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## **LAW ALERT: AMERICAN RECOVERY AND REINVESTMENT ACT**

### **LOW INCOME HOUSING TAX CREDIT PROVISIONS UNDER ARRA**

The American Reinvestment and Recovery Act of 2009 ("ARRA") was signed into law on February 17, 2009 and includes several provisions meant to jumpstart the flagging Low Income Housing Tax Credit ("LIHTC") program. This alert discusses ARRA's most important LIHTC-related funding provisions, namely the HOME Gap program and the Exchange Funding program, plus related labor standards issues.

While advocates had hoped that ARRA would include language allowing LIHTCs to be carried back against past profits and/or accelerated to double the impact over years one, two, and three, these provisions were stripped from the final version of the bill.

#### **Gap Financing Under the HOME Investment Partnerships Program**

ARRA appropriates \$2.25 billion for gap financing of LIHTC projects through the HOME Investment Partnerships Program ("HOME Gap") to be administered by the federal Department of Housing and Urban Development ("HUD"). HUD will make California's apportioned funds, estimated to be around \$325 million, available to the California Tax Credit Allocation Committee ("TCAC") based on the 2008 HOME funding formula. TCAC will in turn competitively distribute the funds, pursuant to its Qualified Allocation Plan ("QAP"), to owners of projects that have received or will receive LIHTCs during fiscal years 2007, 2008, and 2009, with priority given to projects expected to be completed by

February 2012. HOME Gap funds should be available to both 9% and 4% LIHTC Projects.

TCAC must commit 75% of its HOME Gap funds by February 2010. TCAC must also demonstrate to HUD that project owners receiving HOME Gap funding have in turn expended 75% of the HOME Gap funds by February 2011 and 100% by February 2012. Funds not expended in a timely fashion will be redistributed by TCAC, with funds not expended by February 2012 being returned to HUD. TCAC's usual regulatory requirements, plus labor standards and environmental review requirements unique to ARRA, will apply to projects receiving HOME Gap funds. The HOME Gap funds will not be considered federal grants which reduce a project's eligible basis. TCAC currently intends to award funds as soft loans secured by the deeds of trust.

In order to provide for the distribution of the HOME Gap funds, TCAC intends to amend its QAP within the next 30-60 days. ARRA's stated priority of jumpstarting the tax credit market makes the use of HOME Gap funding extremely time-sensitive, as evidenced by the commitment and expenditure deadlines, the emphasis on project readiness as a priority, and the limitation of eligible projects to those having received credit awards in 2007 or 2008, or those that will receive awards by September 30, 2009.

Use of HOME Gap funds is also subject to the requirements of the National Environmental Policy Act (NEPA).

### **Grants In-Lieu of Low Income Housing Tax Credits**

ARRA authorizes TCAC to exchange a portion of its LIHTC ceiling for grants from the federal Department of Treasury ("Treasury"). TCAC may exchange 100% of the unused 2008 credits and credits returned in 2009 plus 40% of the per capita ceiling or national pool for 2009. Any amount exchanged will reduce the amounts of credits otherwise available for allocation. Treasury will pay \$0.85 per \$1.00 credit exchanged ("Exchange Funding") to TCAC. TCAC will pool this Exchange Funding to provide subawards that ensure projects are financially feasible (TCAC's current intent is that these subawards will be in the form of loans as well).

TCAC's amendment of its QAP will also establish a procedure to govern subawards. Subawards may be made to a qualified low-income building with or without a tax credit allocation. In other words, the project must either have a credit allocation or show TCAC that the subaward will increase the total affordable housing funds available to California. Subawards should be available to both 9% and 4% LIHTC projects. A project must also make a good faith effort to find a traditional investor before receiving a subaward. Subawards will be subject to the same limitations as a tax credit allocation. Exchange Funding must be used by January 1, 2011 or else be returned to Treasury.

While ARRA provides additional grants to projects that include certain energy properties, such as solar panels, partnerships with any government entity or non-profit organization as

a partner are ineligible. This effectively disqualifies most LIHTC partnerships.

### **Prevailing Wage Requirements**

HOME Gap financing is subject to federal Davis-Bacon prevailing wage requirements. While HUD has the ability to waive many regulations to expedite the use of ARRA funds, labor standards are specifically exempted from this treatment. In addition, the HOME Gap financing may also trigger California prevailing wage requirements. However, if the HOME Gap financing assistance is structured as a below market rate loan and the assisted project is subject to a recorded restriction requiring that 40% of the units remain in low income occupancy for at least 20 years, as most of these projects will, then the project will be exempt from California prevailing wage requirements. Care must still be taken, however, because there may be local prevailing wage requirements that apply even if the project qualifies for the "below market rate exemption."

Exchange Funding is likely not subject to federal Davis-Bacon prevailing wage requirements. However, the Exchange Funding is subject to California prevailing wage requirements, unless the assistance can be structured to fit the "below market rate loan exemption" described above. Care must be taken, however, to confirm that other forms of assistance do not trigger California prevailing wage law requirements, and that local prevailing wage requirements do not apply.

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**For more information please call John Haygood, Margaret Jung, Josh Mukhopadhyay, or any Goldfarb & Lipman attorney at 510-836-6336.**

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