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October 8, 2015

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street SW., Room 10276
Washington, DC 20410-0001

RE: Improving the Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs Participants; Docket Number: FR-5850-P-01

Dear Sir or Madam:

The following comments are submitted on behalf of the National Affordable Housing Management Association (NAHMA).

About NAHMA

NAHMA members manage and provide quality affordable housing to more than two million Americans with very low to moderate incomes. Presidents and executives of property management companies, owners of affordable rental housing, public agencies and national organizations involved in affordable housing, and providers of supplies and services to the affordable housing industry make up the membership of NAHMA. In addition, NAHMA serves as the national voice in Washington for 19 regional, state and local affordable housing management associations (AHMAs) nationwide.

We are encouraged by HUD's acknowledgement that one size does not fit all when it comes to the Previous Participation review process. We applaud HUD's efforts to revise and streamline the "2530" regulations and note that there are a number of positive concepts set forth in the preamble, including minimizing burdens for HUD and its program participants and reducing the number of respondents who must file as participants. However, the text of the rule rather than the preamble will control how HUD actually regulates in this area, and there are disconnects between assertions made in the preamble and the proposed regulations. In particular, the regulations include many open-ended, catch-all categories, which are overly broad and ambiguous, and may actually increase burdens on a number of participants. We look forward to working with HUD to continue to improve the 2530 review process and have included below recommendations to strength the proposed rule.

Comments

1. Entities with huge portfolios and many institutional investors need the speed of electronic transfer capabilities of the Active Partner Performance System (APPS). We sincerely hope
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that while the department is taking this opportunity to revamp the entire process, HUD also includes updates to the technology that supports the previous participation file and review process.

2. Proposed rule § 200.220(a) (1) states that the Commissioner's review shall consider undefined "general business practices and other factors" in determining whether a Controlling Participant is expected to operate a Covered Project in a manner consistent with HUD's purposes. Additionally, the proposed rule does not specify how HUD intends to determine whether Controlling Participants have control over the finances or operation of a Covered Project, and depending upon how HUD decides to define such a term, this could result in a large number of individuals and/or entities that are considered to be Controlling Participants. Finally, HUD has not specified how far back it will look when evaluating the previous participation record of Controlling Participants, and we see no reason for HUD to depart from the ten (10) year period specified in the existing regulations.
3. The preamble suggests that additional guidance will follow the proposed revision to the rules, but it does not specify how or when such guidance will be issued. It is unclear if the Department intends to issue additional regulations or whether it will utilize Notices or other guidance to set forth HUD policy and specify procedural requirements. We understand from HUD's September 16, 2015, teleconference regarding the proposed rule that the Department intends to issue at least one Mortgagee Letter to elaborate on concepts not covered in the rule text. However, Mortgagee Letters are not subject to the Administrative Procedure Act, lack notice and comment opportunities, and should not be used as a substitute for formal rule making. The Administrative Procedures Act requires that all rules of procedure, all substantive rules of general applicability and statements of general policy or interpretation of general applicability must be published in the Federal Register, 5 CFR § (a)(1)(C) and (D). Furthermore, presumably uninsured properties whose sole contact with HUD involves a Section 8 Housing Assistance Payments Contract would not be subject to any such requirements set forth in a Mortgagee Letter. The Department has not indicated how it proposes to regulate such uninsured properties if its chosen vehicle to elaborate on its regulatory scheme is inapplicable to a sizeable segment of the HUD-assisted universe.
4. Because there are so many vague and undefined terms in the proposed 2530 regulations, It is premature to consider a final rule as the next step in the process, and HUD may violate the Administrative Procedures Act if it neglects to provide the public a meaningful opportunity to review and comment on the forthcoming revisions. Accordingly, HUD should revise and elaborate on the proposed rule before final publication, and because so many concepts and details were not presented for review and comment in the proposed rule, the Department should re-issue a revised proposed 2530 rule before proceeding to final rule making.
5. On page 47875, Preamble Section I, top of middle column: the rules says that HUD "requires participants to complete a Form 2530 for each project regardless of the number of Forms 2530 each participant completed in the recent past, regardless of how many projects the participant is involved in each year, and regardless of whether the participant is a well-established, experienced institutional entity already familiar to HUD." We encourage and support any regulation that would allow a participant who is a high participant as owners and purchasers of HUD assisted properties to submit a 2530 annually, thus HUD provides pre-approval of the participant for the year. The issue with the 2530 process has always been the inconsistency from HUD office to HUD office on the review of the previous participation and what and when

a 2530 review needs headquarter' s approval or not. The regulation is unclear as to whether the review policy will be consistent.

