

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 200

[Docket No. FR-5073-P-01]

RIN 2502-AI47

**Participation and Compliance Requirements -
Revisions and Updates**

AGENCY: Office of the Assistant Secretary for Housing – Federal Housing
Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This rule proposes revisions to HUD’s regulations that require an applicant to disclose and certify as to the applicant’s past performance in HUD’s multifamily housing mortgage insurance programs (multifamily housing programs) prior to any new participation in these programs. The procedure by which these certifications of past performance are submitted to HUD is the new automated filing system called the Active Partner Participation System (APPS). Among other changes to the regulations, this proposed rule would incorporate new policies regarding electronic filing of previous participation certifications; revise the system for identifying parties affected by HUD’s APPS; include newer forms of business ownership and housing programs that are not incorporated in HUD’s currently codified regulations; establish requirements for passive investor participation in certain HUD multifamily mortgage insurance and hospital mortgage insurance programs; and revise the informal due process elements of the regulations.

DATES: Comment due date: *[Insert date that is 60 days from the date of publication in the Federal Register]*

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0500.

Interested persons also may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically in order to make them immediately available to the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title. All comments and communications submitted to HUD will be available, without charge, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339. Copies of all comments submitted are available for inspection and downloading at

www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: William W. Hill, Director, Policy and Participation Standards Division, Office of Housing, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-8000; telephone (202) 708-1320, extension 2625 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the toll-free Federal

Information Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The purpose of the previous participation certification process is to ensure that prospective participants in HUD's multifamily housing programs have a history of carrying out their financial, legal, and administrative obligations in a satisfactory and timely manner. Therefore, entities that want to participate in multifamily housing programs must file a previous participation certificate (PPC) together with a description of all previous participation in multifamily programs at the time they seek to engage in new business with HUD.

HUD's multifamily housing participation and compliance regulations are found at 24 CFR part 200, subpart H. Until 2005, the regulations required the filing of a paper PPC known as form HUD-2530. The regulations were revised in 2005 to provide for the electronic filing of the PPC through the APPS beginning on October 11, 2005, which was subsequently extended to July 1, 2006.

II. This Proposed Rule

A. Applicability.

This proposed rule would update § 200.213 of the currently codified regulations to make the regulations expressly applicable to: (1) multifamily housing programs that have come into existence since the last time the regulations were updated, and (2) existing programs for which HUD believes it is appropriate that participants comply with PPC requirements.

New programs that would be made subject to the PPC requirements include: (1)

the risk-sharing programs under section 542(c) of the Housing and Community Development Act of 1992 (12 U.S.C. 1707 note), and (2) hospital mortgage insurance under section 242 of the National Housing Act (12 U.S.C. 1715z-7) (hospitals are generally included in the existing regulations under the definition of “projects,” but this rule would include the section 242 hospital insurance program specifically in the “applicability” section of the regulations as well).

This proposed rule would also require PPC filings for participation in the following types of projects: (1) Section 202 and 811 projects with project rental assistance contracts (PRAC); (2) projects financed or to be financed with insured or non-insured mortgages receiving interest reduction payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1); (3) projects with mortgages that were HUD-held and where the HUD-held mortgage was sold and the project secured by the mortgage continues to receive HUD assistance (any form of HUD assistance) and/or is subject to an income restriction or HUD use agreement; and (4) such projects where there was a prepayment approved subject to a use restriction or use agreement. The rule proposes that sales of projects owned by HUD, including projects sold at foreclosure, be covered only where the project continues to receive HUD assistance (any form of assistance), and/or is subject to an income restriction, HUD use agreement, or other continuing relationship with HUD.

This rule proposes to add a new paragraph (a)(6) to § 200.217 to include an additional type of transaction that would require the filing of a PPC. This addition is an application to transfer, assign, or assume a subsidy contract.

As more fully discussed later in this preamble, this proposed rule would narrow

the category of individuals who must file PPCs. The rule proposes to limit PPC filings to participants that are active in a transaction, not passive investors.

B. Definitions.

The proposed rule would revise certain definitions used in the existing regulations (24 CFR 200.215) and add new ones.

The definition of “affiliate” would be revised to include parties that have direct or indirect operational control of a participant, as well as policy control.

The definition of “packager or consultant” would be revised to include expanded services that such packager or consultant may perform, as well as a statement that a packager or consultant is generally employed for a specific purpose and relatively short duration.

A definition would be added for the term “participant flag,” or “flag.” A flag does not result in disapproval or interruption in existing HUD business, but rather indicates that there is a noncompliance problem that should be resolved. The flag functions as a type of risk indicator that will be evaluated when the participant makes a request to participate in new business with HUD.

A definition of “participant” would be added to replace “principal.” The rule proposes to establish new categories of natural persons and organizations that do business with HUD. The overall category denoting an organization doing business with HUD would be “participant.” Within the category of participant, there would be three subcategories: “operational participant,” “supportive participant,” and “investment participant.” Each of these categories would be defined. Investment participants would be passive participants without any operational or policy control, and would not have to

file PPCs. Operational and supportive participants would have an active role, and would be required by this proposed rule to file PPCs. In addition, the operational participant would be required to make specific certifications about the investment participant that is engaged in a transaction or about investment participants if there is more than one such participant.

