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Principal Documents Used in Tax-Exempt Multifamily Housing Bond Financings

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The purpose of this memorandum is to summarize the principal documents which are utilized in most tax-exempt multifamily housing bond financings. These documents will, of course, vary greatly depending upon a number of factors. These include whether the bond issue is credit-enhanced or noncredit-enhanced, whether it is fixed or variable rate, whether the financing structure involves a loan of bond proceeds to the borrower (most typical structure), or a lease, installment sale, or other arrangement, and other factors.

Trust Indenture

The basic terms of the Bonds are typically set forth in a Trust Indenture between the Issuer and a commercial bank serving as Bond Trustee. The Indenture is typically prepared by Bond Counsel. The Indenture will set forth the basic financial terms of the Bonds, including their maturities, interest rates (or methodology for determining interest rates, in the case of a variable rate issue), redemption provisions, mandatory tender provisions, if any (on certain variable rate transactions), and other such basic financial terms. The Indenture will also include the form of the Bonds in which the basic Bond terms are contained. The Indenture will also set forth the basic security for the Bonds and, in the “granting clauses,” the Issuer will typically convey its interest in this “trust estate” (except for certain “reserved rights”) to the Bond Trustee acting on behalf of the Bondholders. The Indenture will also set forth various funds and accounts, will specify how Bond proceeds and other monies will initially be deposited into those funds and accounts and will provide a “waterfall of funds” directing how revenues coming into the Indenture will be disbursed to pay debt service on the Bonds, to cover other administrative expenses of the issue, and for other purposes. If the Bond issue is credit-enhanced, the Indenture will typically contain provisions instructing the Trustee as to how and when to draw upon the credit-enhancement to provide for payment of debt service on the Bonds. Finally, the Indenture will set forth certain events of default and remedies, as well as provisions governing the role of the Trustee, supplemental indentures and certain other matters.

Loan or Financing Agreement

In a typical multifamily transaction, Bond proceeds are loaned by the Trustee on behalf of the Issuer to the Borrower to provide for the construction or acquisition and rehabilitation of the Project. The terms of this “loan” are often set forth in a Loan Agreement or Financing Agreement, also prepared by Bond Counsel, to which the Issuer and the Borrower are both a party. The Trustee and, if another Lender is disbursing Bond proceeds on behalf of the Issuer, that Lender may also be a party. The Loan Agreement may or may not contain one or more forms of note evidencing the obligation of the Borrower to repay the loan of Bond proceeds to the Lender or to the Trustee on behalf of the Issuer. Whether or not a form of note is contained in the Loan Agreement, the basic terms of the loan will typically be set forth in this document. In addition, the Loan Agreement will often contain various other representations, warranties and covenants on behalf of the Borrower which are generally designed to ensure the property is operated and maintained in such a manner as to enable the Borrower to make the payments due on the loan and to preserve the tax-exempt status of the Bonds. The typical Loan Agreement will contain specified events of defaults and remedies and will embody various other provisions relating to the Project.

Mortgage or Deed of Trust

The obligation of the Borrower to repay the loan of Bond proceeds under the Loan Agreement is secured in most financings by a Mortgage or Deed of Trust on the property, granting a real estate security interest in the Project and related fixtures to the Bond Trustee and typically to any Credit-Enhancer of the Bonds. In addition, a Security Agreement may be embodied in the Deed of Trust or separately prepared to create a security interest in equipment relating to the Project in personal property to the Trustee and/or Credit-Enhancer. The Mortgage or Deed of Trust and any related Security Agreement may be prepared by Bond Counsel, Lender’s Counsel or Borrower’s Counsel or by Counsel to the Credit-Enhancer, will contain typical real estate security provisions, and will vary from state-to-state.

