



July 6, 2009 FINAL EXCHANGE GUIDANCE

**WISCONSIN HOUSING AND ECONOMIC DEVELOPMENT AUTHORITY**

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

**LOW INCOME HOUSING TAX CREDIT**

**EXCHANGE PROGRAM**

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 Exchange funding pursuant to these Development Selection Process and Criteria.

**I. Introduction and Program Outline**

WHEDA has exchanged 100% of the unused 2008 per capita credit carried forward to 2009 and 40% of the 2009 per capita credit. Midwest Disaster Credits cannot be exchanged. The Exchange has resulted in approximately \$115 million in funding availability. WHEDA may reserve 10% of all Exchange proceeds for contingencies or use in 2010, at its discretion.

Section 1602 of ARRA allows WHEDA to finance construction or acquisition and rehabilitation of qualified low-income building for low-income housing in lieu of low-income housing tax credits.

WHEDA may use the funds to make sub-awards (referred to as LIHTC Exchange) to finance the construction or acquisition and rehabilitation of qualified low-income buildings with or without an allocation under Section 42 of the Code. The sub-awards are subject to the same requirements as low-income housing credits under Section 42 of the Code. Sub-awardees must demonstrate a good faith effort to obtain investment commitments utilizing credits. WHEDA may use the funds to make sub-awards

through December 31, 2010. Any funds not used to make sub-awards before January 1, 2011 must be returned to the Treasury.

It is expected that the Exchange 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 LIHTC Exchange grants will be subject to funding availability by the U.S Treasury. Guidance for this program is provided by the U.S. Treasury at the following website: <http://www.treasury.gov/recovery/LIH-grants.shtml>. WHEDA program guidelines are subject to revision based on changing circumstances including additional federal guidance. WHEDA will announce and publish revisions on WHEDA.com.

## **II. Evaluation**

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

Exchange funds may be used for capital investment in eligible projects. Capital investment means costs that are eligible costs of a project under Section 42 of the IRC. Section 1604 of the Recovery Act specifically prohibits the use of grant funds for swimming pools.

Exchange 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., required under Section 42 of the IRC and its implementing regulations), and all other requirements of the Act. A third party cost certification will be required after completion of the project.

In addition, WHEDA is required to perform Asset Management oversight of Exchange developments that will include annual, audited financial statement reporting and quarterly occupancy reporting, among other requirements.

### **b. Eligible Participants**

WHEDA will accept requests for LIHTC Exchange funds for rental housing projects that received or will receive an "award of LIHTCs" in 2008 or 2009 (and potentially 2010) which encounter diminished investor equity interest despite demonstrated good faith efforts, and which require such funding to be completed. WHEDA's definition for "award of LIHTCs" includes projects with the following status:

- 2008 Carryover
- 2009 Reservation-active/fully executed
- 2009 Reservation-rescinded due to lack of investor LOI
- 2009 Carryover-active/fully executed
- 2009 Carryover-rescinded

Such projects must be qualified low-income buildings under Section 42 of the Internal Revenue Code (the Code). Requests must demonstrate a level of readiness indicating the ability to close within 120 days of executing an Exchange Commitment.

### **c. Selection Criteria**

**2008** - Applicants for Exchange grants for unclosed 2008, 9% LIHTC Carryover applicants meeting the eligibility requirements (subject to applicant submittal, WHEDA review, and underwriting) will be given priority. Applicants must meet eligibility requirements and must demonstrate a level of readiness

indicating the ability to close within 120 days of receiving an Exchange Commitment. Applicants must demonstrate to WHEDA's satisfaction the inability to secure a viable LIHTC investor.

**Deadline for application submittal is July 15, 2009.**

Applicant denials will be made in writing to the participant explaining the reason for denial. .

**2009** - Commitments for Exchange grants for all 2009, 9% LIHTC projects will be awarded competitively (subject to applicant submittal, WHEDA review, and underwriting). Applicants must meet eligibility requirements and must demonstrate a level of readiness indicating the ability to close within 120 days of receiving an Exchange Commitment. Applicants must demonstrate to WHEDA's satisfaction inability to secure a viable LIHTC investor.

**Deadline for application submittal is September 1, 2009.**

Exchange proceeds remaining as of September 1, 2009 shall be distributed among the 2009 QAP Set Asides by their respective percentages. Applicants from 2009 will then be ranked by LIHTC score and readiness criteria.

WHEDA expects to evaluate all applications 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
- Demonstrate ability to close within 120 days of Commitment
- Demonstrate ability to expend all Exchange proceeds by December 31, 2010

Developments will be rescored using a combination of LIHTC score and readiness to arrive at a new LIHTC Exchange score. WHEDA will issue Exchange Commitments based on these scores until available funds are exhausted.

WHEDA reserves the right to open another "application round" in late 2009 or in 2010 should funds remain available or become available, in order to most efficiently deploy Exchange proceeds. WHEDA's Executive Director maintains the right to commit Exchange 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 Exchange 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 July 6, 2009.

