The 2009 Recovery Act: Allocations for Public Housing, Green Retrofits, Section 8, HOME, Low-Income Housing and New Markets Tax Credit Stimulus

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the Recovery Act or ARRA). Among its provisions the Recovery Act included extraordinary grants of direct funding and tax incentives targeted to support affordable multifamily housing preservation and development. Eight days later, on February 25, 2009, the U.S. Department of Housing and Urban Development (HUD) allocated 75 percent of all the Recovery Act funds authorized for HUD’s administration. In addition, state credit agencies have begun to move forward in applying new housing credit stimulus measures.

In this Update, we discuss funding for Section 8, 811 and 202 environmentally-friendly rehabilitation, LIHTC, NMTC, HOME Gap funds, Public Housing and other key items contained in the Recovery Act:

Section 8, 811 and 202 Stability, and Energy/Green Retrofit Investment

In addition to providing $2 billion of additional funds for 12 months of funding of Section 8 project-based Housing Assistance Payments (HAP) contracts, the Recovery Act includes $250 million directed specifically to energy efficiency and green investment for these properties.

The Recovery Act allocates $250 million specifically for grants or loans to owners of Section 202, Section 811 and project-based Section 8 properties for use in retrofitting buildings to make them more energy efficient or toward other green investments in their properties. These funds will be administered by HUD’s Office of Affordable Housing Preservation (OAHP), which is commonly known for its current administration of HUD’s Mark-to-Market (M2M) program. OAHP has, for nearly a year, implemented a green incentive program as part of its M2M restructuring work. That OAHP incentive program has, by all accounts and in our experience, been broadly and enthusiastically accepted by program participants.

Although owners who receive ARRA “Green Funds” must abide by certain wage requirements, HUD is authorized to provide owner incentives for participation, including fees for implementation and oversight and to encourage job creation for low- and very-low-income individuals. In conjunction with allowing owners incentives to participate in the program, HUD also may require that it share in a portion of future property utility savings resulting from the improvements built with Green Funds.

Eligibility Limits. The Recovery Act limits eligibility for funds to owners with satisfactory Management Operating Review (MOR) scores and who are otherwise in compliance with applicable performance and legal standards. Recipient owners also must commit to an additional 15-year affordability period and spend Green Funds within two years of receipt.

LIHTC Exchange/Conversion

To support an affordable multifamily marketplace that remains anemic for lack of Low Income Housing Tax Credit Stimulus, the Recovery Act includes $250 million specifically for grants or loans to owners of LIHTC properties for use in retrofitting buildings to make them more energy efficient or toward other green investments. These funds will be administered by HUD’s Office of Affordable Housing Preservation (OAHP), which is commonly known for its current administration of HUD’s Mark-to-Market (M2M) program. OAHP has, for nearly a year, implemented a green incentive program as part of its M2M restructuring work. That OAHP incentive program has, by all accounts and in our experience, been broadly and enthusiastically accepted by program participants.

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Credit (LIHTC) equity, the Recovery Act included authority for conversion by states of their unused and undersubscribed housing credit allocations into direct federal grants to otherwise worthy projects.

The Secretary of the Treasury is directed to make grants to each state housing credit agency in an amount corresponding to a portion of the state’s LIHTC allocation – the “low-income housing grant election amount.” Each state may apply for an LIHTC grant election amount equal to 85 percent of the product of: 100 percent of (a) the state’s unused allocation from 2008 and (b) any allocation returned in 2009 plus 40 percent of (i) the state’s 2009 allocation, as elected by the state, and (ii) the state’s share of the 2009 national pool multiplied by 10. Effectively, the Treasury may buy all of a state’s unused 2008 housing credits, all 2009 credits returned by awardees and up to 40 percent of the state’s 2009 credit allocation. The Treasury will pay 85 cents per credit, which is not a bad price in today’s market.

The Treasury’s funds will be delivered to states in exchange for a portion of their LIHTC authority, and then will be loaned or granted to LIHTC-qualified projects. We expect that Treasury will issue guidance shortly, confirming that these grants will not reduce depreciable or eligible basis.

Although we continue to close LIHTC transactions throughout the country, difficulty in obtaining equity does arise, particularly in rural areas lacking Community Investment Act (CRA) interest, and for most new construction projects generally. Ideally, Treasury’s “investment” under the Recovery Act can contribute to some restoration of the market for these projects, and for others deemed less worthy by the currently limited investor pool. This new funding method also can allow some public housing authorities and smaller nonprofits to obtain “equity” in an LIHTC market that would otherwise require investment guarantees they may be statutorily or financially prohibited from offering.

Recipients of these credit exchange funds will be regulated as if their property had received an allocation of LIHTC, for the purposes of use and other restrictions. However, state agencies, in some circumstances, may use a portion of their exchange proceeds to make sub-awards for financing qualified low-income buildings that did not receive competitive LIHTC allocations.

State housing credit agencies currently are evaluating this new mechanism for project funding, and are soliciting comments from program participants. Statutory rules for application are somewhat uncertain, and states’ evaluation of their potential low-income housing grant election amounts will continue as this year’s application rounds move forward. Certain states have delayed their allocation process in order to account for this new credit exchange. We will keep you informed on progress and status as states clarify their intent, and welcome your input as the opportunity to shape this program and use of funds moves forward.

