



## **Affordable Housing and Other Key Provisions of the American Recovery and Reinvestment Act of 2009**

WHITE PAPER

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February 2009

| AFFORDABLE HOUSING |

On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 ("Act") which Congress had passed four days earlier. The Act provides a series of provisions aimed at stimulating the economy, including new affordable housing provisions, an expansion of the New Markets Tax Credit ("NMTC") program, energy related changes and spending, bond related changes and other general tax provisions. The following is an overview of some of the significant provisions.

### **Capital Financing Provisions**

The Act provides \$2.25 billion to be available to state housing credit agencies until September 30, 2011. These funds are to be used for either 9% or tax-exempt bond deals as additional financing. Projects that are awarded tax credits under Section 42(h) during fiscal years 2007, 2008, or 2009 are eligible to receive this additional financing. The funds will be apportioned among state credit agencies based on the percentage of HOME funds apportioned to each state and participating jurisdictions for fiscal year 2008. The funds must be distributed competitively and pursuant to the qualified allocation plan. Funds are available to owners who either receive, or have received, an award of tax credit under Section 42(h). States must give priority to projects expected to be completed within 3 years of enactment. The funds do NOT result in reduced eligible basis. 75% of the funds must be committed by housing credit agencies within 1 year of the date of enactment, and 75% of funds must be expended by owners within 2 years of the date of enactment. All funds must be expended within 3 years of the date of enactment. Some HOME restrictions apply including Fair Housing, non-discrimination, labor standards, and environmental standards.

### **Credit Exchange Provisions**

The Treasury Secretary is authorized to make a grant to each state housing credit agency, at the agency's election, in the maximum amount of 85% of the following amounts:

- 10 times the sum of:
  - 40% of the sum of the states' annual per capita credit amount (for 2009 the greater of
  - \$2.30 per state resident or \$2,665,000), plus
  - 40% of any amount it received from the national pool, plus
  - 100% of the 2009 credit ceiling attributable to a state's unused credit ceiling for 2008, plus
  - 100% of a state's credit ceiling returned in 2009

However, any amounts exchanged will reduce the amount of credit available to the state agency for allocation purposes.

The exchanged credit awards may be made for construction or acquisition/rehabilitation of qualified low- income buildings **with or without** an allocation of tax credits. These awards may only be made to qualified low-income buildings without tax credit allocations if the credit agency determines that such use will increase the total funds available to the state for the building and

rehabilitation of affordable housing. State credit agencies must establish a process by which those allocated credits demonstrate good faith efforts to obtain investment commitments for credit before the agency can make an award of funds. All awards are subject to the same LIHTC requirements prescribed by section 42. Exchanged funds will not reduce eligible basis nor, per the conference agreement, will the funds be considered taxable income. Funds are subject to recapture if the buildings are not in compliance during the compliance period. Any recapture is payable to the Secretary of the Treasury. If the housing credit agency does not make use of the exchange funds before January 1, 2011, unused funds will be returned to the Treasury.

### **Other Affordable Housing Provisions**

- \$2 billion to fully fund project-based Section 8 contracts
- \$4 billion in capital funds for public housing agencies. \$3 billion according to formula and \$1 billion competitive
- \$250 million of public housing and HUD assisted multifamily "green" or sustainable investments

### **Energy Grant vs. Energy Tax Credit**

The Act allows a taxpayer to take either a tax credit or a grant to be administered by the Department of the Treasury for property placed in service that is qualified under Section 45 or Section 48. The grant amount is 30% of the basis that would be eligible under Section 48 or that would comprise a Section 45 credit-eligible facility (the grant is 10% of the basis eligible for tax credits for geothermal heat pumps, qualified microturbines, and combined heat and power property). The Act mandates that grants be issued within the later of 60 days of the receipt of a grant application, or the placed in service date of the qualifying property. The grant is not includible in income, but there is a basis reduction of 50% of the grant amount. The grant is payable to the party that is entitled to the tax credit. This provision is applicable to property placed in service in 2009 or 2010 or that began construction in 2009 or 2010 and will be completed prior to 2013 (for wind), 2014 (for other Section 45 qualified facilities), and 2017 (for Section 48 property). The grant is subject to recapture if there is a disposition of the property within five years of being placed in service.

### **Deferral of Debt Forgiveness Income**

A taxpayer can elect to have debt discharge income from the reacquisition of an applicable debt instrument (after Dec. 31, 2008, and before Jan. 1, 2011) included in gross income ratably over five tax years. For debt repurchased in 2009 the taxpayer is required to start including in gross income the debt discharge income starting with the fifth taxable year following the year of the debt repurchase. For debt repurchased in 2010 the income inclusion period begins the fourth taxable year after the repurchase of the debt. The term "applicable debt instrument" refers to any debt instrument issued by a C-corporation or any other person in connection with the conduct of a trade or business by that person. The term "debt instrument" is broadly defined to include a bond, debenture, note, certificate, or any other instrument or contractual arrangement constituting

indebtedness within the meaning of Code Section 1275(a)(1). For partnerships, S-corporations or other pass through entities, the election is made by the entity. The election is made on an instrument by instrument basis. An election is made by attaching the required statement to the tax return in the tax year the debt is reacquired. If a taxpayer elects to defer debt discharge income from a reacquisition of an applicable debt instrument, the normal exclusions for title 11 bankruptcy, insolvency, qualified farm indebtedness, and qualified real property business indebtedness will not apply to debt discharge income for the tax year of the election **or any other later tax year.**

### **Bonus Depreciation**

The Act extends the 50% first year bonus depreciation allowance. In most instances, the provision is effective for property placed in service after December 31, 2008 and before January 1, 2010 and for certain property placed in service before January 1, 2011. Generally, properties other than buildings are eligible for the bonus depreciation.

### **New Markets Tax Credit**

The Act authorized an additional \$1.5 billion for the 2008 allocation round and an additional \$1.5 billion for the 2009 allocation round. Only 2008 applicants who applied and did not receive their full request, or those who applied and did not receive an award, are entitled to the 2008 additional amounts.

*The above summary is not intended to be a comprehensive overview of the provisions contained in the American Recovery and Reinvestment Act. Further analysis should be done to fully understand the provision outlined above.*