

TCAP Guidance On Fees and Asset Management



As of September 18, 2009

I. INTRODUCTION

This guidance addresses TCAP administrative, project compliance, and asset management costs that may occur during the implementation of the TCAP program. Understanding the distinctions among these cost categories will assist grantees in determining which costs are eligible TCAP costs and which costs must be paid through other funding sources. Differentiating among administrative, project compliance and asset management costs will also help grantees understand which costs must be borne by the grantee, and which costs can be paid for by the project owner, including costs for activities undertaken by third party contractors at the expense of the project owner.

II. GRANTEE ADMINISTRATIVE COSTS

The Recovery Act did not authorize the use of TCAP funds for administration of the TCAP Program. Therefore, TCAP grantees must pay for the cost of administration of their TCAP program. Furthermore, a TCAP grantee cannot reimburse its administrative costs by charging fees to TCAP projects. 24 CFR 85.22(a)(2), which applies to many federal programs, including TCAP, prohibits the use of TCAP funds awarded to a project for payment of fees to TCAP grantees. In addition, fees charged to TCAP projects, paid for by other sources of funds, are considered “program income.” Program income can only be used to pay for TCAP eligible costs and cannot be used to pay for a grantee’s administrative costs. (See 24 CFR 85.25 and TCAP guidance on Program Income at www.hud.gov/recovery/tax)

If a TCAP grantee does not have the appropriate staff to perform required administrative tasks, it may choose to contract with a third party to perform certain administrative functions. However, regardless of whether a TCAP grantee performs these administrative functions itself or hires a contractor to do so, a TCAP grantee may not charge any fees to the TCAP project owner in an attempt to recoup all or a portion of the TCAP grantee’s administrative costs. For example, some TCAP grantees have proposed to charge “pass-through fees” that they plan to charge projects to pay third-party contractors to perform (NEPA) environmental reviews. This is not permitted because the grantee’s costs for performing required functions, such as environmental reviews, are not reimbursable from any outside source of funds (i.e., TCAP funds, other project funds).

The following are examples of required TCAP grantee administrative functions:

- **General management, oversight and coordination.** Reasonable costs of overall program management, coordination, monitoring, and evaluation.
- **Preparing reports and other documents** related to the program for submission to HUD;
- **Travel costs** incurred for official business in carrying out the program;
- **Administrative services.** Services such as general legal services, accounting services, and audit services;
- **Staff and overhead.** Staff and overhead costs directly related to carrying out the project, such as work specifications preparation, loan processing, inspections, and other services related to assisting potential tenants.
- **Compliance Monitoring, such as**
 - NEPA: Conducting “environmental reviews” of proposed projects to meet the requirements of the National Environmental Policy Act (NEPA) of 1969 (and related laws) before committing TCAP funds to projects;
 - Federal Labor Standards: Monitoring to assure compliance with federal labor standards during construction, such as the Davis Bacon Act;
 - Lead-based Paint: Monitoring projects during construction to ensure compliance with the Residential Lead-Based Paint Hazard Reduction Act of 1992 (where applicable).

The cost of providing information necessary for compliance monitoring may be borne by the project owner. For example, the TCAP grantee may require the project owner to document affirmative marketing activities and outreach to prove compliance with Fair Housing Act requirements. (See section on Project Compliance Costs below) In addition, certain compliance monitoring activities required of TCAP grantees may be included as part of required asset management activities. For example, reviews of projects to determine compliance with the Fair Housing Act or the Residential Lead-Based Paint Hazard Reduction Act of 1992 during the grant period can be incorporated into a grantee’s asset management activities and fee structure (See section on Asset Management below).

Legal Fees

Legal fees incurred by the TCAP grantee to perform its administrative functions, e.g., to pay for outside counsel fees associated with awarding TCAP funds to a project (as a grant or a loan), are grantee administrative costs which cannot be passed onto the TCAP project. There may also be closing costs related to the TCAP grant or loan which are the grantee's responsibility, such as the cost of recording the required TCAP written agreement as a deed restriction. However, closing costs that are attributable to the project and not part of the grantee's administrative responsibilities, such as appraisals or local recording fees are "project costs" payable by the TCAP project owner.

III. PROJECT COMPLIANCE COSTS

While the costs to carry out compliance monitoring fall solely upon the TCAP grantee, the project owner is solely responsible for the costs of making the project compliant with all applicable TCAP program requirements during the development of the project as well as during the TCAP grant period. In order to meet its monitoring responsibilities, the TCAP grantee may require TCAP project owners to provide the information or documentation needed by the grantee to make compliance determinations. The project owner is responsible for the costs of providing the information or documentation to the grantee about such compliance. These costs may be allowable TCAP project costs. See CPD Notice 09-03 for more guidance on eligible TCAP project costs.

The following are some examples of project costs related to documentation of compliance:

- **NEPA and Related Laws**

Costs associated with supplying information necessary for the grantee to conduct their environmental review of the project may be charged to the project, architectural and engineering studies, soil tests, research, documentation, and certifications regarding status of the site with respect to archeological findings, historic preservation, wetlands, flood plains, etc.

- **Davis Bacon Act/Labor Laws Compliance**

Project costs include expenses incurred to provide required reports to the TCAP grantee, such as payroll forms, or other reports that will enable the grantee to determine that the construction contract contains the correct wage rate decisions or meets labor standards. Also, any costs incurred as a result of providing information required by the Recovery Act in regard to job creation would be a project cost.

- **Section 504 of the Rehabilitation Act of 1973**
Costs of design and/or engineering studies related to compliance with Section 504 of the Rehabilitation Act of 1973, including certifications from architects or engineers regarding the project design and construction specifications, are project costs.