The term “project” would be revised to specifically include a project covered by a housing assistance payment (HAP) contract, a PRAC, or Section 811 contract, regardless of the number of units.

The concept of a “responsible natural person” would be added and defined as a natural person with decision-making authority on behalf of an organization. All organizations must disclose at least one responsible natural person in order to be cleared for participation in HUD’s multifamily housing programs.

The definition of “risk” would be revised to add new risk factors, which the system (APPS) will track. New risk factors would include the participant’s financial stability and performance, both presently and in the past, and previous performance in accordance with statutes, regulations, and program requirements in all HUD-covered multifamily housing activities, and other factors that the Department determines indicative of risk.

A new definition particular to its usage in APPS is proposed for the term “participant mark.” Participant mark is a risk indicator added to a participant’s APPS record that would require any new participation by the participant to be reviewed by the Participation Review Committee (Review Committee).

New definitions would be added for “organization” and “participant proxy.”

“Organization” would be defined to include all types of business associations, as well as include additional types to those referenced in the existing regulations, such as limited liability companies (LLCs) and limited liability limited partnerships (LLLPs). In order to participate in HUD programs, organizations would have to have at least one responsible natural person who is disclosed and cleared through APPS.

A “participant proxy” would be defined as a party authorized by the participant to enter, maintain, change, edit, delete, appoint, or authorize secure system users, in the name of the participant, and to certify for the participant within the APPS processes. The proxy may also be called the participant’s secure system coordinator or system user. The participant controls the selection and authorization of persons to act in the role of participant proxy, and the participant may be its organization’s own proxy. The business processes, instructions, etc., that govern the appointment of a proxy (there may be more than one), are shown on HUD’s Internet site at:

<http://www.hud.gov/offices/reac/online/reasyst.cfm>.

As they relate to APPS and the application for a PPC, HUD considers all actions of the participant proxy to be the actions of the participant.

C. New procedures and standards.

Section 200.219 would specify the required contents of the APPS certification. This rule is proposing to align these certification requirements more closely with the requirements of HUD’s governmentwide suspension and debarment regulations in 24 CFR part 24.

This rule proposes to add a new paragraph (b) to § 200.225 to provide further details about flags and their function. Flags, as noted earlier in this preamble, are a

notation of an event of noncompliance and are considered as risk indicators when the participant involved seeks new HUD business. Flags, however, do not themselves affect the participant's current business.

The proposed rule would also include a new type of disapproval standard. That standard, at 24 CFR 200.230(c)(1), provides that HUD will disapprove participation in new business for any operational participant that has had an insured mortgage assigned in exchange for a multifamily mortgage or hospital claim against the insurance fund or funds, and where such activity occurred within 12 months prior to the application for new business. HUD believes this standard to be fair and that the standard will provide further incentive to operational participants to avoid claims, which, in turn, will reduce HUD's payment of insurance claims.

The existing standard provides for HUD to consider the circumstances surrounding the default that led to the claim. HUD has decided that it is in the best interest of the government to replace the deliberations on circumstances in favor of this more objective and uniform standard. The single greatest cost to HUD in the multifamily programs is the payment of insurance benefits to eligible lenders following a default under an insured mortgage. However, because the insurance programs are non-recourse to the individuals and organizations in the multifamily programs, there is less incentive to avoid the filing of a claim by the insured lender. The standard proposed by this rule would provide a clear incentive to operational participants to avoid mortgage defaults.

Total claims for insurance benefits in years 2000 – 2005 were, by fiscal year:

FY	UPB of Claims
2001	\$ 787,472,885
2002	\$ 1,012,012,183
2003	\$ 1,061,966,181
2004	\$ 1,459,032,620
2005	\$ 1,220,159,520
TOTAL	\$ 5,540,643,389

D. Appeal procedures.

The rule proposes to replace the due process appeal procedures of the existing regulations (§§ 200.241-200.245) with a different, pre-decisional due process procedure. Where there are adverse risk factors, the participant would be notified of those factors and have an opportunity for a hearing before a decision is made. Additionally, the participant would have the opportunity to informally discuss the findings with the relevant field office. Specifically, a new § 200.229 would be added stating that before the Review Committee considers a participant's application, the Review Committee will notify the participant of any risk indicators present in HUD's records.

Before a determination is made on the new application, the Review Committee would provide a participant with an opportunity to informally present the reasons why its application should be approved, notwithstanding the risk indicators. The participant would be able to make such a presentation in person, by telephone, or in writing and to submit documents and other materials prior to or during the hearing, and those materials would become part of the administrative record concerning the Review Committee's determination. The participant would have the right to be represented by counsel at the hearing. The Review Committee's determination on the application would be a final agency action.

E. Safeguards of government-held personal data.

On May 10, 2006, President Bush signed Executive Order 13402, entitled

“Strengthening Federal Efforts to Protect Against Identity Theft.” In this Executive Order, the President directs federal agencies to, among other things, increase safeguards to better secure government-held personal data. Through this Executive Order, the President also appointed a federal agency task force to review the activities of federal agencies on the use and retention of personal data and submit to the President a coordinated strategic plan to further improve the effectiveness and efficiency of the federal government’s activities in the areas of identity theft awareness, prevention, detection, and prosecution. By Executive Order 13414, which amended Executive Order 13402, the President has directed the submission of the strategic plan by February 9, 2007, or as soon as practicable thereafter. HUD fully supports the Administration’s efforts in this area, and is attentive to the need for increased safeguards for personal data. HUD believes reducing the number of individuals who must file a PPC is one step toward greater protection. Upon release of the strategic plan, HUD will reevaluate the 2530 system in light of any applicable task force recommendations which would better secure personal data.

III. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB control number 2502-0018. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Environmental Impact

This proposed rule does not direct, provide assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1) this proposed rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 12866

OMB reviewed this rule under Executive Order 12866, Regulatory Planning and Review. OMB determined that this rule is a significant regulatory action (although not economically significant as defined in section 3(f) of the Order). The docket file is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Divisions at (202) 708-3055 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of

small entities. This rule will not place any burdens on entities or businesses, but rather would revise and make more efficient a pre-existing system for submitting required certifications.

Notwithstanding the determination that this rule will not have a significant impact on a substantial number of small entities, HUD specifically invites any comments regarding any less burdensome alternatives to this rule that meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the executive order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, approved March 22, 1995) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. This rule does not impose any federal mandates on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

List of Subjects

24 CFR part 200

Administrative practice and procedure, Home improvement, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, HUD proposes to amend 24 CFR part 200, as follows:

PART 200 – INTRODUCTION TO FHA PROGRAMS

1. The authority citation for 24 CFR part 200 continues to read as follows:

Authority: 12 U.S.C. 1702-1715z-21; 42 U.S.C. 3535(d).

Subpart H—Participation and Compliance Requirements

2. Revise 24 CFR 200.210 to read as follows:

§ 200.210 Policy.

It is the Department's policy that participants in its housing programs be responsible participants that will honor their legal, financial, and contractual obligations. Accordingly, uniform standards are established in this part for the approval, disapproval, or withholding of approval action of prospective participants in HUD programs and projects based upon past performance as well as other related information that indicates the ability of the prospective participant to honor its legal, financial, and contractual obligations.

3. Revise 24 CFR 200.213 to revise the undesignated introductory paragraph and to redesignate § 200.213(d) as § 200.213(e); add a new § 200.213(d); revise § 200.213(e); and add new §§ 200.213(f), 200.213(g), 200.213(h), and 200.213(i), to read as follows:

§ 200.213 Applicability of procedure.

The previous participation review and clearance procedure set forth in this part is administered by the Assistant Secretary for Housing – Federal Housing Commissioner and is applicable to all participants and to their:

* * * * *

(d) Risk-sharing projects under section 542(c) of the Housing and Community Development Act of 1992 (12 U.S.C. 1707 note) and hospital mortgages under section

242 of the National Housing Act (12 U.S.C. 1715z-7);

(e) Sales of projects by the Secretary where there continues to exist HUD rental assistance, income, rental, or other use restrictions, FHA mortgage insurance, below-market financing, or any other continuing relationship between HUD and the project. These sales may include “all cash” sales and/or financed sales of HUD-owned multifamily housing projects; and foreclosure sales of any multifamily housing securing a mortgage held by the Secretary;

(f) Section 202 and section 811 Direct Loans with a Project Assistance Contract (PAC), Section 202 and section 811 Capital Advance projects with Project Rental Assistance Contracts (PRAC);

(g) Projects financed or to be financed with insured or non-insured mortgages receiving interest reduction payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1);

(h) Projects subject to HUD-held mortgages that subsequently are sold to participants as defined in § 200.215 of this subpart; and

(i) Projects identified in paragraphs (a) through (h) of this section, which were prepaid, but which prepayment was approved subject to a use restriction or use agreement.

4. Revise 24 CFR 200.215 to read as follows:

§ 200.215 Definitions.

Affiliate. An affiliate is any person or business concern that directly or indirectly controls policy or operations of a participant or has the power to do so. Affiliates include, but are not limited to, the following:

(1) If the participant is a partnership, all general partners, and each limited partner having a 25 percent or more interest in the partnership;

(2) If the participant is a public or private corporation or governmental entity, the president, vice president, secretary, and treasurer and any other executive officers who are directly responsible to the board of directors, or the equivalent thereof, for project operations, for reporting on policy for project operations, for setting such policy, or all of these; all the directors; and each stockholder having a 25 percent or more interest, except for large publicly traded corporations with diverse interests where real estate investment is not the primary corporate endeavor;

(3) If the participant is a limited liability company, the managing member or members, all members with responsibility for any aspects of project operations, and all members having a 25 percent or more interest in the limited liability company.

(4) If the participant is a limited liability limited partnership, all general partners, and each member or partner having a 25 percent or more interest in the partnership.

APPS. APPS is the Active Partners Participation System, an Internet-based computer application that is the method by which participants are required to file applications to HUD for participation clearance. APPS electronically collects, records, and stores current participant and historical information about participant performance.

Assistant Secretary. Assistant Secretary means the Assistant Secretary for Housing – Federal Housing Commissioner.

Felony. A felony is any offense punishable by imprisonment for a term exceeding one year, but does not include any offense classified as a misdemeanor under the laws of a state and punishable by a term of imprisonment of two years or less.

