

Proposed Solution to 2530 Process May Create More Problems

By Michael J. Novogradac, CPA

A little more than a year ago, the U.S. Department of Housing and Urban Development (HUD), to the untold relief of many industry participants, advised those in HUD programs that they had the option of filing through April 30, 2006 their previous participation clearance (PPC) applications, HUD Form 2530, either in paper form or via the Active Partner Performance System (APPS). At issue was that many professionals had been experiencing difficulties with the new electronic system and were in jeopardy of not being able to close deals, including some low-income housing tax credit (LIHTC) transactions. Closing that particular PPC chapter, HUD on April 21, 2006 announced that all participants required to apply for previous participation clearance had to do so through the APPS, with no exceptions.

In the latest installment on previous participation certificate filings, a draft HUD proposed rule on Form 2530 for PPC filing requirements was transmitted to the Hill last month. The proposed rule would, among other things, provide relief for passive investors in low-income housing tax credits (LIHTC) by eliminating the need for them to file a PPC. It would simply require that they be listed as a passive investor on Form 2530. However, there's a chance that the rule as proposed could be problematic. "One of major concerns, one thing that's jumped out at us in the first go round, is that HUD may have made it worse," says Richard Goldstein, of the law firm Nixon Peabody LLP.

Background

HUD's regulations require an applicant to disclose and certify its past performance in HUD's multifamily housing mortgage insurance programs prior to any new participation in these programs. Form 2530 is used to make certain that prospective participants in multifamily housing properties assisted or insured by HUD have a history of meeting their financial, legal and administrative obligations. To that end, entities that want to participate in multifamily housing programs must at the time they seek to engage in new business with HUD, file a PPC along with a description of all previous participation in such

programs. At present, members of limited partnerships and limited liability companies must file a Form 2530 if they have at least a 25 percent interest in the ownership entity.

The Affordable Housing Tax Credit Coalition (AHTCC) cautions that investors who represent about one-half of the investment in the LIHTC program have elected not to invest in HUD multifamily properties if such investments would subject them to the 2530 system. The coalition says investors have reduced their investments to less than 25 percent for any property (the trigger for a 2530 filing), introducing a high risk that some HUD financed affordable housing developments will not be rehabilitated or preserved and making investment in these projects less efficient.

Industry action

The industry has not been silent on this matter and in fact has taken an active role in ensuring that any rule on previous participation is relevant and does not create requirements that would create insurmountable problems for investors. Those action include:

- September 2005. 17 of the largest corporate investors in LIHTC-financed properties write to the Federal Housing Commissioner to request that passive corporate investors be exempt from filing HUD's Form 2530. The reasoning being that the passive investors have little ability to control the properties and have invested through syndication firms that manage and oversee the investments and that are and will continue to be subject to 2530 filings.
- May, 2006. HUD representatives tell members of the AHTCC that they expected to issue by the end of June the regulation exempting passive investors from filing a PPC.
- September 2006. HUD sends a draft rule to the Office of Management and Budget (OMB) for review.
- October 19, 2006. LIHTC organizations, includ-

(continued on page 2)

Proposed Solution to 2530 Process

(continued from page 1)

ing the AHTCC, and individuals meet with OMB and HUD.

- October 30, 2006. Sens. Paul Sarbanes, D-Md., Jack Reed, D-R.I., and Wayne Allard, D-Colo., request that OMB “review and publish the proposal as expeditiously as possible.”
- December 4, 2006. AHTCC sends a letter to Reps. Michael Oxley, R-Ohio, chairman, and Barney Frank, D-Mass., ranking member, of the House Committee on Financial Services, and Sens. Richard Shelby, R-Ala., chairman, and Sarbanes, ranking member, of the Senate Committee on Banking, Housing and Urban Affairs, indicating its strong support of the goals of the 2530 process.

