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Jim Tassos
Deputy Director of Tax Policy and Strategic Initiatives
National Council of State Housing Agencies
444 North Capitol Street NW, Suite 438
Washington, DC 20001

Re: NCHSA Task Force on Recommended Practices in Housing Credit Administration

Dear Mr. Tassos,

Thank you for the opportunity to provide feedback on the National Council of State Housing Agencies (NCSHA) Recommended Practices in Housing Credit Administration (RP). National Housing & Rehabilitation Association (NH&RA) and our members work closely with both NCSHA and Housing Agencies to preserve and develop new affordable housing across the country.

Tax-Exempt Bonds

Over the last several years, NH&RA has led an initiative aimed at better utilizing tax-exempt bonds (TEB) and the accompanying four percent LIHTCs for affordable housing. Our work has led to demonstrable increases in TEB and four percent production in Oregon and Tennessee and we've partnered with many Housing Agencies to implement changes to make production and preservation via their four percent programs more viable. Initially, NH&RA's work was aimed at putting a latent resource to work to help solve the affordable housing crisis. Our efforts, combined with many others, have been successful to the point that four percent and TEB allocations have become competitive in many states. NH&RA encourages the task force to adopt two different sets of polices for under- and over-subscribed states.

We also encourage Housing Agencies to treat the allocation of nine percent LIHTCs and four percent LIHTCs separately. TEB transactions are inherently more complicated transactions with higher fixed-costs compared to the nine percent LIHTC. The majority of these costs are associated with TEB issuance costs including fees associated with trustees, bond counsel, underwriters and credit raters or enhancers. Additionally, four percent and TEB transactions must take on more debt since the four percent LIHTC that is paired with TEBs is a shallow subsidy program designed to generate tax credit equity covering about 30 percent of eligible depreciable costs. This increased debt makes four percent transactions uniquely susceptible to viability challenges as the cost of capital and interest rates rise.

Considerations for Over-Subscribed States

To the extent that PAB volume cap is a limited resource in a given state, Housing Agencies should place limits on the total amount of volume cap available to a project and/or sponsor and not constrain the total amount of four percent credits available. Maximizing the amount of credits available to the project

will reduce the overall amount of necessary debt leverage, making more projects viable as four percent TEB projects.

Several over-subscribed states have provisions within their QAP that limit the amount of bonds to 51 – 60 percent of aggregate basis. As Congress contemplates lowering the 50 percent test, it would be prudent to anticipate a potential change and encourage Housing Agencies to limit bonds to five percent above the statutorily required minimum to stretch the scarce resources as far as possible.

Considerations for Under-Subscribed States

Rolling Application Deadlines

Because of the highly competitive nature of the nine percent program most states have one or two application rounds per year for the nine percent credit, which allows applications to be scored against each other. Fixed application cycles make sense when administering a competitive program with limited resources; however, they are not without their downsides. Given the current velocity of sales of raw land and existing multifamily buildings, application cycles do not align with the expectations of the marketplace, and sellers may be unwilling to consider purchase offers with lengthy options. One of the most attractive features of the four percent LIHTC program to developers is the relative certainty and speed of execution. Developers able to meet threshold requirements and able to execute in capital markets have a high degree of confidence of a potential award and are able to commit to shorter option periods, making them more competitive in the acquisition marketplace. Rolling applications that are considered and processed speedily by Housing Agencies facilitate quicker and more efficient closings and allow affordable housing developers to better compete with conventional buyers.

Recommendation: Housing Agencies should consider awarding four percent LIHTCs on a rolling basis as applications are submitted. To the extent that competitive gap funding is made available to support TEB transactions Housing Agencies and local jurisdictions should consider having rolling deadlines for these resources or adopt multiple application deadlines throughout the year. Housing Agencies and issuers should also schedule regular meetings of their governing boards (ideally monthly) to assure that applications, waivers and appeals can be reviewed on a timely basis.

Maximizing Eligible Basis

The compelling financial attribute of the four percent LIHTC program is the "as of right" credits that come with meeting the IRC Section 142 requirements along with the threshold requirements set forth in a Housing Agency's QAP. While volume cap is a limited resource, the credits associated with TEB transactions are only limited by the amount of eligible basis. This is a significant difference from the nine percent LIHTC program where the allocation of annual credit authority is capped. Given the competitiveness of the nine percent LIHTC program, it is wholly appropriate that Housing Agencies place limits on the total amount of nine percent credits available to a sponsor and/or project. QAPs should be structured to allow for differing credit limitations between the nine percent and four percent program.

Recommendation: Leverage developer fees to maximize eligible basis.

Developer fees serve many purposes in LIHTC developments, they should never be thought of solely as profit to the developer. Given the rent and income restrictions associated with the program, cashflow is

very limited on LIHTC transactions. Developer fees serve as the primary form of compensation for LIHTC developers, which pays for overhead of essential functions, including accounting, human resources, information technology, asset management, insurance and legal fees and many others. Developer fees also serve as the primary form of reimbursement for pre-development costs and resident services. In short, LIHTC developers have significant fixed costs outside of the sources and uses of a specific development that are critical to allowing a business to operate and build affordable housing. Developer fees must be sufficient to cover these costs and compensate for the risks inborn in affordable housing transactions if the industry wants to continue to attract and retain the highest quality developers.

