

# LIHTC MONTHLY REPORT

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## HUD Issues New 2530 Guidance for Passive Investors

By Richard S. Goldstein, Nixon Peabody LLP

Under longstanding Department of Housing and Urban Development (HUD) policies and procedures, persons and entities wishing to participate in the ownership of HUD-assisted or financed properties have been required to file lengthy previous participation certifications with HUD, detailing the party's prior history with government assisted and financed properties. Known as the "2530" process, after the number of the HUD form used for this purpose, the object of the procedure was to assure that persons with histories of defaults or other bad performance were not permitted to participate unless and until such performance issues were resolved. Unfortunately, the system has been plagued with problems for years, in a number of ways, including the time involved to get approval or resolve issues and the inclusion of passive investors in this process despite the fact that such investors have no control over property operations. This problem has become particularly acute for investors in low-income housing tax credit properties that are HUD-financed or assisted. In fact, the issues became so pervasive that a number of major corporate LIHTC investors simply refused to invest in properties requiring 2530 approval.

Earlier this year, as a result of these pervasive problems and HUD's apparent inability to resolve them, Congress passed and the President signed into law, the Preservation Approval Process Improvement Act of 2007. Under the law, HUD was required to immediately suspend all filing requirements for limited liability corporate investors (LLCIs) that own or expect to own interest in entities that generate LIHTCs. The law also directs HUD to suspend its mandatory electronic filing of previous participation certificates (applicants may still utilize the electronic system on a voluntary basis). The passage of this legislation was a major victory for a number of industry groups, led by the Affordable Housing Tax Credit Coalition (AHTCC).

In mid-July 2007, HUD issued a new memorandum to its field offices outlining the procedures for determining whether investors are exempt from filing 2530 previous participation certifications under the new law. Under the new memorandum, HUD will request from each entity that claims to be an LLCI a certification from an authorized signer that provides the name of the entity and which states:

1. it is an LLCI as noted in the Preservation Approval Process Improvement Act and defined in the memorandum,
2. it is investing in an entity (entity must be named) that has made a complete application to a state tax credit allocating agency to receive low income-housing tax credits or to which the agency has issued an allocation or letter of intent to allocate housing credits,
3. it is a company organized under state LLC, LP or LLP statutes, and
4. it has limited or no control over routine property operations or HUD regulatory and/or contract compliance with certain exceptions allowed.

The LLCI must also certify that if any facts change, or if it withdraws from participation in the owner entity, it will so disclose to HUD with an explanation. An organizational chart containing any entity owning greater than 25 percent in the ownership entity must be submitted with this certification.

Once the field reviews the organizational chart and certification, the multifamily director must countersign the certification and issue a letter naming the LLCI, and certain other designating information, with a statement that such

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entity will not be required to file a 2530 in accordance with the new law. If an entity does not qualify as an LLCI, the field must also issue a letter with an explanation as to why the LLCI designation was denied.

This guidance supersedes a June 21 HUD memo that required the field offices to obtain and review the contents of all investment contracts with LLCI entities, including the contracts of each LLCI within the organization that holds any interest greater than 24 percent of the ownership entity, before determining whether an entity qualified as an LLCI under the new law. The new memo deletes the requirement for HUD to review such investment contracts.

After the release of the July field office memorandum, HUD clarified two additional matters. First, HUD recognizes that a number of investors are not organized under state law and that some may be organized under federal charters (e.g., Fannie Mae and Freddie Mac) or federal banking laws (e.g., national banks). Accordingly, they intend to revise the certification form to allow the LLCI to accurately reflect its relevant organizational laws. Second, as to who is allowed to provide the certification on behalf of the LLCI, HUD has stated that it does not intend to question the authority of the signer of the certification. The person providing the LLCI certification must state that he or she is "authorized to certify." Accordingly, as long as a syndicator has been authorized by an LLCI to make the certification, then HUD will not question that person's authority and we believe that it would be permissible for a syndicator to make the certification, provided, of course, that the LLCI meets the definition contained in the memorandum.

This new guidance represents a substantial improvement over previous HUD procedures in this area and will make it much easier to admit LLCI entities into HUD financed and assisted LIHTC properties. However, AHTCC and other industry groups continue to work with HUD to modify several areas, including: allowing limited scope filings to be made by syndicators so as to avoid the requirement that parent corporations and their boards of directors are drawn into the process, and making the electronic filing system more user-friendly.

As additional modifications are issued, updates will be made available on [www.novoco.com](http://www.novoco.com) and in the *LIHTC Monthly Report*. For further information, please contact the author at (202) 585-8730. ❖

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