6. Page 47876, Preamble Section II.A., bottom of middle column: The preamble states that only those persons or entities as “determined by HUD” to have control over a proposed project’s finances or operations shall be considered to be “Controlling Participant”; however, it does not clarify how HUD will reach these determinations. HUD should clarify the criteria it will use to determine which persons or entities exercise such control and are therefore considered to be Controlling Participant(s).
7. Page 47876, Preamble Section II.B., bottom of third column: The preamble mentions but does not discuss what constitutes an “impermissible risk to the Department”. This concept should be clarified with a meaningful definition.
8. Page 47877, Preamble Section II.B., first column: With respect to the concept of “unacceptable risk”, the preamble includes a list of deficiencies as well as the open-ended catch-all provision – “but not limited to” – without clarifying how HUD proposes to reach such determinations of risk. Additionally, the preamble does not clarify how unacceptable risk “in accordance with contemporary transactional practices” will be determined, much less what constitutes such practices.
9. Page 47877, Section III, Regulatory Review – Executive Orders 12866 and 13563. It is unclear whether the proposed rule responds to the directive of Executive Order 13563 to reduce burden because the Department has failed to specify how it will exercise the enormous amount of discretion that it has apparently retained in these proposed rules.
10. Page 47877, Preamble Section III, Regulatory Flexibility Act. Despite the preamble’s claims that the proposed rule would “greatly streamline” HUD’s previous participation review process, HUD’s intention to “tailor” requested information to specific applicants contradicts that claim. Regulations cannot be so flexible that they risk invalidation on the grounds that they are void for vagueness.
11. Page 47878, Preamble Section III, Paperwork Reduction Act. It is impossible to determine whether the Department’s burden hour estimates are accurate because the 2530 forms are apparently slated for comprehensive revision, and there exists tremendous ambiguity about what type and scope of materials and additional information HUD will require as part of its previous participation review.
12. Page 47879, Section 200.216(a) (7) – Controlling Participant – Definitions – It is unclear how HUD intends to treat Boards of Directors in the non-hospital context as the proposed rules are silent on this matter. For consistency, HUD should subject all Boards of Directors to the same rules.
13. Page 47879, Section 200.216(a) (7) – Controlling Participant – Definitions – The proposed rule does not clarify how HUD proposes to determine whether the hospital Board of Directors and its executive management have control over the finances or operation of a Covered Project. Accordingly, the proposed rules are at risk of being challenged for being void for vagueness.
14. Page 47879, Section 200.216(a)(8) – Controlling Participant – Definitions – As mentioned previously, HUD’s use of this catch-all provision leaves the Department vulnerable to

challenges that the regulation is void for vagueness. At a minimum, HUD must clarify – in a meaningful way – how it proposes to determine that such person(s) or entity exercise control over the finances or operation of a Covered Project.

15. Page 47879, Section 200.216(b) – Control of Entities – Once again, the Department fails to clarify how it would determine whether individuals participating in a Controlling Participant actually control the financing or operational decisions of the participant. The definition as proposed is overly broad. It is unclear if HUD’s intention is to go beyond the asserted 25% threshold, or whether HUD will examine different tiers in an organizational structure. HUD should formally adopt its long-standing “three tiers” level of review and eliminate ambiguity about depth of review.
16. Page 47880, Section 200.218(d) – Triggering Events – Arguably HUD lacks authority to exercise control over and therefore review what is only vaguely referred to as “another contract” via which a Controlling Participant receives “funds” in connection with a Covered Project. If such other contract is not HUD-related, and more particularly, does not relate to a program overseen by HUD’s Office of Housing, HUD should ignore it as part of its participation review because it is irrelevant.
17. Page 47880, Section 200.218(f) – Triggering Events – While it is appropriate for HUD to regulate Covered Projects that are currently subject to Use Agreements, HUD lacks authority over those properties that may, during some uncertain date in the future, become subject to a Use Agreement, must less “any other” HUD requirements or affordability restrictions of prospective applicability.
18. Page 47880, Section 200.220(a)(1) – Previous Participation Review – Scope of Review – The proposed regulation does not clarify what specific types of financial or operational performances may indicate a future financial or operating risk. It is unclear what “other factors” will be included as part of the Commissioner’s review, and HUD should so specify; otherwise, the rules are at risk of invalidation because they are void for vagueness. Furthermore, it is unclear what would trigger the Commissioner to exercise its asserted discretion to review participation in any other federal programs, regardless of their similarities to, nexus with, or applicability to the HUD programs at issue.
19. Page 47880, Section 200.220(b)(1) – Previous Participation Review – Results of Review – HUD must clarify what it means to “limit” or “otherwise condition” approval for the Controlling Participant to continue to participate in a Covered Project. Additionally, such limits and/or conditional approvals should specify the time limits associated with each alternative.
20. Page 47880, Section 200.220(b) (2) – Previous Participation Review – Results of Review – Notice Timeframe: The proposed rule does not specify in what timeframe the Department shall provide notice of a previous participation determination. HUD should provide such notice within 14 calendar days of reaching such a determination so as not to thwart or unnecessarily hinder transactions.
21. Page 47880, Section 200.220(b)(2) – Previous Participation Review – Results of Review – Notice to other parties: The proposed rule does not specify which other parties, aside from the FHA-approved lender in the transaction, may receive notice of a previous participation determination from the Department. Presumably only those parties actually involved in the transaction at issue should be notified, and HUD should clarify this in its rule. HUD should be