Limitations on reasonable developer fees, particularly deferred developer fees, hurts the financial viability of projects and disincentivizes committed, high-quality developers from participating in the program. Developers, especially in the nine percent LIHTC, take on a large risk when submitting a LIHTC application due to the highly competitive nature of the program. Both four and nine percent developers must take on risk in acquiring properties and forecasting construction pricing. The four percent tax credit tax-exempt bond transactions have a higher proportion of foreclosable debt, for which the developer is ultimately responsible. The developer fee compensates developers for these risks, for which they may not receive any compensation for up to four to six years of pre-development work and overhead.

Maximizing developer fees, within reason and the constraints of the law and regulation, is a proven and successful method of increasing eligible basis, raising additional LIHTC equity and generating more production through the TEB program. In effect, progressive approaches to structuring developer fee policy can serve as an alternative to gap financing in a project, allowing Housing Agencies to prioritize soft dollars for other needs.

Housing Agencies should consider separate developer fee policies from their nine percent programs that include the following features:

- Developer fee calculation will include all eligible basis of the property (i.e. acquisition basis and hard costs), less reserves.
- Fifteen percent cap on paid developer fees.
- Allow for additional total developer fee in excess of 15 percent provided that this additional increment of developer fee is *deferred* for projects demonstrating documented need, and perhaps meeting additional criteria as defined by the Housing Agency. To comply with tax law, developers and investors must size deferred fee to demonstrate that it can be reasonably paid by year 13 of the compliance period.
- No fixed dollar amount or per unit limitation on developer fees.
- Do not reduce developer fee (deferred or otherwise) to serve as a construction contingency.

Recommendation: Include all documented and reasonable acquisition costs in eligible basis to maximize viability of preservation transactions.

TEBs are particularly well suited for preservation transactions and QAP policies should be designed to encourage their use for the preservation of existing LIHTC, Section 8 and USDA Rural Development properties. So long as it is supportable by a credibly conducted, methodologically sound, independent and disinterested third-party appraisal, Housing Agencies should allow for all reasonable acquisition costs to be included in eligible basis. Policies should not penalize related party transactions or the use of

seller-financing as long as it is supported by a credible appraisal and complies with the IRS regulations governing related party transactions and true-debt.

Responses to NCSHA Questions

I) Responding to Higher Development and Operating Costs

1. *Do any of the current recommended practices relating to this issue need revision in light of the current volatility in development and operating cost—in particular,*
   a. *the practices on development cost limits (RP 14),*
      i. Given the public resources involved, Housing Agencies should adopt policies that ensure affordable housing projects are neither over-subsidized nor over-built. LIHTCs must be allocated reasonably and efficiently; and these policies should consider the significant differences between the nine percent and four percent projects. Development cost limits should consider the similar hard development costs between nine percent and four percent projects and should also account for the significant soft costs associated with TEB transactions, namely the costs of issuance, that are not incurred by nine percent transactions.

      ii. NH&RA understands and appreciates the need for development cost limits, both from the public perception perspective and the public policy goal to stretch a scare resource as far as possible. We strongly believe that these cost limits should be market-based and frequently updated so that affordable developers are not unnecessarily hindered, especially in an inflationary economy. Any development cost limit should include a provision that indexes them to inflation.

      iii. All industry participants share the same goal of securing the land for as little as possible. However, LIHTC developers are at a significant disadvantage to market rate developers because they must option the land while they go through the tax credit process – a disadvantage brokers and owners are aware of and charge a premium for. Additionally, land which achieves other policy goals (high opportunity areas and in lower flood risk zones) is often more expensive. Housing Agencies should recognize these facts when judging costs of applications and rely on professional appraisals.

   b. *developer fee limits (RP 15),*
      i. See recommendations included in the Maximizing Eligible Basis section.
      ii. As with distinct development cost limits, separate developer fee limits for nine and four percent credits to account for increased risk, work and transaction costs associated with four percent credits.

      iii. Acquiring land control through a long-term, third-party ground lease should be recognized as a proper cost in analyzing maximum fees, even though it may not

be includible in eligible basis. Differentiation should be made in acquiring land or an existing project from a third party than from a party with an identity of interest.

c. *cost certifications (RP 17),*
    i. NH&RA echoes the comments submitted by the Affordable Housing Tax Credit Coalition: While we encourage Agency diligence in detecting fraudulent practices by "bad actors" certain practices have made the timing of the cost certification and 8609 delivery process beyond the expectations of the Code and LIHTC Investors and created an uneconomic duplication of professional and developer resources. We recommend that the cost certifications by licensed professionals be, on a general basis, accepted provided that the independent certified public accountants meet and certify to standardized practices in preparing the cost certification. Some Housing Agencies require duplicative support for the cost certification on a regular basis. Either random retesting be done, or Housing Agencies should perform a separate audit in limited circumstances where warranted.