- Applicants must submit:
- WHEDA Loan Application\*
  - Amount requested
  - Revised sources and uses
  - Copies of unexpired commitments from all funding sources
  - Anticipated closing date (must be no later than 120 days from Commitment)

- Explanation of inability to secure LIHTC investor\*\*
- Anticipated construction, completion and draw schedule\*\*\*
- Statement surrendering LIHTC award
- Current Financial statements of developer/sponsor (guarantor)
- Documentation/Description of Readiness Criteria

\* Exchange funds will be awarded as grants, not loans

\*\* Inability to secure equity investors shall be documented by providing contact information of investors or syndicators (minimum five) who were contacted, and describing the response, if any. WHEDA may contact equity providers for verification.

\*\*\* Applicant shall provide a draw schedule showing the best estimate of costs to be incurred each month of the construction period.

### **III. General Requirements**

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

Grants will be sized to the lesser of the most recent credit application's stated equity need, or \$0.85, subject to increases approved by WHEDA necessary to fund additional reserves. Participants should size and initially request Exchange grants to account for the creation of a 12 month debt service/operating expense reserve

All parameters of the most recently accepted LIHTC application shall remain in force, except the above. WHEDA will verify that the grant is consistent with the requirement of section 42(m)(2) of the Code that the grant made for a project does not exceed the amount necessary to ensure the financial feasibility of the project and its viability throughout the credit period.

After WHEDA's review and acceptance of the participant's request, WHEDA will issue an Exchange Commitment.

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

The Exchange funds themselves do not require compliance with the various crosscutting financing requirements (i.e., Davis-Bacon, Environmental Review, Uniform Relocation, etc.). Other funding sources may require such compliance.

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

Applicants must return their 2008 or 2009 Credits (and TCAP commitments, if any) simultaneously with applying for Exchange funds.

Credits that are returned by 2009 LIHTC/Exchange applicants shall be returned to the Set Aside from which the original credit award was made.

The Commitment will expire 120 days from the date of Commitment.

#### **d. Exchange 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 Exchange grant program and Section 1602 sub-award requirements including the requirements of Section 42 of the Code 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 Exchange written agreement must be signed and dated by WHEDA and the project owner before any Exchange funds are disbursed. Federal funds cannot be drawn from the U.S. Treasury in advance of the need to pay an eligible cost. Consequently, Exchange 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's account, they must be expended by an eligible Exchange cost within 3 days.

The written agreement shall impose conditions or restrictions, including a requirement providing for recapture, so as to assure that the qualified low-income building remains a qualified low-income building during a 30-year compliance period.

WHEDA may disburse grant funds to owners in 2009 and 2010. No grant funds may be disbursed to owners after December 31, 2010.

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

Exchange grants will require an execution of a Regulatory Agreement at closing. Exchange contributions will be for fifteen (15) year terms with no interest or payments. If the project remains in compliance with applicable program requirements for the entire 15 years, the full amount of the contribution will be forgiven.

It is expected the Regulatory Agreement will include these requirements:

- Developer fee paid 25% at closing, 25% at construction completion/CO, and 40% at perm loan/conversion. WHEDA reserves the right to direct ten percent (10%) of the Developer's Fee into a third party account to be released in the tenth year of the agreement.
- 25% of cash-flow directed to WHEDA-held reserve, after payment of non-interest bearing deferred developer fee
- Sponsor operating deficit guarantees for ten years
- Twelve month operating/debt service reserve
- Residual sale restricted to 501(c)(3) entity for exit taxes plus outstanding debt
- 30 year Land Use Restriction Agreement
- Recapture provisions
- Evidence and maintenance of replacement reserve
- Letter of credit or performance bond for project completion
- Project scope, commitments and certifications from most recent Credit application will apply

Remedies for default on the Exchange agreements or other non-compliance may include WHEDA having the ability to do some or all of the following:

- Declare participants not in good standing
- Change the structure of the ownership entity, including adding or removing members/partners
- Replace the management agent
- Recapture as authorized under federal policies
- Other remedies as determined by WHEDA, up to and including barring from future participation in the LIHTC program.

WHEDA must be provided with a final Sources and Uses minimum seven days prior to closing.

WHEDA will not close if it determines the development is no longer financially feasible (minimum 1.15 DCR).

Owner/sponsor must agree to submit draws of 100% of the Exchange Funds by December 1, 2010. **No disbursement of any funds for project draws shall occur without prior written approval by WHEDA, regardless of the source of funds being used to pay the construction costs.** Funds cannot be disbursed to sub-awardees after December 31, 2010.

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 demonstrate the overage is due to WHEDA reserve requirements.

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

**f. Reporting and Compliance**

WHEDA will charge an annual Asset Management fee equal to the annual Tax Credit Monitoring fees (as periodically adjusted) charged to LIHTC developments throughout the term of the compliance and extended use period.

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 Exchange funding.