

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 200

[Docket No. FR-4870-F-02]

RIN 2502-A110

**Revised Guidelines for Previous
Participation Certification**

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

ACTION: Final rule.

SUMMARY: This final rule revises the regulations to require all participants in HUD's Multifamily Housing Programs to file their Previous Participation Certificates by a specified date using the Active Partner Performance System on HUD's secure Internet site. This rule follows publication of a proposed rule and takes into consideration the public comments received on the proposed rule. This rule makes no substantive change to the proposed rule, but provides for a six-month delay in the effective date of the electronic submission requirement.

DATES: *Effective Date:* May 13, 2005.

FOR FURTHER INFORMATION CONTACT: James E. Collins, Management Analyst, Housing Policy and Participation Standards Division, Office of the Deputy Assistant Secretary for Multifamily Housing, Room 6180, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-8000; telephone 202-708-1320, extension 3279 (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 past financial, legal, and administrative obligations in a satisfactory and timely manner. The current system requires HUD's business partners that want to participate in multifamily housing programs to file a paper Previous Participation Certificate using form HUD-2530 together with a description of all previous participation in multifamily programs every time they wish to do business with HUD.

II. The April 19, 2004, Proposed Rule

On April 19, 2004 (69 FR 21036), HUD published a proposed rule that advised of HUD's intention to amend 24 CFR 200.217(a) to require that filing, by a specific date, of the Previous Participation Certificate by participants in HUD's Multifamily Housing programs be done electronically rather than by completing a paper form (form HUD-2530). In the proposed rule, HUD advised that the electronic filing would be accomplished by using a secure Internet-based application developed by HUD known as the Active Partner Performance System (APPS). The proposed rule also clarified the types of transactions for which a principal or participant in HUD multifamily mortgage insurance and project-based subsidy programs must complete an electronic Previous Participation Certificate.

The proposed rule stated that APPS will provide participants with a secure environment within the HUD firewall where participants will record pertinent information about their specific relationship to any property. Using the APPS application, participants will be able to ensure that their individual records are complete, correct, and accurate at all times. APPS will provide participants with information about the physical condition of properties with which they are associated and will highlight any problems that may exist. Further, APPS will assist HUD in monitoring participants. APPS will allow HUD to maintain a history of participants, their various roles in property operations, and properties with which they are or were involved. A clear benefit of using APPS is that risk assessment of a party's new or revised participation will occur faster, as paper is not required to be sent back and forth across the country. Risk information will be shared automatically with participants, which will make the issues resolution process more efficient.

III. This Final Rule

This final rule implements the proposed rule without substantive change, except that HUD has adopted the suggestion that there be a six-month transition period. Hence, while the rule as a whole is effective 30 days from the date of publication, the effective date of the provision requiring electronic submission of the Previous Participation Certificate is 180 days from the date of publication in the **Federal Register**. Prior to that date, participants are required to continue to file form HUD-2530 as a condition prerequisite to new or revised participation.

IV. Discussion of Public Comments

The public comment period for the proposed rule closed on May 19, 2004. HUD received seven comments in response to the rule: One from a local residential services association; three from national associations representing management groups and builders; one from a government sponsored enterprise; one from a mortgage group; and one from a national law firm. Each of the seven commenters expressed their general support for HUD's effort to require electronic filing of multifamily Previous Participation Certificates. One commenter supported "any procedural changes that reduce the paperwork burden." One commenter agreed that "there are clear benefits to an electronic submission, including faster reviews by HUD staff, which is critical to the timely approval of FHA mortgage insurance for new projects."

The following presents the significant issues raised by the commenters and HUD's response to the comments.

Comment: Alternate Form for Submission: One comment noted a desire to see a provision in the rule for transmission of participation data in a form other than through APPS: "HUD electronic systems are often less than user friendly. If HUD-2530s could be sent via the Internet to local offices, the process would be faster and less cumbersome."

HUD Response: At this time HUD does not plan to provide such alternatives. HUD has explored other forms of submission, but has so far found none as effective as APPS. HUD has continued to develop some alternatives within the system to ease the burden of initial inputs of organization and participant data. For example, HUD now makes data regarding the participant's portfolio available on-line and has adjusted the system to remove some redundant and repetitive steps. The Department continues to work to make the system efficient and easy to use. HUD believes, based on its experience, that the solution that the commenter suggests would actually decrease the system's efficiency.

Comment: Effective Date and Transition Period: Three commenters stated their concern of being required to use the electronic system immediately, beginning 30 days following the date the final rule is published in the **Federal Register**. One comment requested an effective date of at least six months because "[t]he effective date of this rule should recognize that experience with [APPS] varies across the affordable housing industry." Two commenters

suggested a transition period during which the applicants could submit certifications on paper while any difficulties or technical issues with the system are being resolved. One commenter also suggested that "HUD must allow itself sufficient time to make this requirement practical," and two commenters noted that training on the electronic system should be widely available prior to the effective date.

