



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

Special Attention of:

Notice: H 09-09

All Multifamily Hub Directors
All Program Center Directors
All Project Managers
All Field Office Directors

Issued: JULY 29, 2009

Expires: JULY 31, 2010

Cross reference:
Mortgagee Letter 2009-24

SUBJECT: Housing Tax Credit Coordination Act of 2008

On July 30, 2008, the Housing and Economic Development Recovery Act of 2008 (HERA) became Public Law 110-289. Title VIII of HERA, in subtitle B, cited as the "Housing Tax Credit Coordination Act of 2008," made changes to the multifamily programs of the Federal Housing Administration (FHA) to facilitate the use of such programs with Low-Income Housing Tax Credits. In anticipation of HERA, and to further the Department's goal of encouraging the use of FHA multifamily programs with these tax credits, the Department issued Mortgagee Letter 2008-19, Streamlined Processing of Multifamily Mortgage Insurance Applications Involving Low-Income Housing Tax Credits, and released initial policy and procedures on the use of Master Leases that permit a combination of investment by one or more investors under one or more tax credit program. Now, under the authority of HERA, we are able to further promote the use of FHA programs with Low-Income Housing Tax Credits. This Mortgagee Letter describes the additional authority granted under HERA and the Department's implementation of Sections 2832 and 2834 of the Act.

Section 2832 of HERA requires the Secretary to implement administrative and procedural changes to expedite the approval of multifamily housing projects utilizing FHA mortgage insurance programs with either Low-Income Housing Tax Credits or tax-exempt housing bonds. The Department has already taken certain steps to achieve expedited approval of such projects. First, all of the provisions of Mortgagee Letter 2008-19 that streamline FHA multifamily mortgage insurance processing remain in effect. Second, we are in the process of obtaining Departmental clearance of a final Master Lease policy to facilitate the use of tax credits. In addition, HERA requires the Secretary to consult with the Commissioner of the Internal Revenue Service, the product of which may result in additional administrative and procedural changes to

expedite the approval of FHA mortgage insurance programs with Low-Income Housing Tax Credits or tax-exempt housing bonds. Finally, the Department published a Federal Register Notice soliciting recommendations from the public regarding further administrative and procedural changes that may be implemented to facilitate the approval of FHA mortgage insurance with Low-Income Housing Tax Credits or tax-exempt housing bonds.

Section 2834 of HERA provides three substantive changes to the Department's processing of certain FHA mortgage insurance applications. The first change eliminates mortgage insurance provided pursuant to Title II of the National Housing Act (12 U.S.C. 1707, et. seq.) as a basis to require the statutorily prescribed certification from the Secretary that existing subsidy layering requirements have been satisfied. This HUD Notice and its accompanying Mortgagee Letter supersedes all previously issued subsidy layering guidance by either a Mortgagee Letter, HUD Notice, HUD Handbook, etc., with respect to mortgage insurance under Title II of the National Housing Act.

The second substantive change affects the mortgagor's obligation under section 227 of the National Housing Act (12 U.S.C. 1715r) to certify "actual cost" upon completion of project construction, rehabilitation or repair for mortgage insurance transactions involving low-income housing tax credits. If the Secretary determines at the time of Firm Commitment issuance that the ratio of loan proceeds to the actual cost of such projects is less than 80 percent, the mortgagor will not be required to certify actual costs to HUD. For example, in cost programs such as 221(d)(4) and 220, when the "Maximum Insurable Mortgage" derived utilizing Form HUD 92264-A is less than 80 percent of the Total Estimated Replacement Cost of Project derived under section G. of Form HUD-92264, the mortgagor will not be required to certify actual cost to HUD. Attachment 1 provides an example of this computation. In cases that are exempt from cost certification, a Cost Certification Audit Fee, line 66, Section G., Form HUD-92264 is not applicable. The exemption from cost certification requirements provided by HERA applies to applications for mortgage insurance involving Low-Income Housing Tax Credits under the following programs: Sections 213, 220, 221(d)(3), 221(d)(4), and 231.

For projects that are exempt from providing a cost certification, when the project reaches 100% substantial completion as deemed by the HUD Inspector, the Mortgagee will be notified of the substantial completion date.

