONSIN HOUSING AND ECONOMIC DEVELOPMENT AUTHORITY**

**American Recovery and Reinvestment Act of 2009 (ARRA)**

**LOW INCOME HOUSING TAX CREDIT**

**TAX CREDIT ASSISTANCE PROGRAM FINANCING**

On February 17, 2009 President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA). The new law includes enhancements to the LIHTC program.

The American Recovery and Reinvestment Act included two provisions for Housing Credits:

- \$2.25 billion for the Tax Credit Assistance Program (TCAP) , and
- the ability for agencies to exchange certain allocations for cash from the Treasury (Exchange)

The Wisconsin Housing and Economic Development Authority (WHEDA) will administer distribution of the state's \$35,594,904 in TCAP funding pursuant to these Development Selection Process and Criteria.

WHEDA is required by HUD to publish WHEDA's TCAP guidance for public comment. WHEDA's submittal to HUD for funding approval is due no later than June 3, 2009 but only after the public comment period. WHEDA expects to issue Final TCAP Guidance after HUD approval is received.

**I. Introduction and Program Outline**

WHEDA anticipates receiving funding authority from HUD in the amount of \$35,594,904 to be used as a source of LIHTC gap financing under its TCAP program. It is expected that the TCAP program will address funding gaps created by diminished investor demand for low-income housing tax credits. In this way, the near term goal of creating and retaining jobs is achieved, as well as the long-term benefit of increasing the affordable housing supply.

WHEDA's ability to commit or close TCAP loans will be subject to funding availability and further guidance by HUD. The initial guidance for the application of TCAP funding is provided by HUD at <http://www.hud.gov/recovery/tax-credit.cfm>. WHEDA program guidelines are subject to revision based on changing circumstances including additional federal guidance. WHEDA will announce and publish revisions on WHEDA.com.

WHEDA intends to offer TCAP options to LIHTC participants to enhance development strength and encourage investment from traditional syndicator and investor sources.

The rules or terms herein shall not supersede that of the Section 42 program.

## **II. Evaluation**

### **a. Eligible Uses of Funds**

TCAP funds may be used for capital investment in eligible LIHTC projects. Capital investment means costs that are included in the 'eligible basis' of a project under Section 42 of the IRC. Section 1604 of the ARRA specifically prohibits the use of grant funds for swimming pools.

The TCAP assistance provided to a project is subject to the same limitations (including rent, income, use restrictions and compliance monitoring) as required by WHEDA with respect to an award of LIHTC to a project (i.e., as required under Section 42 of the IRC and its implementing regulations), and all other requirements of the Act.

### **b. Eligible Participants**

Eligible participants are sponsors of rental housing projects that received or simultaneously receive an "award of LIHTCs" under Section 42(h) of the Internal Revenue Code of 1986, as amended, (IRC) (26 U.S.C. 42), during the period from October 1, 2006 to September 30, 2009 (federal fiscal years 2007, 2008 or 2009), and require additional funding to be completed. WHEDA's definition for "award of LIHTCs" is a development with one of the following: 1) an active LIHTC Reservation, 2) a fully executed Carryover Agreement or 3) an executed Tier One Review letter (4% Credits).

### **c. Selection Criteria**

WHEDA expects to prioritize and award TCAP funds to developments based on all of the following criteria:

- Meet the above eligibility requirements
- Projects that will start construction the earliest, as determined by the following "Readiness Criteria": site already owned or under control, zoning status, completed Environmental/Phase I (no outstanding issues), completed engineering and construction drawings, unexpired commitments for construction and/or permanent loan/other funders, bids in place for major line items of construction contract including HVAC, electrical, rough carpentry, excavation and concrete, executed construction contract or building permit in hand.
- Not previously closed with an equity investor
- Projects that are able to secure an equity investment at or above \$.60
- Demonstrate ability to close within 120 days of Commitment
- Demonstrate ability of project completion by February 16, 2012

WHEDA will review each request based on the materials submitted and deny TCAP funding to those, in WHEDA's sole judgment, will be unable to meet the criteria. WHEDA's Executive Director maintains the right to commit TCAP funds due to unforeseen circumstances if such commitment will further the housing priorities stated in WHEDA's 2009-2010 QAP, and is determined to be in the best interests of the citizens of the State of Wisconsin. All TCAP award results will be posted on WHEDA.com and be made available to the public under Wisconsin's Open Records law.

### **d. Application Process**

Eligible Participants may apply to WHEDA the day its “Final TCAP Guidance” is published on WHEDA.com. WHEDA strongly encourages Participants to apply as soon as possible.