- **Lead-Based Paint Hazard Control**
All costs associated with lead-based paint evaluations, risk assessments, engineering studies or other information that must be provided to the TCAP grantee to demonstrate compliance, are project costs.

- **Legal Fees and Closing Costs**
Legal fees and closing costs incurred by TCAP project owners related to the development of a TCAP project are eligible project costs, however, these costs are payable with TCAP funds only if they meet the definition of eligible TCAP costs defined in CPD 09-03, which states that all costs included in the eligible basis of a LIHTC project (as defined by Section 42 of the Internal Revenue Code) are eligible TCAP costs.

IV. ASSET MANAGEMENT

The Recovery Act requires that TCAP grantees perform asset management functions for TCAP projects “to ensure compliance with section 42 of the IRC of 1986, and the long term viability of buildings funded” by TCAP.

TCAP grantees may charge fees to TCAP project owners for the asset management activities described below. Because asset management for TCAP projects is statutorily required, asset management fees are the only fees charged to TCAP projects that are not considered program income. 24 CFR 85.22(a)(2) prohibits project owners from paying eligible asset management fees with TCAP funds, therefore project owners must identify other funding sources to pay these fees.

Each TCAP grantee should establish the asset management fee amount(s) and structure that is most likely to assist the grantee and TCAP project owners to successfully develop TCAP projects timely, and in compliance with TCAP program requirements. Differing fee levels for differing levels of asset management services are allowable, as long as the fee structure is transparent and applied uniformly to all TCAP projects.

Asset management activities for a project may begin when TCAP funds are first committed to a TCAP project. The following is the list of activities eligible to be paid for with fees charged for asset management, organized by project stage. Note: not every activity on this list must be performed for every project, as some activities will not be applicable or necessary to every project.

➤ **Development/Construction Activities**

- Review of underwriting assumptions to ensure adequacy of debt service coverage, reserve levels, and other underwriting benchmarks;
- Review of market studies for proposed developments to ensure reasonableness of assumptions and proposed market capture rates;
- Review of drawing, architectural and engineering plans & specifications for compliance with federal requirements, project design review for compatibility with market studies, etc.;
- Review of capital needs assessments of rehabilitation developments to ensure adequacy and reasonableness of assessments and proposed scope of rehabilitation;
- Monitor construction to ensure the development is progressing as scheduled (e.g. actual construction start date compared to original projections, projected construction end date compared to original projections);
- Monitor construction draws and change orders to analyze actual development costs and compare to original budget. Monitor contingency/change orders to ascertain if the construction budget is not workable;
- Conduct periodic construction inspections and quality reviews, if needed. Confirm construction completion guarantees;
- Confirm receipt of certificate of occupancy for development; and
- Conduct reviews to confirm compliance with LIHTC and TCAP requirements related to construction and design of the project, such as Section 504 of the Rehabilitation Act of 1973 or the Lead-Based Paint Poisoning Prevention Act and the Residential Lead-Based Paint Hazard Reduction Act of 1992.

➤ **Property Management and Operations**

Perform Review/Assessment of:

- Marketing plans and leasing procedures;
- Occupancy rates/vacancy turnover performance;
- Livability services, such as building security and amenities (e.g. pools, business center, laundry rooms);
- Energy efficiency measures/utility cost controls;
- Maintenance performance, including preventative maintenance;
- Inspection reports regarding local housing code compliance or other codes related to maintaining a valid certificate of occupancy or other necessary licenses;
- Documentation of tenant files to ensure tenant qualifications per LIHTC and TCAP income targeting requirements;
- General operating procedures, including procedures for prompt correction of any physical and tenant noncompliance, disaster contingency plans, etc.;
- Inspections and evaluations of physical plant in conjunction with capital repair and replacement planning evaluation of building;
- Compliance related to LIHTC and TCAP requirements, and actions taken by the grantee and project owner to address findings of non-compliance made by the TCAP grantee or a federal agency; and
- Documentation of compliance or findings of non-compliance with other applicable federal, state or local laws related to property management, such as occupancy or property standards, fair housing laws, etc.

➤ **Financial Management**

Review Project Financial Management for:

- Appropriate risk management techniques and insurance coverage;
- Proper budgeting, accounting and internal controls;
- Audit compliance, e.g. - ensure delivery of independent audits, review draft audits prepared by independent auditors;
- Timeliness of required project compliance reports submitted by owners to TCAP grantees with respect to LIHTC and TCAP requirements, and any findings of non-compliance by the grantee or a federal agency;
- Establishment of lease-up, operating, emergency and replacement project reserves, also management of operating reserves and replacement reserves (including approval of expenditures); and
- Analyses of annual operating budget, debt coverage, cash flow trends, and other financial information, such as operating cost analyses, comparisons of actual costs vs. budget, prior year operations, and comps, such as state averages.

➤ **Long-Term Viability Assessment**

Periodic viability analyses, to include:

- Establishment of benchmarks to classify projects as “troubled”;
- Trend analyses of development, property and financial management assessments described above;
- Project cash flow or other analyses to ascertain long term financial viability, e.g. evaluation of debt or other financial restructuring alternatives;
- Ongoing analysis of market conditions and vacancy rates, analysis of ongoing marketability and capital needs of development; comparisons of actual absorption rate, rental revenue, and lease up to original projections;
- Review of project compliance reports related to LIHTC and TCAP requirements, including projections regarding the ability of project to maintain compliance with

LIHTC and TCAP affordability period requirements; the grantee's and project owner's actions to address non-compliance issues; and

- Recommendations and implementation of workout strategies for a troubled projects.