

**FANNIE MAE MULTIFAMILY FINANCING:  
PRACTICAL IMPLICATIONS OF “DUS” LENDING PROGRAM**

**BORROWER’S COUNSEL PERSPECTIVE**

presented by

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**ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW’S  
15<sup>TH</sup> ANNUAL REAL PROPERTY, ESTATE PLANNING SYMPOSIA  
MAY 12-14, 2004  
SEATTLE, WASHINGTON**

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**Borrower’s Counsel Perspective**

I. OVERALL STRUCTURE OF FINANCING FOR MULTIFAMILY TRANSACTION  
(FINANCED WITH TAX EXEMPT BONDS AND LOW INCOME HOUSING TAX CREDITS)

- Example: See Transaction Diagram (Exhibit “A”)

Players and Roles

- Owner Entity
- Bond Issuer
- Bond Trustee
- Bond Purchasers
- Credit Enhancer
- Bond Underwriter/Remarketing Agent
- Credit Rating Agency
- General Partner
- Guarantors
- Tax Credit Investor
- Developer
- Contractor
- Property Manager
- Other parties (Title Agent, Surveyor, Architect, Engineer, Environmental Consultant, Surety, Insurance provider)

## II. HEARING CATS (OR BRINGING THE PROCESSES TOGETHER)

### A. Varying Perspectives on the Deal

- development deal
- tax credit deal
- bond deal

### B. Bond Process

- Identify an Issuer
- Submit bond application
- Inducement Resolution from Issuer (bond issuance clock starts)
  - carry forward allocation
- Obtain bond allocation
- Bond counsel produces documents
- Finalize bond documents
- Publish notice of hearing in paper
- Bond documents are validated (validation hearing)
- Mail Preliminary Official Statement to potential purchasers
- Price bonds
- Close/sell/fund bonds
- Expend bond proceeds & complete project within reasonable period

### C. Tax Credit Process

- Solicit and obtain Investor
- Investor's counsel provides Limited Partnership Agreement and other tax credit investor documents
- After bonds are allocated, submit tax credit application to state agency (must meet threshold requirements)
  - 50% Test - more than 50% of the capitalized costs of the project must be funded by bond proceeds (numerator is bond proceeds paying capitalized costs and denominator is total capitalized costs)
- Fixing Credit Percentage
  - binding agreement w/in x days of issuance or month in which each building is placed in service
- Buildings placed in service (no outside date)
- Cost Certification
- 8609s issued

## III. PRIMARY DOCUMENTS

### A. Bond Documents

1. Indenture of Trust
  - rights of redemption
  - notice and cure
2. Loan Agreement
  - notice and cure
  - defaults

3. Land Use Restriction Agreement
4. Preliminary Official Statement / Official Statement
5. Remarketing Agreement
6. Bond Purchase Agreement
7. Tax Exemption Agreement and Certificates
  - Good Cost / Bad Cost analysis - 95% of bond proceeds must be used for capitalized costs and only 2% can be used for costs of issuance
  - Arbitrage bonds - unless certain spending benchmarks are met within certain time limits earnings from bond proceeds cannot exceed interest cost on the bonds (no positive arbitrage; must rebate the earnings)
  - §142 imposes income and rent restrictions in addition to §42 requirements: at least 20% of units leased to families with income at 50% of AMI or less
  - Scattered site issue - if site not contiguous must meet 50/20 test for each parcel

B. LOC / Credit Enhancement Documents

1. Letter of Credit Agreement / Reimbursement Agreement
2. Deed to Secure Debt, Security Agreement and Assignment of Leases and Rents (First Mortgage)
3. Guaranty Agreements
4. Other

C. Subordinate Loan Documents (if applicable)

1. Second Priority Note
2. Second Priority Loan Agreement
3. Second Priority Deed to Secure Debt (Second Mortgage)
4. Intercreditor Agreement / Casualty and Condemnation Proceeds Agreement
  - casualty & restoration language
  - notice and cure rights
  - priority of payment
  - disbursement
- Related party loan issue (10% ownership interest)
- Loan Terms
  - Payments subject to cash flow
  - pay rate
  - prepaid interest
- Separate construction and permanent loans
- Treatment as real debt
  - interest at AFR compounded annually
  - probability of repayment
  - back-end analysis
- Portion of funds as grant; grant income issue; excluded from basis
- Separate below market loan; risk of consolidation of loans

D. Tax Credit Equity / Partnership Documents

1. Limited Partnership Agreement
2. General Partner organizational documents
3. Partnership Management Fee Agreement (Incentive Mgt Fee)
4. Asset Management Fee Agreement
5. Development Services Agreement
  - Section 42(m)(2)(D) Determination from Issuer
  - Election to Fix Tax Credit Percentage

IV. OTHER ISSUES

- Legal Opinions
  - to Lender(s)
  - to Investor