Industry reaction

When contacted in early December, Goldstein said he, his partners and others in the industry were still in the process of digesting the proposed ruling. “Our initial review of it leads us to believe it’s going to be very problematic,” he said. “HUD, on face of the proposal addressed the concerns on passive investors, but may have made [the situation] worse.”

Under the present rule, passive investors make their own statements to the government. The proposed rule says that syndicators have to do certifications and make statements with respect to passive investors. “I don’t know how syndicators can do that,” said Goldstein, noting that if passive investors say something to syndicators that is false, the syndicators can then be prosecuted for making a false claim to the government. “I don’t know what syndicator in his right mind will want to do that,” said Goldstein. “It’s scary. It’s one thing to say something about one’s own company but an entirely different thing to say something about another based on statement made to you. The stakes are very high.”

In a December 21 letter to HUD secretary Alphonso Jackson, AHTCC wrote that the proposed rule is “fraught with very significant problems.” Like Goldstein, David Sebastian, the coalition’s president, noted that the proposed rule requires “operational participants” to make numerous certifications on behalf of

“investment participants.”

Those certifications would, among other things, certify that the investment participant has not:

- Been found to have violated or to be in violation of any housing-related statute or regulation
- Been held civilly or criminally liable for any offense indicating a lack of business integrity or honesty
- Violated the provisions of the Drug-Free Workplace Act of 1988
- Failed to pay a single substantial debt, or a number of outstanding debts

“Operational participants cannot reasonably certify information beyond their control and which is not relevant to the sound operation of HUD properties,” wrote Sebastian. “This is simply not practicable.”

AHTCC requested that the proposed rule not be published as drafted and asked for a meeting with senior HUD personnel in order to address the problems it sees. “We would like to work with HUD to have a rule that identifies the information that we agree is relevant and [one] that leaves out onerous and impossible-to-attain information,” said Francine Friedman, an associate with Hunton & Williams’ government relations team in Washington, D.C. and who represents the AHTCC as a lobbyist.

In a separate December 21 letter to Jackson, Reps. Barney Frank, D-Mass., Maxine Waters, D-Calif., Michael Oxley, R-Ohio and Spencer Bachus, R-Ala. asked HUD to delay action on the proposed rule because of concerns raised about the execution of Rule 2530. “Upon review of the proposed rule during the Congressional review period, we are not certain that the proposed rule adequately addresses these concerns, and may in fact create new concerns,” the representatives wrote.

Friedman says the coalition has always been of the belief that it’s fair that HUD should know who an investor is and that the relationship between a syndicator and investor and an investor’s role in the

(continued on page 3)

Proposed Solution to 2530 Process

(continued from page 2)

property should be explained. That the rule must be improved is without question. Friedman notes the Rule 2530 as written is unlikely to encourage any investors who were discouraged by the previous rule but exactly how improvements will be made remains to be seen. "There are a lot of different moving parts and players and we're trying to figure out what combination will get the rule where it needs to be," Friedman said. The proposed rule, as drafted, "doesn't get you there," she said. ❖

This article first appeared in the January 2007 issue of Novogradac & Company's LIHTC Monthly Report and is reproduced here with the permission of Novogradac & Company LLP.

© Novogradac & Company LLP 2007 - All Rights Reserved.

Notice pursuant to IRS regulations: Any U.S. federal tax advice contained in this article is not intended to be used, and cannot be used, by any taxpayer for the purpose of avoiding penalties under the Internal Revenue Code; nor is any such advice intended to be used to support the promotion or marketing of a transaction. Any advice expressed in this article is limited to the federal tax issues addressed in it. Additional issues may exist outside the limited scope of any advice provided – any such advice does not consider or provide a conclusion with respect to any additional issues. Taxpayers contemplating undertaking a transaction should seek advice based on their particular circumstances.

This editorial material is for informational purposes only and should not be construed otherwise. Advice and interpretation regarding property compliance or any other material covered in this article can only be obtained from your tax advisor. For further information visit www.taxcredithousing.com.