Applicants must submit:

- WHEDA Loan Application
- Amount requested
- Revised Sources and Uses
- Detailed cost estimate for Davis Bacon/federal financing compliance
- Phase One Environmental & Screening Questionnaire
- Anticipated closing date
- Anticipated construction and completion schedule
- Letter of Intent from syndicator/investor
- Explanation of the TCAP request in terms of filling the gap caused by syndicator/investor’s LOI as compared to the latest LIHTC application submitted to WHEDA.
- Documentation/Description of Readiness Criteria

### **III. General Requirements**

#### **a. Underwriting Parameters**

All parameters of the most recently accepted LIHTC application shall remain in force, except those noted below. Participants should size and initially request TCAP funds which account for these changes only:

- Minimum credit price of \$0.60
- Costs estimated by applicant, and approved by WHEDA, necessary to satisfy Davis Bacon wages and other federal financing requirements.
- Other changes to Sources and Uses mandated by an investor’s commitment or LOI may be approved by WHEDA if, in WHEDA’s sole judgment are, deemed reasonable.
- The following equity pay-in schedule is assumed in relation to the minimum credit price of \$0.60: minimum of 15% at construction loan closing as justified by costs and, no greater than 20% remaining due at stabilized occupancy.

#### **b. Federal Financing Requirements**

HUD has advised that TCAP funds are subject to various federal financing requirements (See Exhibit A, Federal Requirements).

All participants must provide a clear estimate indicating the additional funds estimated for Davis Bacon and other federal financing requirements. Note: Directing the funding source to eleven units of a development (often done with HOME funds) does not avoid Davis Bacon.

**(NOTE on Environmental Reviews:** Prospective applicants are advised to submit both a Phase One Environmental Review and a completed Screening Questionnaire (located on WHEDA.com) as soon as possible to avoid delays. There is a review and public notice process that may take several weeks.)

After receipt of the Screening Questionnaire and Phase One, WHEDA will order the environmental review, post the public notice, and submit all applicable information to HUD to obtain HUD Request for Release of Funds (RROF).

WHEDA will require that an environmental review is conducted according to environmental review under the National Environmental Policy Act (NEPA) of 1969 and related federal environmental authorities and regulations at 24 CFR Part 58 “Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities.”

**Once an owner applies for TCAP funds, committing TCAP or any other funds to, or undertaking any “choice-limiting” activity prior to successful completion of the environmental clearance review (i.e., HUD approval of the Request for Release of Funds), is prohibited. This includes any activity that will result in a physical change and/or acquisition, including leasing, or disposition of real property. Performing a choice-limiting action may disqualify a project from receiving any federal funds.**

If a federal environmental review has already been completed for a project, providing TCAP funds to the project may not require an additional environmental review.

### **c. TCAP Commitment and Expenditure Deadlines**

After WHEDA’s review and acceptance of the participant’s TCAP request WHEDA will issue a WHEDA TCAP Loan Commitment. The Commitment will expire 120 days from the date of Commitment.

ARRA imposes both commitment and expenditure deadlines on TCAP funds. WHEDA is required to:

- Commit not less than 75 percent of its TCAP funds within one year of the enactment of the Recovery Act ( February 16, 2010);
- Demonstrate that all project owners have expended 75 percent of the TCAP funds within two years of the enactment of the Recovery Act ( February 16, 2011); and
- Expend 100 percent of its TCAP funds within three years of the enactment of the Recovery Act (February 16, 2012).

WHEDA will incorporate expenditure benchmarks into a “written agreement” with development owners.

Under HUD guidelines, developments receiving “Midwest Disaster Credits” are ineligible for TCAP funds unless such developments also receive a nominal amount of Per Capita Credit. Recipients of Midwest Disaster Credit may be required to accept an allocation of Per Capita Credits simultaneously with the TCAP Loan Commitment.

### **d. TCAP Written Agreements and Disbursements**

WHEDA must execute a legally binding written agreement with each project owner. The written agreement will set forth all of the TCAP program and crosscutting federal grant requirements applicable to the funding, and must make these requirements enforceable through the recordation of a restriction that is binding on all owners and successors, e.g., a covenant.

The written agreement for a project cannot be executed until environmental clearance for the project is completed and the Request for Release of Funds (RROF) is approved.