HUD Response: HUD plans a transition period of six months from the effective date of this final rule. This will allow time for registration and entry of data by participants and for participants to become familiar with the processes. The APPS process requires the entry of baseline data about individuals and companies, collectively known as participants. It is similar in nature to the paper process where the parties listed on the paper form HUD-2530 listed names, addresses, employer identification, taxpayer identification, and other data. After the baseline is entered, the participant is responsible to keep the data updated at all times. The second and final step is to link individual property experience to the participant. All work is on-line through HUD's secure servers. During the transition period, participants will be required to file paper form HUD-2530 Previous Participation Certifications for all new business. On and after the effective date, paper forms will not be accepted.

In order to facilitate the transition, HUD is providing informational materials, including the APPS user guide, on HUD's Web site at <http://www.hud.gov/offices/hsg/mfh/apps/appsmfhm.cfm>. The APPS online application itself has on-line help functions to assist while the participant is entering data.

Comment: Information Collection: Three commenters discussed the issue of information collection generally. One commenter "urge[d] HUD to carefully review all information requested under the new submission procedure to ensure that it is consistent with current 2530 regulations." Another commenter noted "[t]he computerized system should clearly allow for similar entries to the system as currently structured, and not increase the scope of entities subject to submission." The commenters also suggested that HUD use the new electronic system to communicate to users, for example, any changes that affect the system should be promptly posted. Two commenters suggested specifically for HUD to be able to notify participants when flags are placed and/or resolved to their account.

HUD Response: HUD does not believe that the requirements of this final rule seek information beyond the scope of what is required now. The APPS will reduce the burden on the public through on-line storage of all required data, which will be secure, accessible, and able to be updated by the participant.

On the point raised about electronic communication, HUD agrees that digital communications to participants about APPS-related events would be beneficial. HUD is considering this functionality for the future. Presently, HUD communicates with participants using various methods. Inspection report information is presently sent to participants by e-mail.

Comment: Definition of "Participant": Three commenters expressed their concern over the lack of a definition for "participant." One commenter noted that "'principal' is defined under 24 CFR 200.215, but 'participant' is not, and there is no definition for that term in the Proposed Rule." One commenter stated they were advised that the "three-tier rule in the 2530 handbook would be effectively eliminated and thus numerous additional (undefined) 'participants' would be required to file certifications." Because "principal" and "participant" are important terms, the commenters suggested that they should be clearly defined in the regulations.

HUD Response: "Participant" is the term that refers generically to all principals, affiliates, etc. referred to in existing regulations. So as not to confuse users, HUD has replaced references to "participant" with "principal."

As to the so-called "three-tier rule," that "rule" is not based on a regulation promulgated after notice-and-comment rulemaking, but rather is a procedural guideline. A careful reading of HUD's codified regulations does not include any limitation on organizational levels that must file certifications. HUD Handbook 4065.1 will be updated to reflect this regulation and more current policy.

Comment: Program References: Two commenters noted that the proposed rule appears to reference HUD programs which no longer exist and fails to reference current HUD program activities. One commenter suggested that HUD should "delete or revise 24 C.F.R. Section 200.213."

HUD Response: This change would be beyond the scope of the current rulemaking. HUD plans to update this section in the future.

Comment: Limited Liability Companies (LLCs) and Limited Partnerships (LPs): Two commenters stated that it is unclear whether the

proposed rule would apply to LLCs and LPs equally or whether different standards would apply. Both commenters suggested that the final rule should clarify that equal requirements apply to both LLCs and LPs. Moreover, one commenter maintained that "passive investors," such as Limited Partners, should not be made to track some of the information required in the HUD-2530 because they are not actively involved in the management of the property.

HUD Response: HUD is considering changes to 24 CFR, Subpart H that will clarify treatment of "passive investors" and recently created business entity types. Under existing regulations at 24 CFR part 200.215, other public and private entities proposing to participate in HUD programs are covered. Therefore, even where not specifically mentioned, LLCs and LPs are covered.

At the present time, the Department has chosen to treat LLCs as if they were partnerships. The Managing Member will be considered a general partner and the members limited partners for participation clearance purposes.

Comment: Interest Reduction Payment Contract: One commenter requested clarification as to whether the HUD-2530 would have to be filed by the owner of the property or the lender, in connection with the assumption of an Interest Reduction Contract. The commenter suggested that only the owner should be required to file the HUD-2530.

HUD Response: The previous participation process requires a HUD-2530, Previous Participation Certification, to be submitted when there is new or significantly expanded participation. To determine whether a submission or application is required, Field Offices have been advised to require a Previous Participation Certification when there is any apparent change in control, including introduction of new entities. Each case must be evaluated on its own terms as to whether it requires a new filing.