The Mortgagor must account for all operating income during construction and ending three months prior to the originally scheduled date of the first principal payment under the mortgage. Therefore an income and expense statement must be submitted covering the period from first occupancy (if occupancy occurred during construction) or from the date of substantial completion (as deemed by the HUD Inspector) up through the period ending three months prior to the date of the first principal payment under the mortgage as originally scheduled. The statement must be submitted to HUD, at least 30 days prior to the date scheduled for Final

Endorsement. If the income and expenses statement evidence receipt of income (Excess Funds) during this period, the mortgagor will be required to deposit the Excess Funds into the reserve fund for replacements established under the Regulatory Agreement, unless the HFA has notified HUD that the funds must be used in another manner to be in compliance with IRC, Section 42 low-income housing tax credit requirements

If during construction the project experiences significant cost overruns that result in the mortgagor requesting a mortgage increase, the mortgagor will be required to justify and support such request with documentation satisfactory to HUD that provides a suitable basis for a mortgage increase.

Also, for those projects that are exempt from providing a cost certification, after construction completion, the Hub or PC will issue a modified HUD Form 2580 – Determination of Maximum Insurable Mortgage. See Attachment 3.

Finally, the last substantive change under section 2834 involves the requirement under 24 CFR 200.54 that the mortgagor deposit with the mortgagee the amount of “cash deemed by the Commissioner to be sufficient, when added to the proceeds of the insured mortgage, to assure project completion and pay the initial service charge, carrying charges, and legal and organizational expenses incident to the construction of the project.” HERA provides that if the project is to receive the benefit of equity from Low-Income Housing Tax Credits, the Department may not require the escrowing of any of such equity, or accept any form of security in place thereof, such as a letter of credit. The Department is in the process of making a conforming rule change to 24 CFR 200.54 to implement this provision of HERA.

While low-income housing tax credit equity will not be escrowed, an appropriate amount of tax credit equity must be invested at the time of initial endorsement to provide a reasonable degree of assurance that the relationship between the mortgagor and the tax credit investor will be maintained. We believe that an expenditure of 20% of the total low-income housing tax credit equity at the time of initial endorsement is sufficient to ensure the investor’s continued commitment. **If less than 20% is proposed, the Hub/PC office must submit a recommendation to HQ.** The Hub/PC must review the justification submitted by the Lender as address in the Underwriting Summary Report as to how the lesser amount is appropriate as an initial investment of the tax credit equity, and forward a recommendation to HQ, along with supporting documentation for approval of the lesser amount. An annotated example of information derived from Form HUD-92264-A to assist with the calculation of the amount of the initial and subsequent infusions of tax credit equity is attached hereto as Attachment 2.

Based on the guidance reflected herein, the Commitment for Insurance of Advances, form HUD-92432 (Commitment), should contain, among other special conditions, the conditions as outlined on Attachment 4.

If you have any questions concerning this Notice, please contact Joseph Sealey, Director, Technical Support Division, Office of Multifamily Housing Development at (202) 402-2559.

David H. Stevens,
Assistant Secretary for Housing –
Deputy Federal Housing Commissioner

ATTACHMENT 1

The following examples illustrate the applicability of cost certification under HERA legislation. Criteria 11 is used in the examples since it will often control as the Maximum Insurable Mortgage under LIHTC applications.

Section 221(d)(4)

Form HUD 92264-A Criteria 11.

11. Amount Based on Deduction of Grants, Loans, Tax Credits and Gifts for Mortgageable Items:

Total Project Replacement Cost (from Section G. Form HUD 92264) ..	\$ 13,000,000
LIHTCs for Mortgageable Items	<u>5,000,000</u>
Maximum Insurable Mortgage Amount.....	\$ 8,000,000

$\$ 8,000,000 / \$13,000,000 = 62\%$.

In this example a cost certification is not required under HERA for a LIHTC application. The ratio of loan proceeds to the firm commitment estimated project replacement cost is less than 80%.