The TCAP written agreement must be signed and dated by WHEDA and the project owner before any TCAP funds are disbursed. Federal funds cannot be drawn from the U.S. Treasury in advance of the need to pay an eligible cost. Consequently, TCAP funds cannot be drawn from the U.S. Treasury and placed in escrow or advanced in lump sums to project owners. Once funds are drawn from WHEDA’s U.S. Treasury account, they must be expended for an eligible TCAP cost within 3 days.

### **e. Regulatory and Closing**

TCAP awards will be made as eighteen (18) year subordinate loans, using a 0% interest rate. No prepayment will be allowed prior to February 17, 2012.

TCAP written agreements will specify expenditure benchmarks. If an owner fails to expend TCAP funds according to the agreement, WHEDA will assess whether the delay will affect its ability to meet federal

requirements. If a construction delay will affect WHEDA's ability to meet ARRA expenditure requirements, it will take all necessary steps to redistribute TCAP funds to a more deserving project, including the following:

- de-obligating the remaining TCAP funds,
- initiating foreclosure proceedings to recoup amounts already expended, and
- redistribute the de-obligated and/or recouped TCAP funds to other eligible projects based on the selection criteria above .

Remedies for loan default or other noncompliance under the written agreement may include WHEDA having the ability to do some or all of the following:

- declaring participants not in good standing,
- changing the structure of the ownership entity, including adding or removing members/partners,
- replacing the management company,
- initiating recapture,
- initiating foreclosure proceedings, and
- other remedies as determined by WHEDA.

WHEDA must be provided a Final Sources and Uses a minimum of seven days prior to the sponsor's closing with an equity provider and/or construction lender.

Downward adjustments to TCAP may occur if Sources exceed Uses. Once reserved, the TCAP amount cannot be increased for any reason.

WHEDA shall disburse TCAP funds at closing or during construction as needed upon receiving evidence that costs have been incurred.

WHEDA will not close on any development in which Total Development Costs at closing are expected to exceed 221 (d) 4 limits then posted on WHEDA.com, unless the participant can clearly itemize and demonstrate the overage is due solely to federal funding requirements.

Developments will remain subject to all Section 42 requirements, and certifications made in the LIHTC applications submitted to WHEDA.

WHEDA intends to publish periodic reports on its website regarding the awarding of TCAP under this program.

#### **f. Reporting and Compliance**

Owners will report to WHEDA, no less than quarterly:

- Project completion status
- An estimate of the number of jobs created and/or retained
- Any other information necessary for WHEDA's federal reporting requirements

Owners will follow WHEDA's processes and procedures applicable to IRS Code Section 42 projects and any additional compliance and financial reporting requirements made necessary due to TCAP funding.

## EXHIBIT A

### FEDERAL GRANT REQUIREMENTS

TCAP funds are federal financial assistance and, therefore, are subject to requirements applicable to such funds.

- **Fair Housing Act** (42 U.S.C. 3601-19) and implementing regulations at [24 CFR Part 100](#) and the regulations at [24 CFR Part 107](#) (Equal Opportunity in Housing).
- **Title VI of the Civil Rights Act of 1964** (42 U.S.C. 2000(d)) (Nondiscrimination in Federally Assisted Programs) and implementing regulations at [24 CFR Part 1](#).
- **The Age Discrimination Act of 1975** (42 U.S.C. 6101-07) and implementing regulations at [24 CFR Part 146](#) "Nondiscrimination on the Basis of Age in HUD Programs or Activities Receiving Federal Financial Assistance."
- **Affirmatively Furthering Fair Housing**
  - WHEDA will establish an affirmative fair housing marketing plan for its TCAP projects. Each project owner applying for TCAP must submit an affirmative fair housing marketing plan. Each project owner will be required to follow its plan when marketing TCAP units. Affirmative marketing steps consist of actions to provide information and otherwise attract eligible persons in the housing market to the available housing without regard to race, color, national origin, sex, religion, familial status or disability. The affirmative marketing requirements and procedures adopted must include:
    - Methods for informing the public, owners and potential tenants about Federal fair housing laws and the grantee's affirmative marketing policy;
    - Requirements and practices each owner must adhere to in order to carry out WHEDA's affirmative marketing procedures and requirements;
    - Procedures to be used by owners to inform and solicit applications from persons in the housing market areas that are not likely to apply for the housing without special outreach. Special outreach, as appropriate, includes but is not limited to, the translation of marketing material for persons who are limited English proficient; the placement of translated marketing material in minority owned media; and the provision of meaningful access concerning the residential rental project (e.g. providing translated information about application procedures, tenancy and other project amenities);

- Records that will be kept describing actions taken by the owners to affirmatively market units and records to assess the results of these actions.
- **Section 504 of the Rehabilitation Act of 1973** (29 U.S.C. 794) and implementing regulations at [24 CFR Part 8](#) “Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development.”