Flag or participant flag means a data entry in APPS that indicates the presence of an incidence of noncompliance or failure to meet HUD standards by a participant or participants. The act of entering data concerning an event of noncompliance or performance failure is referred to as “flagging the participant.” Flags alert other HUD personnel of the existence of the noncompliance or performance failure. Flags are entered into APPS by authorized field office staff and managers and may be resolved by the person who entered the flag into APPS or his or her supervisor/manager. Flags are an indicator of risk to HUD and are evaluated by HUD when the participant requests new business within HUD multifamily housing programs.

Managing member. A managing member in a limited liability company (LLC) is a key person in the organization and is usually vested with discretionary authority to manage the affairs of the organization.

Mark or participant mark. A mark or a participant mark is an APPS risk indicator applied to a specific participant file, which requires review by the Multifamily Participation Review Committee (see § 200.224) of the participant regardless of the existence of present noncompliance. The participant mark may be recommended by a Hub Director or Directors or by the Participation Review Committee. The participant mark placement requires that all new participant activity be forwarded to HUD Headquarters for review and approval.

Member. A member is a person or organization that is a part of a limited partnership (LP), limited liability partnership (LLP), limited liability limited partnership (LLLP), limited liability company (LLC), partnership, corporation, or any other organization, and includes such concepts as partner, member, or shareholder, no matter

the specific term used.

Organization. An organization is a business concern including, but not limited to, a partnership, limited partnership, corporation, LLC, LLLP, joint venture, trust, not-for-profit (nonprofit) association, or other legally recognized business organization. An organization could also be an individual doing business as a corporation, a limited liability organization, or any other form of business association.

Packager or consultant. A packager or consultant is a person or firm that furnishes or proposes to furnish advisory services in connection with the financing, construction, or operations of a project and the related HUD program requirements. Such services may include, but are not limited to, the selection and negotiation of contracts with a general contractor, architect, attorney, engineer, or management agent; advice on program regulations; seeking approvals under HUD multifamily housing program rules and policies; arranging meetings and discussion about processing of transactions; and the advisory services of professionals such as architects, engineers, or attorneys other than direct work in their professional capacities. The packager or consultant is generally employed for a specific and relatively brief period to fulfill a specific role or specific purpose. This term does not include traditional trades such as roofers, plumbers, and electricians.

Participant. A participant is any person or organization engaged in the business of developing or operating properties involving HUD-insured mortgages. Participants include, but are not limited to, persons or organizations serving as an owner, managing agent, sponsor, affiliate, prime contractor, turnkey developer, nursing home administrator, nursing home lessee or operator, hospital officer or administrator,

packager, consultant, architect, or attorney who has any interest in the project other than an arms-length fee arrangement for professional services. Organizations that may be participants include, but are not limited to: joint ventures, partnerships, corporations, trusts, nonprofit associations, limited liability companies, limited liability partnerships, and limited liability limited partnerships. There are three classes of participants: operational, supportive, and investment. An operational participant is a participant that has general and routine control over the operations of a property and is responsible for success of the venture.

(1) Operational participants include, but are not limited to: owners, sponsors, developers, syndicators, general partners, special limited partners, tax matters partners, managing members, non-managing members that exert control by virtue of their responsibility for a specific aspect of the ownership organization or property operations, chief operating officers, chief executive officers, board presidents, and board chairmen.

(2) Supportive participants are those that support the owner in delivering services or operating the property. Supportive participants are engaged by the owner or on behalf of the owner and are paid from project development or operational funds. Supportive participants include, but are not limited to, management agents, administrators, general contractors (but not construction trade contractors such as roofers, pavers, carpenters, and the like), advisors, consultants, or packagers.

(3) Investment participants are passive investors in HUD programs. Investment participants do not have operational or policy control or influence but only a passive financial interest in the participant organization.

The term “participant” also includes any affiliates of a participant. The term

specifically excludes: mortgagees acting in their capacity as such; parties whose sole interest is that of purchaser or owner of less than five individual units in the same condominium or cooperative development; parties whose sole interest is that of a tenant in a single unit; and public housing agencies (PHAs), where the PHA is acting in its capacity as a PHA owning and/or operating public housing.

Participant proxy. A participant proxy is a party authorized by the participant, directly or through the participant's HUD secure systems or secure systems coordinator, to enter, maintain, change, edit, or delete participant data, request participant clearance, and appoint or authorize secure system users, in the name of the participant. The participant proxy is identified in HUD systems, and HUD considers actions taken by it to be actions taken by the participant.

Participation Review Committee. See *Review Committee*.

Participation control officer. (See § 200.224).

PPC. PPC refers to the previous participation certificate, form HUD-2530.

Project. A project for previous participation clearance purposes is:

- (1) Five or more residential units covered by a single mortgage, loan, capital grant, or contract of assistance;
- (2) A hospital, group practice facility, or nursing home;
- (3) Cooperative and condominium developments;
- (4) A subdivision being developed and financed with a mortgage under Title X of the National Housing Act (prior to the repeal of Title X by section 133(a) of Pub. L. 101-235); or
- (5) A development covered by a HAP contract, PRAC contract, or Section 811

contract, regardless of the number of units under contract.

Responsible natural person. A responsible natural person is an individual who has authority to act and make legally binding decisions on behalf of the organization.

Review Committee or Multifamily Participation Review Committee. (See § 200.224).