mindful of concerns about privacy and disclosure of trade secrets as well as releases of information that may be pre-decisional and prejudicial, particularly because the Department's determination may not necessarily be based on a complete record if the Controlling Participant has yet to appeal HUD's decision and present additional evidence and the Department has not adequately weighed such additional material.

22. Page 47880, Section 200.220(c)(2)(i) – Previous Participation Review – Basis for Disapproval: The Department should clarify what it means to be “restricted” from doing business with any other department or agency of the federal government, because this term is undefined and could conceivably capture relatively minor limitations on a Controlling Participant's activities. This ambiguous basis for disapproval also fails to consider the nexus between the restriction and the relevant HUD programs.
23. Page 47880, Section 200.220(c) (2) (ii) – Previous Participation Review – Basis for Disapproval: HUD should clarify what constitutes a “record” of “significant risk” that would form the basis for disapproval, otherwise the regulation is at risk of being found to be void for vagueness. For example, NAHMA members have found State Agencies often overstep their authority on matters outside their control and there is a concern that allegations from a State Agency of non-compliance could in itself become a flag or reason for denial of participation.
24. Page 47880, Section 200.220(d)(1) – Previous Participation Review – Alternatives to Disapproval: HUD should define what it means to “condition” or “limit” approval and also specify the time period for such actions. Such time periods should be reasonably related to the rationale for such a determination, and clearly articulated by the Department.
25. Page 47880, Section 200.220(d)(2) – Previous Participation Review – Alternatives to Disapproval: HUD should clarify how long it may temporarily withhold issuing a previous participation determination so as not to interfere with transactions or unnecessarily hinder the business decisions of prospective participants.
26. Page 47880, Section 200.220(d) (3) – Previous Participation Review – Alternatives to Disapproval: HUD should clarify the scope of expected remediation or remedial measures that Controlling Principals may be required to undertake. The language in the proposed regulation, “to the Commissioner's satisfaction”, is incredibly vague and open-ended and must be adequately defined. Otherwise, Controlling Participants will have inadequate notice of the regulatory requirements by which they are expected to abide.
27. Page 47880, Section 200.222(c) – Request for Reconsideration: HUD should specify the timeframe in which the HUD review committee or reviewing officer shall schedule a review of any requests for reconsideration, because in the past there were no deadlines incumbent on HUD to resolve 2530 flags, which resulted in closing delays, delayed property improvements, and losses of tax credits and investment dollars in a number of cases. We recommend that HUD schedule such a review no later than 14 calendar days following receipt of a request for reconsideration.
28. Page 47880, Section 200.222(c) – Request for Reconsideration: HUD must provide Controlling Participants sufficient advance written notice of its review of a request for reconsideration to enable participants to have adequate time to prepare a comprehensive review package. We suggest that HUD provide participants with such notice at least 14 days from the day of its receipt of the Controlling Participants' request for reconsideration.

29. Page 47880, Section 200.222(d) – Request for Reconsideration: In the interest of ensuring that decisions do not languish and resolution of open matters is achieved in a timely fashion, HUD should impose an upper time limit during which the review committee or reviewing officer may affirm, modify or reverse the initial decision. A reasonable time frame would be 30 days following receipt of the Controlling Participant’s submission of supplemental materials in support of reconsideration.

We greatly appreciate the opportunity to comment on the proposed Previous Participation rule. If you have any questions, please contact Larry Keys, NAHMA Director of Government Affairs, at lkeys@nahma.org or 703-683-8630, ext.111.

Sincerely,

A handwritten signature in black ink, appearing to read "Kris Cook".

Kris Cook, CAE
Executive Director