    The Housing Agencies, in performing their feasibility analysis, should be able to rely upon certifications of anticipated sources and uses in the 8609 process and not have to wait for final conversion of loans or other events that occur after the commencement of the credit period in issuing form 8609s. A recertification upon conversion or requirements to provide information for refinancing or new financing during the credit period or compliance period would allow the Housing Agencies to identify those participants that have "gamed" the system, by providing limitations on their seeking future allocations of LIHTC. We do not recommend that there be a revocation or reduction in the amount of LIHTC provided in the Form 8609 unless there are instances of fraud or bad faith inducement.

d. *reserve levels (RP 19), and*
    i. Many parties have a vested financial interest in the successful operation of an affordable housing community. Financial partners should be able to determine the reserve levels and be able to provide lower reserve levels to developers with proven track records.

e. *operating expenses (RP 20)?*

2. *What, if any, new recommended practices should state allocating agencies consider to respond to current volatility in development and operating costs?*
    a. Our response to question 1(a) around better tying development cost limits to current market conditions and regularly updating them will go a long way to solving this problem. During COVID-19 many states used waiver authority broadly to address market volatility. We encourage further use of waivers during volatile markets and further

request that the waivers be frequently advertised and that granted waivers be publicly posted.

II) Preserving Affordability and Protecting Low-Income Renters

3. *Do any of the current recommended practices relating to this issue—in particular, the practices on encouraging preservation (RP 26), qualified contracts (RP 27), and compliance in the extended use period (RP 43)—need revision in light of current preservation challenges?*
    a. States best understand the delicate balancing act of addressing both new construction and preservation and we encourage NCHSA's RP to remain neutral on the resource allocation split, other than to say Housing Agencies should pursue both objectives.

       Preservation requirements should not be overly onerous. Related to question seven, requiring a concerted community revitalization plan may exclude smaller communities without the resources to undertake such a plan from being able to preserve their affordable housing.

4. *What, if any, new recommended practices should state allocating agencies consider to respond to current preservation challenges, including the premature ending of affordability restrictions by qualified contract, challenge to the right of first refusal provision, or the end of the statutory affordability period at Year 30?*

III) Expanding Opportunity for Renters and Industry Participants of Color

5. *Do any of the current recommended practices relating to this issue—in particular, the practices on reducing local barriers to development (RP 4), development and management experience (RP 7), promoting choice and opportunity for residents (RP 9), and fair housing compliance (RP 41)—need revision in light of enhanced focus on the need for more equitable development and management?*

6. *What, if any, new recommended practices should state allocating agencies consider to expand opportunity for renters and industry participants of color?*

IV) Optimizing the Siting of New Housing Credit Developments

7. *Do any of the current recommended practices relating to this issue—in particular, the practices on qualified allocation plans (RP 1), concerted community revitalization plans (RP 3), site visits (RP 6), market analysis (RP 8), promoting choice and opportunity for residents (RP 9), rural development (RP 10), and Native American development (RP 11)—need revision in light of current housing market dynamics?*

    a. Formed in 2001, the National Council of Housing Market Analysts (NCHMA) serves as an organizing body that develops standards, ethics and best practices for market study providers. Today, NCHMA is still the only professional body dedicated exclusively to enhancing the professionalism and standards surrounding residential market analysis. NCHMA is run through NH&RA and provides certification to members who adhere to our Code of Ethics and Standards of Professional Practice and maintain market analysis

specific continuing education. NCHMA and NH&RA encourage the adoption of the NHCMA Model Content Standards. Furthermore, we request that NCHMA members be added to Housing Agencies' lists of approved market study providers and encourage Housing Agencies to consider limiting their lists to *only* NCHMA members.

b. Section 42 of the IRC requires Housing Agencies to include a 30 percent basis-boost for developments in Difficult to Development Areas (DDAs) and Qualified Census Tracts (QCTs) and several additional basis boosts are contemplated in the Affordable Housing Credit Improvement Act. The basis boost is a powerful financial incentive that increases the amount of tax credit equity available to the project. Section 42(m)(1)(B)(ii)(III) of the IRC requires Housing Agencies to give preference in allocating credits to projects located in qualified census tracts. Housing Agencies should ensure that their QAPs do not unwittingly disincentivize or make it impossible to develop affordable housing in QCTs and DDAs.

8. *What, if any, new recommended practices should state allocating agencies consider to optimize siting of new Housing Credit developments?*

V) Other Topics

9. *In addition to the four major issues outlined above, are there other existing recommended practices that you suggest need revision? If yes, please specify what revisions are needed and why.*

10. *Are there other aspects of state Housing Credit administration that would benefit from new recommended practices? If yes, please specify what new practices are needed and why.*

Thank you for your consideration of this feedback. We welcome the opportunity to discuss any of these items with you further at your leisure. I can be reached directly at 202-939-1787 or ksnyder@dworbell.com.

Sincerely,

Kaitlyn Snyder

Managing Director