Regulatory Agreement or Declaration of Restrictive Covenants

In order for the Borrower to be eligible to use tax-exempt multifamily housing bond financing for its Project, it will typically be required to satisfy the provisions of Section 142(d) of the Internal Revenue Code (in the case of private activity bonds for profit-motivated sponsors), Section 145 of the Code (in the case of certain financings for charitable organizations under Section 501(c)(3) of the Code) and/or other provisions of the Code applicable to tax-exempt multifamily housing bonds. These detailed requirements are typically embodied in a separate Regulatory Agreement or Declaration of Restrictive Covenants. This document is typically prepared by Bond Counsel, is executed and delivered at closing, is recorded at closing or at least before Bond proceeds are disbursed, and will “run with the land” on the property. In the case of a private activity bond financing under Section 142(d), this is the Agreement which will, for example, require that at least 20% of the units be set

aside for persons at or below 50% of area median income or that 40% of the units be set aside for persons at 60% of area median income, in both cases adjusted for family size. In addition, it will impose a requirement that the facility consist of a residential **rental** housing facility, as compared to condominium or other ownership structures, and will set forth various other related requirements of the Code applicable to these financings. In a typical private activity bond financing, these requirements will run at least 15 years after 50% occupancy is reached or, if later, as long as the Bonds remain outstanding.

Credit Enhancement Facility

Assuming the Bonds are credit-enhanced, as at least the senior component of most multifamily housing bond issues are, there will be some type of credit enhancement facility. This may consist of a Credit Enhancement Agreement (*e.g.*, a Fannie Mae for Freddie Mac credit-enhanced financing), a letter of credit (in the case of bank credit enhanced financing), a Bond Insurance Policy (MBIA, Ambac, FSA and other bond insurers), a Mortgage Insurance Policy (in FHA-insured financings), or Government Guaranteed Pass-Through Security (Ginnie Mae-backed financings), or similar device. In so called “direct pay” structures, the credit enhancement agreement will be drawn upon by the Trustee to make scheduled payments of debt service on the Bonds, and the Borrower will (often simultaneously) reimburse the Credit Facility Provider for these draws. The use of this structure also places practically all bankruptcy risk upon the Credit Enhancer as opposed to the Bondholder. Most variable rate transactions utilize a direct pay structure.

Other credit enhancement structures, most often used in fixed rate financings, may provide a “standby” type of Credit Enhancement Facility (*e.g.*, FHA mortgage insurance or bond insurance and surety bonds). Under this structure, payments made by the Borrower under its Note or Loan Agreement are used to pay debt service on the Bonds. The credit enhancement is only hit if there is an interruption in payments from the Borrower and it is necessary to draw upon the Credit Enhancement in order to cure a default on the Mortgage Loan or the Bonds or otherwise make up a deficit in payments.

Reimbursement Agreement

On most credit-enhanced structures there will be a separate Reimbursement Agreement between the Credit Enhancement Provider and the Borrower. This will often set forth the details of the understanding between the Borrower and the Credit Enhancer. It will contain numerous and elaborate default and remedial provisions and will typically give the Credit Enhancer tremendous control, particularly following any default in the Borrower’s obligations on the transaction. The Credit Enhancement and related Reimbursement Agreement are typically prepared by Counsel to the Credit Enhancer.

Intercreditor Agreement

On many credit-enhanced transactions, there will be a form of Intercreditor Agreement, often prepared by Bond Counsel (since the Issuer is typically a party), which will govern the respective rights of the Trustee on behalf of the Issuer, on the one hand, and the Credit Enhancer on the other. This Agreement will set forth the rights of the respective parties to real estate security for the Bonds and to direct control of proceedings in the event the Borrower defaults on any of its obligations on the transaction. This Agreement will typically give principal control and enforcement rights to the Credit Enhancer following a loan default, so long as the Credit Enhancer is performing its obligations under the credit enhancement facility, and otherwise to the Trustee on behalf of the Issuer and the Bondholders.