Comment: 30-Day Advance Filing: One commenter stated that the existing rule requires only that a HUD-2530 be filed prior to the date of the proposed transaction, whereas the proposed rule requires that the HUD-2530 be filed at least 30 days prior to the transaction. The commenter requested clarification on this apparent discrepancy.

HUD Response: HUD is making this change because recent experience has shown that in order to prevent delays from occurring in business transactions, HUD needs this material to be filed earlier than previously.

Comment: Disclosure of Principals: One commenter noted that “the proposed rule places no limitation or qualification for disclosure and places companies at risk of violating a rule unless they spend significant time documenting information clearly relevant to a transaction.” The commenter suggested that the disclosure of up to “three tiers” in the organizational structure, per guidance contained in HUD Handbook 4065.1, be required. Additionally, the commenter suggested that disclosure of principals in large public entities should be limited to “affiliates, persons or divisions with operational control over the property at issue.”

HUD Response: As stated earlier, the so-called “three-tier rule” is derived from Handbook policy and is not a rule promulgated under the Administrative Procedure Act. A careful reading of the regulations does not include any limitation on organizational levels. HUD Handbook 4065.1 will be updated to reflect this regulation and current policy. HUD Handbook 4065.1 allows the Department to limit disclosure of the principals in large public entities. HUD may clarify this distinction in future rule changes.

Comment: Definition of Interest: One commenter noted that the proposed rule does not contain a definition of interest. The commenter stated “[t]he previous participation procedures require submission for all limited partners with more than 25% interest and stockholders with more than 10% interest in the property. However, there is no definition of what constitutes an interest.”

HUD Response: The definition of “interest” in this regulation is the ordinary legal definition: “A legal share in something; all or part of a legal or equitable claim to or right in property” (Black’s Law Dictionary 828 (8th ed. 2004)). Because the commonly-understood definition of “interest” is being used, it is not necessary to specifically define the term in this rule.

Comment: Migration of Data: One commenter stated that APPS should allow the migration of data from other commonly-used databases.

HUD Response: HUD does not plan to provide this functionality at this time due to budgetary constraints.

Comment: Task Force: One commenter states that a task force review should be completed prior to requiring the use of a computerized system, and that such a delay would provide for a transitional period.

HUD Response: HUD has considered this comment, and believes that it is appropriate at this time to go forward

with the transition to electronic filing. HUD has built a six-month transition period into the rule, making any further delay unnecessary.

V. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in § 200.217 have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2502–0118. 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 valid control number.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact remains applicable to this final rule and is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector. This rule does not impose a federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of the Unfunded Mandates Reform Act of 1995.

Impact on Small Entities

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule does not change informational obligations for entities, but simply provides for electronic filing of the same information that is currently required.

Therefore, the undersigned certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities,

and an initial regulatory flexibility analysis is not required.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number is 14.117.

List of Subjects in 24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Lead poisoning, Loan programs—housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 200 as follows:

PART 200—INTRODUCTION TO FHA PROGRAMS

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

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

■ 2. Amend § 200.217 by revising paragraph (a) to read as follows:

§ 200.217 Filing of previous participation certificate on prescribed form.

(a) Effective October 11, 2005, or on such later date as may be allowed by HUD, all principals in HUD multifamily mortgage and project based subsidy programs must submit an electronic Previous Participation Certificate (form HUD–2530) via HUD’s secure web server as a condition prerequisite to new or revised participation. Prior to this date, principals are required to file form HUD–2530 as a condition prerequisite to new or revised participation. Filing requirements are as prescribed by the Assistant Secretary for Housing–Federal Housing Commissioner at the occurrence of any of the events below:

(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 or refinanced 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);

(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 Cranston-Gonzales National Affordable Housing Act (Supportive Housing for Persons with Disabilities);

(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 described in § 200.213(c);

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

(6) With a request to assume any existing Housing Assistance Payments Contract, Interest Reduction Contract, Rent Supplement Contract, or Rental Assistance Payments Contract;

(7) With a request to change ownership of a property regulated or controlled by a HUD "use agreement";

(8) With an application or request to change the approved lessee operating a nursing home, assisted living, or skilled care facility;

(9) With a 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;

(10) With a bid to purchase a Secretary-owned project;

(11) With a bid to purchase a mortgage note held by the Commissioner;

(12) At least 30 days prior to the date of any proposed substitution or addition

of a new principal in an existing project, such as management agents, LLC members, directors, or partners, or proposed participation in a different capacity from that previously approved for the same project;

(13) At least 30 days prior to the proposed acquisition by an existing limited partner, stockholder, or any principal of additional interests resulting in a total interest of at least 25 percent (partners) or 10 percent (non-partners); or

(14) Certificates of participation must be submitted for interests acquired by any party or organization by inheritance or court decree within 30 days after said acquisition or decree, but will not be subject to review or disapproval.

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Dated: April 4, 2005.

John C. Weicher,

Assistant Secretary for Housing-Federal Housing Commissioner.

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