ATTACHMENT 2

Equity Contribution Clarification

Pursuant to the Housing and Economic Recovery Act of 2008, HUD may no longer require that a mortgagor place in escrow low income housing tax credit proceeds/equity (LIHTC Equity). HUD will require, however, that an appropriate amount of the LIHTC Equity be invested in the project and applied to HUD approved items at the time of Initial Endorsement. The amount deemed by the Commissioner to be sufficient for such purposes will depend on the circumstances of each transaction, but should be an amount that assures an ongoing relationship between the mortgagor and the tax credit investor (Investor). It is recommended that the initial installment of LIHTC Equity be an amount that is equal to or exceeds twenty percent (20%) of the total LIHTC Equity that will be available for the project. If less than 20% is proposed, a recommendation must be sent to HQ for review and approval. Clarification of such requirement is provided in the example below:

There is no change in the computation to determine the cash requirements and/or front money escrow on HUD Form 92264-A. However, the calculation of the initial installment of LIHTC equity is calculated as follows:

Example of LIHTC equity contribution calculation adapted from Form HUD-92264A, Section II Total Requirements for Settlement – Part B.

1. a. Development Cost	\$14,381,216	
1. b-c Total of lines a & b	<u>\$14,381,216</u>	
2. Land Indebtedness	<u>\$ 625,000</u>	
3. Subtotal (lines 1c + 2)	<u>\$15,006,216</u>	
4. a. Mortgage Amount	\$10,935,000	
4. b. Home funds	<u>\$ 650,000</u>	
5. Fees not to be paid in cash	<u>\$ 0</u>	
6. Subtotal (lines 4a+4b+5)	<u>\$11,585,000</u>	
7. Cash investment require	<u>\$ 3,421,216</u>	
8. Initial Operating Deficit	<u>\$ 488,772</u>	
9. Other Cost (Bond cost \$312,617) and \$15,000		<u>\$ 327,617</u>
10. Working Capital		<u>\$ 218,700</u>
11. Other: Social Services Escrow \$55,000 + Fee \$2,066,897) ...		<u>\$ 2,121,897</u>
12. Total estimated cash requirement (sum of lines 7+8+9+10+11)		<u>\$ 6,578,202</u>
Front money escrow, if any (subtract line 6 from line 1) ...		<u>\$ 2,796,216</u>

Section III Source of Funds to Meet Cash Requirements

Source:

A	Tax Credit Equity	<u>\$5,027,301</u>
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B	Developer funds	<u>\$1,550,901</u>
	Total available cash for project	<u>\$6,578,202</u>

The initial 20% calculation of the tax credit equity (***should be the same as the tax credit equity amount reflected in Criterion 11***) for mortgageable items is \$1,005,460. This is based on the mortgageable tax credit allocation of \$5,027,301 x 20% = \$1,005,460, it is not based on the total cash requirements for the project. The remaining cash requirements **not** being satisfied with Low Income Housing Tax Credits will/must be satisfied in accordance with outstanding instructions.

As discussed in Mortgage Letter 2008-19, titled “Streamlined Processing of Multifamily Mortgage Insurance Applications Involving Low Income Housing Tax Credits,” the Commitment for Insurance of Advances, form HUD-92432 (Commitment), should contain, among other special conditions, a requirement for the delivery of evidence satisfactory to HUD of an agreement that binds the Investor to timely and periodically pay to the mortgagor LIHTC Equity to contribute to the completion costs, in the aggregate amounts proffered to HUD on forms HUD-2880 and HUD-92013.

For instance, a contribution schedule that could be acceptable to HUD might require the 2nd installment of LIHTC Equity to be contributed at 50% construction completion, the 3rd installment at 75% construction completion, with the final infusion of LIHTC Equity required to complete construction and pay third party soft costs, exclusive of developer’s fee, by 90% construction completion. HUD is aware that there may be LIHTC Equity pay-ins related to required reserve capitalization and/or developer’s fee scheduled subsequent to construction completion and the achievement of certain Investor tax-related benchmarks established per the partnership or operating agreement controlling the mortgagor entity.

After the first installment of LIHTC Equity is disbursed at Initial Endorsement, the subsequent contributions should be made at a time and in a manner during construction to ensure that the statutory limitations based on actual costs for the applicable FHA mortgage program are maintained during construction. To maintain the appropriate balance of LIHTC Equity and mortgage loan proceeds, at each infusion of LIHTC Equity, those funds may need to be utilized before the next disbursement of mortgage loan proceeds.