HOME Funding for LIHTC Gap

Notwithstanding that LIHTC equity remains available to many projects and many developers, reduced equity pricing has caused gaps in funding for many projects that had solid development budgets at this time last year. To fill some of this pricing gap, the Recovery Act authorizes $2.25 billion in additional HOME “tax credit assistance program” (TCAP) gap funds for direct capital investments in LIHTC projects. Funding is available to projects awarded housing credits in 2007, 2008 and 2009 and will remain available until September 30, 2011. HUD released on February 25, 2009 the allocations, by state, of the entire authorization of TCAP gap funds. These can be viewed at http://www.hud.gov/recovery/tax-credit.cfm.

Awards by state agency of TCAP funds must be made competitively pursuant to the state’s Qualified Allocation Plan (QAP), and only to owners who have previously received or receive simultaneously an award of LIHTC. State credit agencies must commit 75 percent of the TCAP gap funds within one year of receiving them, and demonstrate that owners have expended 75 percent of these funds within two years of the Recovery Act’s enactment. HUD will publish the names of all projects that receive TCAP funds.

As with the housing credit exchange program, state housing credit agencies currently are evaluating this new project funding tool. We will keep you informed on progress and status, as states clarify their intent.

Public Housing Capital Fund Allocations

The Recovery Act provides $4 billion in additional capital funds for use in modernization and development of public housing and mixed-finance projects. On February
25, HUD released its allocation schedule for $3 billion of this funding, distributed among the nation's 3,100 Public Housing Authorities, based on 2008 capital funding formulas. An additional $1 billion authorized by the ARRA will be allocated on a competitive basis in the coming months. HUD has published the amount of noncompetitive public housing funds that each PHA will receive, here: http://www.hud.gov/recovery/phcfund.cfm.

**Deadlines.** On February 25, each PHA should have received an e-mail from the Office of Capital Improvements (the OCI Notice), which provided information on how the non-competitive public housing funds will be allocated and obligated. The OCI Notice includes two very important dates: (1) ACC Amendments (attached to the OCI Notice in form) must be submitted to the appropriate local HUD field office no later than March 9, 2009, and (2) each PHA must provide to HUD, no later than April 10, 2009, its statement describing how obligated funds will be expended.

**Priority Use.** The OCI Notice encourages that PHAs give priority to capital projects that can begin within 120 days, and, as recited in the Recovery Act, to (i) rehabilitation of vacant units and (ii) capital projects that have begun or are included in the PHA’s five-year plan. Once the executed ACC Amendment, annual plan and board resolutions (required with the annual plan) have been submitted, each PHA's allocation will be available starting on March 23, 2009 in the LOCCS system for draw in accordance with normal procedures.

**Competitive Round.** HUD is required to distribute the remaining $1 billion of competitive public housing capital funds by September 30, 2009. Although criteria for competitive awards have not yet been established, PHAs can expect priority for demonstrated need and use for rehabilitation of vacant rental units, capital projects already underway and those that are otherwise part of the PHA’s five-year plan.

**Restrictions on Use.** It should be noted that the public housing funds may not be used for operating expenses or rental assistance commitments. Typical restrictions against using federal funds for replacement housing, however, will not apply to the Recovery Act capital funds. The ARRA requires HUD to develop an oversight system insuring that public housing funds are used to supplement and not supplant other sources of funding obligated by and available to the PHA.

**Obligation and Expenditure Deadlines.** Each PHA (i) must obligate 100 percent of its ARRA capital funds within one year of the date on which funds become available to the agency for obligation, (ii) must spend 60 percent of funds within two years of that date, and (iii) must spend its entire allocation within three years. If any PHA fails to abide by the first benchmark, remaining funds shall be recaptured by HUD. If either of the two- or three-year benchmarks are not met, the balance of funds will be recaptured by HUD. HUD then will allocate any recaptured funds to other PHAs that are in compliance with program spending requirements.

The Recovery Act states that HUD may waive or specify alternative requirements for any provision of any statute or regulation in connection with the use of these funds (except for fair housing, environmental, labor standards and discrimination). HUD also may direct that requirements relating to the procurement of goods and services arising under state and local laws and regulations not apply to ARRA capital funds.

**New Markets Tax Credit**

We continue to see growth in application of the New Markets Tax Credit (NMTC) for mixed-use development, including large housing components. Although not intended as an affordable housing development tool, and restricted in application to multifamily housing generally, creative models for combination with other state and local subsidy for pass through of return to investors has kept NMTC projects with affordable housing components moving forward.

The Recovery Act, along with several business and investment credit expansions, increased funding for this community development tool. The annual NMTC limitation has been raised from the previous $3.5 billion to $5 billion for 2008 and 2009. Transition rules for 2008 NMTC allocations provide that the 2008 increase be allocated by Treasury to community development entities (CDEs) that submitted applications for 2008 but either did not receive allocations for that year or received smaller allocations than requested.

**Abandoned and Foreclosed Homes (NSP)**

The Recovery Act also provided $2 billion for the redevelopment of abandoned and foreclosed homes under division B, title III of the Housing and Economic Recovery Act of 2008 — commonly referred to as the Neighborhood
Stabilization Program (NSP) — passed last summer. These funds will be available until September 30, 2010. Grantees must expend at least 50 percent of their award within two years of receiving it, and all of the funds within three years. Eligible recipients are states, local governments, nonprofits standing alone, and nonprofits in partnership with for-profit entities. Funding priority will be given to those locations with the greatest number of foreclosed and abandoned homes. HUD must publish funding criteria within 75 days of the Recovery Act’s enactment and applications must be submitted within 150 days of the enactment date, with all funds obligated within a year.

As always, if you have any questions or comments on these or any other topics, please feel free to contact the following individuals or any other member of the Finance, Real Estate, Affordable Housing, Tax, or Low Income Housing Tax Credit practice groups of Pepper Hamilton LLP.

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