Risk. Risk means an indication that the participant may fail to meet its legal, financial, or contractual obligations to HUD. To determine whether a participant's participation in a project constitutes an acceptable risk, the following factors are considered: financial stability and performance presently and in the past; current and previous performance in accordance with program requirements in all HUD-covered multifamily housing activities; current and previous general business practices; other factors that might indicate to the Review Committee that the participant can be expected to operate the project, hospital, nursing home, assisted living, or other covered facility in a manner consistent with furthering HUD's purpose of supporting and providing decent, safe, sanitary, and affordable housing; and any other factors that will assist the Review Committee in making the determination of risk.

Rural Housing Service. Rural Housing Service is the Rural Housing Service of the U.S. Department of Agriculture.

5. Revise 24 CFR 200.217, including the heading, as follows:

§ 200.217 Submission of previous participation certificate on prescribed form.

(a) Participants in any of the following transactions must submit a PPC and related materials electronically through APPS, as prescribed by the Assistant Secretary at the occurrence of any of the events specified in paragraph (a) of this section:

(1) With an Application for a Site Appraisal/Market Analysis Letter, Feasibility Letter, Conditional Commitment for Mortgage Insurance, or Firm Commitment for Mortgage Insurance, whichever application is first filed, for projects to be financed with mortgages insured under the National Housing Act;

(2) With an Application for a Fund Reservation for projects financed or to be financed with direct loans or capital advances under section 202 of the Housing Act of 1959 (Housing for the Elderly and Handicapped) (12 U.S.C. 1701q);

(3) With an Application for a Fund Reservation for projects financed or to be financed with direct loans or capital advances under section 811 of the National Affordable Housing Act (Supportive Housing for Persons with Disabilities) (42 U.S.C. 8013);

(4) With the first request for a reservation of funds for assistance payments for projects in which 20 percent or more of the units are to receive a subsidy as described under § 200.213(c);

(5) With an Application for Transfer of Physical Assets (TPA);

(6) With an application to transfer, assign, or assume a subsidy contract;

(7) With the bid to purchase a project being sold at foreclosure by HUD, or by a foreclosure commissioner acting for HUD, when the terms of the sale permit HUD to disapprove a bidder or where there is expected to be continued HUD assistance, use, rental, or income restrictions of any kind, FHA insurance, below-market financing, or any other kind of continuing relationship between HUD and the project owner/operator;

(8) With the bid to purchase a Secretary-owned project where there is expected to be continued HUD assistance, use, rental, or income restrictions of any kind, FHA

insurance, below-market financing, or any other kind of continuing relationship between HUD and the project owner/operator;

(9) Prior to the date of any proposed substitution or addition of a participant in an existing project;

(10) Prior to the date of the employment of a management company as the operator or agent of a project(s), a substitution of a different management company for the existing approved management company for a project(s), or a change in the control of the existing management company for a project(s);

(11) Prior to the proposed acquisition by an existing participant of additional interests resulting in a total interest in the project of at least 25 percent or of any amount of interest, if HUD determines that a change in control has occurred;

(12) Prior to any change in the managing member of an LLC, or any member who has been designated as a key person or who owns or controls 25 percent or more interest in the LLC;

(13) Prior to the start of an appointment of a board member or board officer; or

(14) With an application for hospital mortgage insurance under section 242 of the National Housing Act (12 U.S.C. 1715z-7).

(b) PPCs must be filed when a PHA applies to purchase, operate, or receive benefits from HUD-related multifamily housing projects as an owner, agent, or consultant.

(c) Revised PPCs must be submitted by organizations or natural persons for interests acquired by inheritance or court decree, but will not be subject to review or disapproval. PPCs must be filed within 120 days following the date of the event of

change.

6. Revise 24 CFR 200.218 to read as follows:

§ 200.218 Who must certify and sign. –

(a) All operational and supportive participants involved in programs or transactions subject to the regulations of this part must certify and sign the PPC when filing an electronic application for participation. Operational participants will certify and sign for the investment participants. Signature will be by written or electronic means, and in a form prescribed by the Assistant Secretary for Housing–Federal Housing Commissioner. The certification by a participant may be in several parts. Each participant or its designated official or participant proxy is responsible for the certicator’s timely filing and maintaining up-to-date (current at the time of new business request or updated every 6 months whichever occurs first) participant data within APPS, except as provided in § 200.218(b).

(b) For an organization that is a participant, all of its officers, directors, members, partners, or principal stockholders need not individually sign, certify, or file the PPC if these individuals all have the exact same previous participation record. In that event, the individual authorized to sign for the organization and the other individual participants will list on the PPC the full names and taxpayer identification numbers for all such individuals connected with the organization who are not required to sign the PPC. Any individual within the organization who has a separate participation record outside that of his or her organization must certify, sign, and file a separate PPC.

(c) A participant that is an organization is required to apply for participation

clearance and disclose at least one responsible natural person to receive consideration for clearance review.

(d) If an investment participant becomes an operational or supportive participant, for example, because of its action to take control of the property-ownership organization due to that organization's failure to meet its responsibilities, the investment participant must submit a PPC in its new role as an operational or supportive participant.

7. Revise 24 CFR 200.219 to read as follows:

§ 200.219 Content of certification.