The actual amount of the initial equity investment should be reflected in the Firm Commitment as a special condition, and listed as a line item on the initial requisition, HUD Form 92448 for immediate disbursement.

ATTACHMENT 3

SAMPLE MODIFIED FORM HUD-92580

DETERMINATION OF MAXIMUM INSURABLE MORTGAGE

1. (a) Original Mortgage Amount \$10,000,000.00
 (b thru e) are not applicable - insert NA or cross through
2. ~~Certified Actual Cost~~ – strike certified actual cost and
 insert cost from Section g line 74 \$13,000,000
3. Disallowed cost (insert NA) \$ N/A
4. Recognized actual cost of improvements ... (sec. G. line 74) \$13,000,000
5. Land
6. TOTAL LAND AND IMPROVEMENTS \$13,000,000
7. Statutory Percentage of total cost (___% of item 6) \$ N/A
8. Lesser of: (i) \$ ___ existing Mortgage Indebtedness on (Land and
 Improvements to be Rehabilitated) or (ii) an amount Equal
 To ___% of the Fair market Value \$ ___ of
 Land and Improvements Before (Repair or Rehabilitation) \$ N/A
9. TOTAL Line 7 plus line 8, (if any)
10. Maximum Insurable Mortgage in Multiples of \$100, ~~(Item 1(e)~~
~~— Or Item 9 whichever is the Lesser) if Grants involved see~~
~~— attached Sheet to this form for Reconciliation of Adjustment,~~
~~— if required —~~ \$10,000,000

Note: the mortgage credit analyst should note on the form that the project is exempt from cost certification due to the loan to actual cost being less than 80% as authorized under the HERA 08. Insert the actual percentage of the loan to cost _____.

Completion of the reverse side of the form

Schedule 1 NA

Schedule 2 Disallowed Cost NA

Schedule 3 Computation of Mortgagor's Initial Equity Investment

- | | |
|---|---------------------|
| 1. Total Land and Improvements (line 6 above) | <u>\$13,000,000</u> |
| 2. Less: Maximum Insurable Mortgage (line 10 above) | <u>\$10,000,000</u> |
| 3. Mortgagor's Initial Equity Investment | <u>\$ 3,000,000</u> |

ATTACHMENT 4

Special Conditions for Firm Commitment - Form HUD-92432 (Commitment):

1. Provide satisfactory evidence of an agreement that binds the Investor to timely and periodically pay to the mortgagor LIHTC Equity to contribute to the completion cost, in the aggregate amounts proffered to HUD on Form HUD-22880 and HUD 9-2013.
2. An equity contribution schedule acceptable to HUD must be provided prior to Initial Endorsement.
3. The Initial Equity Investment amount is \$ _____. This amount must be reflected on the initial requisition (HUD Form 9-2448) and disbursed in its entirety at Initial Endorsement.
4. Subsequent LIHTC Equity contributions should be made at a time and in a manner during construction to ensure that the statutory limitations based on actual costs for the applicable FHA mortgage program are maintained during construction. To maintain the appropriate balance of LIHTC Equity and mortgage loan proceeds, at each infusion of LIHTC Equity, those funds may need to be utilized before the next disbursement of mortgage loan proceeds.
5. Since the project is exempt from providing a cost certification, prior to Final Endorsement and when the project reaches 100% substantial completion, an income and expense statement must be submitted covering the period from first occupancy (if occupancy occurred during construction) or from the date of substantial completion (as deemed by a HUD Inspector) through the period ending three months prior to the date of the first principal payment under the mortgage, as originally scheduled. The statement must be submitted at least 30 days prior to the date scheduled for Final Endorsement. If the income and expense statement evidences receipt of income (Excess Funds) during this period, the Mortgagor will be required to deposit the Excess Funds into the Reserve Fund for Replacement established under the Regulatory Agreement unless the Housing Finance Agency has notified HUD that the funds must be used in another manner in order to be in compliance with IRC Section 42 for low-income housing tax credits.
6. If during construction the project experiences significant cost overruns that result in the mortgagor requesting a mortgage increase, the mortgagor will be required to justify and support such request with documentation satisfactory to HUD that provides a suitable basis for a mortgage increase.