Official Statement

The Official Statement, generally prepared by Underwriter's Counsel, is a disclosure document similar to a stock prospectus used by the Underwriter to sell the Bonds. It will generally contain a description of the terms of the Bond issue, the Credit Enhancement (if any) and the Credit Enhancer, the Issuer of the Bonds, the Borrower and other private participants and the Project, and the expected sources and uses of Bonds for the financing. It will typically contain summaries of the principal legal documents (Indenture, Loan or Financing Agreement, Regulatory Agreement and possibly other principal financing documents). Detailed aspects of tax-exemption on the Bonds will be described, and the Bond Counsel Opinion relating to the validity and tax-exempt status of the Bonds, as well as the form of the Continuing Disclosure Agreement of the Borrower (on fixed-rate financings) may be attached as Exhibits.

Bond Purchase Agreement

Most transactions will involve the execution and delivery of a Bond Purchase Agreement, also prepared by Underwriter's Counsel, among the Issuer, the Underwriter and the Borrower, at the time the Bonds are sold to the public. The Bond Purchase Agreement will provide that, upon the satisfaction of the conditions set forth therein, the Issuer will agree to issue the Bonds on a day specified for closing, typically several weeks (on a fixed-rate deal) to several days (on a variable rate deal) following the pricing of the Bonds and the execution and delivery of the Bond Purchase Agreement. The Underwriter will agree to purchase the Bonds and the Borrower will agree to borrow the Bond proceeds pursuant to the Bond documents. The Bond Purchase Agreement will specify the terms of the purchase of Bonds, including the agreed underwriting fee or discount, will set forth specific documents, certificates and opinions which must be delivered (often attaching forms of the certificates and opinions as exhibits or specifying their content in the body of the document) in order for the Underwriter to be obligated to close and accept delivery of the Bonds. The Bond Purchase Agreement may contain indemnification provisions in favor of the Issuer and/or the Underwriter, and it may set forth the other fees and expenses of the financing and the party or parties responsible for paying them.

Continuing Disclosure Agreement

In most fixed-rate financings, the Borrower will be required under SEC Rule 15c2-12 to execute and deliver a form of Continuing Disclosure Agreement, in which it will agree to provide to the Trustee, acting in the capacity of a “Dissemination Agent” information regarding certain material events which may occur during the life of the financing, copies of its annual audited financial statements, and certain other continuing disclosure information required by that Rule. This document is typically prepared by Underwriter’s Counsel and sometimes by Bond Counsel.

Remarketing Agreement

In the case of variable rate bond issues, where the interest rate on the Bonds is not fixed to the final maturity at Bond closing, there will typically be a Remarketing Agreement between the Borrower and the Underwriter, serving in the capacity of Remarketing Agent. Under this Agreement, the Remarketing Agent will agree to remarket any Bonds tendered when the interest rate on the Bonds is reset to a new rate. Most variable rate bond issues (though not absolutely all) require all of the Bonds to be tendered when the interest rate is reset to a new mode and no longer permit the Bonds to be retained by their prior holders. The Remarketing Agreement will typically specify the procedure for the remarketing of Bonds, the method of payment and the ongoing fees of the Remarketing Agent. This document is typically prepared by Underwriter’s Counsel.

Other Agreements, Certificates and Opinions

There are numerous other agreements which may be involved in many bond financings. In the event more than one series of Bonds are involved, there may be separate versions of each of some of the above agreements (*e.g.*, Indenture, Loan Agreement) with respect to each series of Bonds and there may be various subordination agreements specifying the respective rights between or among the various series of Bonds or vis-à-vis other non-bond debt. Assuming the structure involves a separate construction credit facility, there may be an entire separate set of documents relating to the construction loan aspect of the financing.

The foregoing is by no means an exhaustive list of the documents, opinions and certificates delivered in a typical tax-exempt multifamily housing bond transaction. A typical closing transcript on such a financing will include at least 40 or 50 and sometimes over 100 items and may consume two or three volumes of materials in especially complex financings. The foregoing should provide, however, a general outline of principal documents utilized in most such transactions.