Section 504 of the Rehabilitation Act of 1973 applies to all TCAP projects. For new construction projects and projects undergoing substantial rehabilitation, five percent of the units must be accessible to persons with mobility impairments and two percent of the units must be accessible to persons with hearing or vision impairments (See 24 CFR 8.22.) Substantial rehabilitation for a multifamily rental project is defined in Section 24 CFR 8.23 as a project with 15 or more units for which the alterations would equal more than 75 percent of the replacement cost for the facility.

Modifications to projects to comply with Section 504 requirements are eligible costs under TCAP. However, compliance with Section 504 requirements may be infeasible or impracticable for some projects, depending on where they are in the development process. If a new construction or substantial rehabilitation project is underway or has already been completed, and it cannot be modified to meet the accessibility requirements established by Section 504, it is ineligible to receive TCAP assistance.

For projects in which the rehabilitation would not be considered substantial, the Section 504 provisions are applicable only to the maximum extent feasible, i.e., not required if it would impose undue financial and administrative burden. See 24 CFR 8.23.

- **National Environmental Policy Act and Related Laws** (Environmental review responsibilities) and implementing regulations at [24 CFR Part 58](#).

The Recovery Act expressly applies section 288 of the HOME statute, which requires the State to assume responsibility for environmental review under the National Environmental Policy Act (NEPA) of 1969 and related federal environmental authorities and regulations at 24 CFR Part 58 “Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities.” The “State”, as defined in the HOME program statute (42 USC 12704(2)), means “any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive officer to act on behalf of the State with regard to the provisions of this Act.” Accordingly, the State is responsible for the environmental review, but the State may designate, if it so chooses, the state housing credit agency to perform the environmental reviews for TCAP projects on behalf of the State.

Once an owner applies for TCAP funds, committing TCAP or any other funds to or undertaking any “choice-limiting” activity prior to successful completion of the environmental clearance review (i.e., HUD approval of the Request for Release of Funds), is prohibited. This includes any activity that will result in a physical change and/or acquisition, including leasing, or disposition of real property. **Performing a choice-limiting action may disqualify a project from receiving any federal funds.** See 24 CFR Part 58 for general information about environmental review requirements at [http://www.access.gpo.gov/nara/cfr/waisidx\\_04/24cfr58\\_04.html](http://www.access.gpo.gov/nara/cfr/waisidx_04/24cfr58_04.html) or <http://www.hud.gov/offices/cpd/environment/index.cfm>.

If a federal environmental review has already been completed for a project, providing TCAP funds to the project may not require an additional environmental review. For example, if the state housing credit agency or another agency or department of the State performed an earlier environmental clearance for HUD assistance on the project that is now receiving TCAP assistance from the state,

and neither the project nor the environmental conditions have changed since the previous review, then no new environmental clearance is required. See 24 CFR 58.35(b)(7).

- **The Lead-Based Paint Poisoning Prevention Act and the Residential Lead-Based Paint Hazard Reduction Act of 1992** and implementing regulations at [24 CFR Part 35](#) are applicable to housing that receives Federal assistance.

Guidance on the applicability of these requirements to TCAP projects will be provided separately.

- **Davis-Bacon Prevailing Wages** Under section 1606 of Division A of the American Recovery and Reinvestment Act of 2009, contractors and subcontractors hired with Recovery Act funds are required to pay prevailing wages to laborers and mechanics in compliance with the Davis-Bacon Act. In the case of projects already under construction, it may be possible to obtain a determination, under 29 CFR 1.6(g), that Davis-Bacon requirements apply prospectively to the construction project, as of the date of the TCAP award. Labor Relations Specialists in HUD Field Offices are available to assist grantees with questions related to these requirements.
- **“Anti-Lobbying” Restrictions** (Restrictions on lobbying in 31 USC 1352 and implementing regulations at 24 CFR Part 87 “New Restrictions on Lobbying”.) This statute prohibits the use of funds appropriated by any act by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with covered Federal action.
- **The Drug-Free Workplace Act of 1988** (41 U.S.C. 701 et seq., as implemented at 24 CFR Part 21 “Government-Wide Requirements for Drug-Free Workplace (Grants)”.) This statute prohibits the receipt of a grant from any Federal agency unless the recipient agrees to provide and certify to a drug-free workplace.

The following requirement applies to the grantee and project owners:

- [2 CFR Part 2424](#) “Non-procurement Debarment and Suspension.”