(a) (1) Each operational or supportive participant (or participant proxy) that executes the PPC certifies that, for a period beginning 10 years prior to the date of the PPC that is under review, the PPC lists all properties, including all projects assisted or insured by HUD or the Rural Housing Service, and state or local housing finance agencies, in which the participant has been or is now an owner, operator, or other form of participant;

(2) For a period beginning 10 years prior to the date of the PPC under review and except as shown on the PPC:

(i) No mortgage on a project listed has ever been in default, assigned, or foreclosed on, nor has mortgage relief been given;

(ii) There has been no default or noncompliance under any conventional construction contract or turnkey contract of sale in connection with a Rural Housing Service, or state and local housing finance agency-assisted project;

(iii) There are no known unresolved findings raised as a result of HUD, HUD's Office of Inspector General, or U.S. Government Accountability Office audits,

management reviews, physical inspections, annual financial reporting, or other governmental reviews or investigations;

(iv) There has been no suspension or termination of payments under any HUD assistance contract attributable to the fault or negligence of the participant;

(v) The participant has not been convicted of a felony (see § 200.215) and is not currently the subject of a complaint or indictment charging a felony;

(vi) The participant has not been suspended, debarred, or otherwise restricted by any department or agency of the federal government or of a state government from doing business with such department or agency;

(vii) The participant has not defaulted on an obligation covered by a surety or performance bond, and has not been the subject of a claim under an employee fidelity bond;

(3) The participant has listed all parties that are known to the participant to be participants under § 200.215(j);

(4) The participant is not a Member of Congress, Resident Commissioner, HUD employee, or a member of a HUD employee's immediate household as defined by HUD's Standards of Conduct in 24 CFR 0.735-205(c);

(5) Except as shown on the PPC under review, the participant is not currently and was not in the past a participant:

(i) In a HUD-assisted or -insured project on which construction, as of the date of said PPC, has stopped for a period in excess of 20 days; or,

(ii) In a HUD-insured project on which construction, as of the date of said PPC, has been substantially completed for more than 90 days; and documents for closing, including cost certification, have not been filed with HUD;

(6) The participant has not committed any of the following acts that could result in debarment under 24 CFR 24.800:

(i) Been held civilly or criminally liable for any offense indicating a lack of business integrity or business honesty, including those offenses specifically referenced in paragraphs (1) through (4) of 24 CFR 24.800(a);

(ii) Violated a material provision of any voluntary exclusion or settlement of a debarment or suspension action;

(iii) Violated the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701);

(iv) Knowingly engaged in business with an ineligible person under 24 CFR part 24, except as permitted under 24 CFR 24.120;

(v) Failed to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed to the federal government under the Internal Revenue Code of 1986) owed to any federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(vi) Willfully failed to perform in accordance with the terms of a public agreement or transaction and does not have a history of failing to perform, or of rendering unsatisfactory performance, of such public agreements or transactions;

(b) The project owner shall certify that the project owner has also listed all other parties that are participants under § 200.215(j).

(c) If a participant cannot certify as to any items under paragraphs (a) and (b) of this section, such items should be noted in the PPC in APPS, and a full explanation of the reason for the non-certification must be included in the PPC in APPS.

(d) *Investment participants.* Investment participants do not file the PPC on their own behalf; however, investment participants will be subject to full post clearance review or audit at random or at targeted intervals to assure full compliance with the certifications process. The operational participant files the PPC on behalf of the investment participants. The operational participant must certify to the following:

(i) Each investment participant is not under indictment for, or convicted of, a felony;

(ii) Each investment participant has not been debarred, suspended, or in any way had its participation in federal government programs limited or rejected in the last 5 years;

(iii) Each investment participant is not now debarred or suspended and does not have any other form of limitation or rejection of its participation in federal government programs currently in force;

(iv) Each investment participant has not been found to have violated or to be in violation of any housing-related statute or regulation;

(v) Each investment participant is not involved as an operational or supportive participant in this transaction;

(vi) Each investment participant has no routine control over the day-to-day

operations of the project;

(vii) Each investment participant does not have any special function in the ownership organization at any level within the ownership organization (e.g., tax matters partner, special limited partner); and

(viii) Each investment participant has entered into an agreement with the operational participant that specifies the extent of the investment participant's rights and responsibilities and that the operational participant will maintain said agreement in full force, updated with all executed amendments and available for review by authorized HUD personnel at all times;

(e) In addition, each operational participant must certify as to each investment participant that the investment participant has not committed any of the following acts that could result in a program participant's debarment under 24 CFR part 24:

(i) Been held civilly or criminally liable for any offense indicating a lack of business integrity or business honesty, including those offenses specifically referenced in paragraphs (1) through (4) of 24 CFR 24.800(a);

(ii) Violated a material provision of any voluntary exclusion or settlement of a debarment or suspension action;

(iii) Violated the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701);

(iv) Engaged in business with an ineligible person under 24 CFR part 24, except as permitted under 24 CFR 24.120;

(v) Failed to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed to the

federal government under the Internal Revenue Code of 1986) owed to any federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(vi) Willfully failed to perform in accordance with the terms of a public agreement or transaction, and does not have a history of failing to perform, or of rendering unsatisfactory performance, of such public agreements or transactions;

(f) *Current information.* Each operational participant or its participant proxy or proxies certifies that the data in APPS is current as of the date of the APPS submission for clearance. Each operational and supportive participant is responsible to update the data on its participation no less than every 6 months. HUD may verify the accuracy of the certification by requiring additional information from the participant. The participant, participants, or their proxies must provide such information upon request, and failure to do so will be grounds for disapproval or withholding or revoking of approval.

8. Revise 24 CFR § 200.222 as follows:

a. Revise the heading to read as follows;

b. Revise the single, undesignated paragraph to read as follows:

§ 200.222 Maintenance of the master list.

An operational or supportive participant must at all times maintain in APPS an up-to-date APPS baseline (formerly known as a master list) of all projects in which the participant has participated. Unless such APPS baseline is maintained, the participant cannot apply for clearance.

9. Revise 24 CFR 200.225 to read as follows:

§ 200.225 Approvals and flags by HUD field offices.

(a) *Approvals.* HUD's Multifamily Housing Hub and/or Program Center Director (or equivalent successor) in each recognized field office is authorized to review the PPC and approve the participation when the participants or organizations have no previous record of participation or they have no uncured or unresolved violations arising from their previous participation. All participants having unresolved violations noted in properties where they presently or previously participated will be referred directly to the Headquarters Policy and Participation Standards Division of HUD's Office of Housing.

(b) *Flags.* Authorized HUD field office staff and managers may enter flags for any noncompliance with any regulation, contract (including mortgage documents), or legally binding agreement; or for failure to perform to any generally applicable standard. The HUD staff or manager who entered the flag may also resolve the flag. Flags remain of record until resolved through either correction of the issue causing the flag or through permanent failure to do so. A flag has no effect on existing business and is only an indicator of an event of noncompliance or failure to perform in the course of business between HUD and the participant.

10. Revise 24 CFR 200.226 as follows:

- a. Revise the heading to read as follows;
- b. Revise § 200.226(a)(1) as follows;
- c. Add a new § 200.226(b) to read as follows:

§ 200.226 Determination by the Participation Control Officer and Director, Policy and Participation Standards Division.

(a) * * *

(1) Approve a participant when a review of the PPC and other available

information reveals that there are no grounds to withhold approval or disapprove under the standards in § 200.229 or § 200.230, respectively.

(2) * * *

(3) * * *

(b) The Director of the Policy and Participation Standards Division of HUD's Office of Housing, upon a recommendation from a Hub Director or Directors or the Review Committee, is authorized to enter a participant mark into APPS.

11. Revise 24 CFR 200.227 to read as follows:

§ 200.227 Multifamily Participation Review Committee.

(a) *Members.* (1) The Chairperson (non-voting) of the Review Committee will be an official appointed by the Deputy Assistant Secretary for Operations or equivalent position or other position as may be designated by the Assistant Secretary for Housing—Federal Housing Commissioner. The Review Committee is composed of the following voting members or their designees each representing the Assistant Secretary: the Director of the Office of Multifamily Housing Development; the Director of the Office of Housing Assistance Contract Administration Oversight; the Director of the Office of Multifamily Asset Management; the Director of the Office of Housing Assistance and Grants Administration; the Director of the Policy and Participation Standards Division; and the Associate Deputy Assistant Secretary for Multifamily Housing Programs.

(2) The Review Committee also includes, as non-voting members, the General Counsel or his or her designee, who provides legal counsel, and the Participation Control Officer in the Policy and Participation Standards Division in the Office of Multifamily Asset Management. The Participation Control Officer is the Executive Secretary to the

Review Committee and is empowered to issue and sign all notices, orders, letters, and directives on behalf of the Review Committee, to keep notes, and to perform other duties assigned by the Chairperson or directed by the Review Committee.

(b) *Functions.* The Review Committee will act for the Assistant Secretary to determine the acceptability of participants in multifamily proposals under this subpart H.

12. Revise 24 CFR 200.228 as follows:

a. Amend §§ 200.228(a)(1), 200.228(a)(2), 200.228(a)(3), and 200.228(a)(4) as follows;

b. Add a new § 200.228(a)(5) to read as follows:

§ 200.228 Determination by the Review Committee.

(a) * * *

(1) Approve the participant after consideration of the entire record in the light of the standards in § 200.230. All mitigating or extenuating factors will be considered. In each case, the decision shall be within the discretion of the Review Committee and rendered in the best interest of the government and the public;

(2) Conditionally approve the participant's participation with such conditions or limitations that in the Review Committee's judgment are necessary to make the participant approvable;

(3) Withhold approval of the participant in accordance with § 200.229;

(4) Disapprove the participant when approval is not justified and withholding approval is not appropriate; or

(5) Authorize a mark on the participant record.

(b) * * *

13. Revise 24 CFR 200.230 as follows:

- a. Revise §§ 200.230(a), 200.230(b), 200.230(c), and 200.230(c)(1);
- b. Redesignate current §§ 200.230(c)(2) – 200.230(c)(7) as §§ 200.230(c)(7) – 200.230(c)(12);
- c. Following § 200.230(c)(1), add new paragraphs §§ 200.230(c)(2) – 200.230(c)(6);
- d. Revise newly designated 200.230(c)(7) – 200.230(c)(9) and 200.230(c)(12);
- e. Revise § 200.230(d);
- f. Revise § 200.230(e);
- g. Revise § 200.230(f);
- h. Revise § 200.230(g).

§ 200.230 Standards for disapproval.

* * * * *

(a) Suspension, debarment, or other restriction of the participant under 24 CFR part 24;

(b) Suspension, debarment, or other restriction of the participant by any other department or agency of the federal government from doing business with such department or agency;

(c) Unless the Review Committee finds mitigating or extenuating circumstances that enable it to make a risk determination for approval, any of the following occurrences attributable or legally imputable to a participant may be the basis for disapproval, whether or not the participant was actively involved in the project:

(1) Mortgage defaults, assignments, or foreclosures, except that approval will be denied if, during the 12-month period prior to the application for clearance, the participant was part of the ownership organization as an operational participant where a multifamily or hospital FHA mortgage insurance claim was paid;

(2) A property physical condition assessment or series of assessments below HUD's standards;

(3) A mortgage delinquency or default that continues for more than a single month in any 12-month period (also known as a rolling delinquency or rolling default);

(4) A less-than-acceptable review of management operations or series of assessments below acceptable standards;

(5) Any failure or series of failures to file a financial report or to provide requested information when due;

(6) False certifications or claims made on any federal government document;

(7) Defaults or noncompliance under any conventional construction contract or turnkey contract of sale in connection with a Rural Housing Service-assisted, and state or local government housing finance agency-assisted property;

(8) Violation of the regulatory agreement contract, or noncompliance with any other legally binding obligation to HUD that has not been corrected to the satisfaction of the Review Committee at the time of its consideration, or a pattern of such behavior;

(9) Abatement, suspension, or termination of payments under any HUD assistance contract;

(10) Defaults under an obligation covered by a surety or performance bond, claims under an employee fidelity bond, or both;

(11) Unresolved findings as a result of HUD or other federal governmental audits or investigations; or

(12) A criminal record or other evidence that the participant's previous conduct or method of doing business has been such that the participant's participation in the project would make it an unacceptable risk from the underwriting standpoint of an insurer, lender, or governmental agency.

(d) With respect to any HUD-insured or -assisted projects, work stoppage for a period in excess of 20 days, or, in the case of an insured project, failure to achieve final endorsement of the mortgage where the project has been substantially completed for more than 90 days but documents for closing, including cost certification, have not been filed with HUD by the participant;

(e) Any serious and significant violation by a management agent of a project management contract, where the contract required HUD or other governmental agency approval or acceptance at its inception; serious and significant violation of a statute, regulation, or contract; or noncompliance with any other legally enforceable obligation to HUD;

(f) Submission of a false or materially incomplete PPC.

(g) Any other significant violation of or noncompliance with regulations or programs or contract requirements of HUD, the Rural Housing Service, or a state or local government's housing finance agency's procedures or regulations in connection with any insured or assisted project.

14. Revise 24 CFR § 200.233 to read as follows:

§ 200.233 Effect and requirement of approval.

Approval is required as a precondition for participation and constitutes clearance of the participant under this part for participation only for a specific project in which the participant undertakes a specific role. Approval of a participant by APPS does not obligate the Department to approve the participant's applications or contracts for participation in other projects or particular programs. An approval issued through APPS will be considered valid for a period not to exceed 60 days from the date of approval. During that 60-day period, the participant will be approved without additional review, subject to limitations in § 200.236.

15. Revise 24 CFR 200.236 to read as follows:

§ 200.236 Modification or withdrawal of certain approvals.

Approvals will be modified or withdrawn only in cases where the participant is subsequently suspended or debarred from further participation in any HUD programs under 24 CFR part 24; is found by the Review Committee to have obtained approval based upon submission of a false, fraudulent, or incomplete report or PPC submission to HUD; or HUD determines, based on updated or additional data, that the participant approval period in § 200.233 should be shortened. In such cases, the Review Committee or its designee may take such action, including modification or withdrawal of approval, as it determines to be in the best interest of the Department and the public. For the purpose of this section, the term approval includes conditional approval.

16. Revise 24 CFR 200.239 as follows:

- a. Amend the undesignated introductory paragraph as follows;
- b. Amend § 200.239(b) as follows:

§ 200.239 Notice of determination.

The Participation Control Officer shall give written notice of disapproval under § 200.226, and of conditional approval, withholding of approval, or disapproval by the Review Committee under § 200.228. The notice shall be transmitted to the participant and to the responsible Field Office. In the case of any such adverse notice:

(a) * * *

(b) The notice to the participant shall be sent by certified mail with return receipt requested, electronic mail (if the participant can receive electronic mail), or both, to the participant's address in APPS.

17. Revise 24 CFR 200.241 as follows:

a. Amend the heading to read as follows;

b. Amend the entire section to read as follows:

§ 200.241 Opportunity to be heard prior to decision.

(a) Prior to making the determination under § 200.228, the Participation Control Officer or the Review Committee shall notify the participant of any marks, participant flags, or any other factors that might affect the Review Committee's approval of the participant.

(b) The participant shall have an opportunity to appear informally before the Review Committee and present reasons why its application should be approved, notwithstanding any risk indicators.

(c) The informal hearing may be conducted in person, by telephone, or upon written submissions. The participant is entitled to present testimony and documentary evidence, and to be represented by counsel.

(d) The Review Committee's determination under § 200.228 is final agency

action. If a hearing is conducted under this section, all statements and evidence presented shall become part of the administrative record of the Department's decision.

18. Remove 24 CFR 200.243.

19. Remove 24 CFR 200.245.

Dated: _____

Brian D. Montgomery, Assistant Secretary for
Housing–Federal Housing Commissioner

[FR-5073-P-01]