

Proposed Rules

Federal Register

Vol. 81, No. 95

Tuesday, May 17, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 200

[Docket No. FR-5850-N-03]

RIN 2502-AJ28

Retrospective Review—Improving the Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs Participants; Supplemental Notice of Proposed Rulemaking

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

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: On August 10, 2015, HUD published in the **Federal Register**, a proposed rule that would revise HUD's regulations for reviewing the previous participation of Federal programs of certain participants seeking to take part in multifamily housing and healthcare programs administered by HUD's Office of Housing. Specifically, the rulemaking proposed to clarify and simplify the process by which HUD reviews the previous participation of participants that have decision-making authority over their projects as one component of HUD's responsibility to assess financial and operational risk to the projects in these programs. The approach offered by the proposed rule was to not only bring greater certainty and clarity to the process but greater flexibility, avoiding a one-size fits all approach.

This document opens the public comment period solely for the provisions addressed in this document to address concerns that while the proposed rule provided greater flexibility, it lacked the greater certainty to which HUD committed, and how HUD would provide such certainty.

DATES: *Comment Due Date:* June 16, 2016.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division,

Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0001.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the document. *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available 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). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal 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:

Aaron Hutchinson, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6178, Washington, DC 20410; telephone number 202-708-3994 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

On August 10, 2015, at 80 FR 47874, HUD published a document that proposed to amend its regulations, at 24 CFR part 200, subpart H, that govern the process by which HUD reviews the previous participation and performance of applicants seeking to participate in HUD's multifamily and healthcare programs. Currently, all principals seeking to participate in HUD's multifamily housing and healthcare programs must certify that all principals involved in a proposed project have acted responsibly and have honored their legal, financial, and contractual obligations in their previous participation in HUD programs, in certain programs administered by the U.S. Department of Agriculture, and in projects assisted or insured by state and local government housing finance agencies. HUD's regulations require applicants to complete a very detailed and lengthy certification form (HUD Form 2530)¹ of participants that have decision-making authority over their projects as one component of HUD's responsibility to assess financial and operational risk to the projects in these programs.

The August 10, 2015, proposed rule proposed to clarify which individuals and entities will be reviewed, the purpose of the review, and the review to be undertaken. HUD proposed by targeting more closely the individuals and actions that would be subject to prior participation review, HUD would not only bring greater certainty and clarity to the process but would provide HUD with flexibility as to the necessary previous participation review for entities and individuals that is not possible in a one-size fits all approach.

The public comment period on the proposed rule closed on October 9,

¹ See <http://portal.hud.gov/hudportal/documents/huddoc?id=2530.pdf>.

2015, and HUD received 33 sets of public comments. The commenters were from real estate organizations, affordable housing nonprofit organizations, consulting firms, non-profit organizations, and law firms. Overall the commenters were very supportive and appreciative of HUD's efforts to reform the regulations. Commenters stated that, in addition to reforms to the regulations, reforms to the review process, additional guidance and training materials were also needed.

Several comments expressed concern that the proposed regulations were overly broad and therefore would be open to various interpretations, which would complicate the review process for applicants and participants rather than simplify the process. The commenters suggested that in order to obtain flexibility in the review process, which the commenters supported, the approach in the proposed rule sacrificed specificity and certainty. Commenters suggested that HUD revise the proposed regulations to provide the greater certainty and specificity they need. Other commenters suggested that HUD issue guidance when HUD issues the final regulations to provide the specificity and certainty that the proposed regulations lack according to the commenters.

II. Proposed Approach To Provide Certainty and Specificity and Retain Flexibility

Through this document, HUD proposes to use an approach that HUD has taken in certain of its other regulations and that is to provide regulations that clearly document the regulatory requirements imposed, but provide in a supplemental document, a document referenced in the regulations, that will address the specific procedures to be followed.² When HUD has taken this approach, HUD commits to provide notice and opportunity for comment for any significant changes made to the document. HUD submits that this approach is particularly suitable for the 2530 process.

For the previous participation review process, HUD proposes to issue with its final regulations a "Processing Guide for Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs' Participants"

(Guide). This Guide, which will be posted on HUD's Web site, will provide the details on procedures which commenters are seeking and which HUD submits is more appropriate for a process guide than for regulatory text. The Guide will provide applicants for and participants in HUD's multifamily housing and healthcare programs the detailed information desired on the previous participation review process, and provide HUD with the ability to make changes as may be needed to address specific circumstances that may arise in the previous participation process and to keep up-to-date with changes that may arise in the housing market. One of the longstanding complaints about HUD's previous participation review process is that the process and the regulations that govern the process are very outdated and do not keep up with the times. HUD submits that a lean set of regulations supplemented by a detailed processing Guide that is subject to notice and comment for any significant changes is the best approach for this process and one that will endure successfully for some time. The appendix to this document provides the proposed Guide for which HUD is seeking public comment for a period of 30 days. The Guide, in addition to elaborating upon terms and provisions in the proposed rule, also addresses "flags," which are not addressed in either the existing regulations or proposed regulations. Flags refer to an issue or issues in a prospective participant's application for which further review is necessary. The Guide also includes certain information collection requirements but those requirements are ones which are already included in HUD's 2530 form and which already have an approval number assigned by the Office of Management and Budget under the Paperwork Reduction Act. For example, the Guide requires organizational information to be presented in an organizational chart instead of merely listed. However, the Guide makes clear that not every entity identified in the organizational chart will be considered a Controlling Participant, as defined in the regulation.

In addition to publication in the **Federal Register**, this document and Guide can be found at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh.

III. Description of Proposed Revisions to Regulations

In addition to issuance of the proposed Guide for comment, HUD also seeks comment on the following additional provisions that are proposed

to be included or revised in the regulation.

A. Inclusion of Applicability of Processing Guide in Regulations

HUD proposes to revise § 200.210 (Policy) to clarify that it is HUD's policy, in accordance with the intent of the National Housing Act, and with other applicable federal statutes, participants in HUD's housing and healthcare programs be responsible individuals and organizations who will honor their legal, financial and contractual obligations. HUD would further clarify that it will review the prior participation of Controlling Participants, as defined in the August 10, 2015, proposed rule, as a prerequisite to participation in HUD's multifamily housing and healthcare programs listed in § 200.214.

HUD would further revise the policy language in § 200.210 to advise that the regulations in 24 CFR part 200, subpart H, as proposed to be amended by the August 10, 2015, proposed rule would be supplemented by the Processing Guide for Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs' Participants (Guide), which would be made available on HUD's Web site at www.hud.gov. HUD would advise that the Guide elaborates on the basic procedures involved in the previous participation review process. HUD would also advise that for any significant changes made to the Guide, HUD would provide advance notice and the opportunity to comment, providing a comment period of no less than 30 days.

B. Description of Definition of "Risk"

In § 200.212, the Definition section, HUD proposes to include a definition of "Risk." While § 200.220 of the proposed rule addresses "risk," HUD is proposing to add a definition of this term that would clarify that in order to determine whether a Controlling Participant's participation in a project would constitute an unacceptable risk, HUD's FHA Commissioner must determine whether the Controlling Participant could be expected to participate in the Covered Project (as defined in the August 10, 2015, proposed rule) in a manner consistent with furthering HUD's purpose of supporting and providing decent, safe and affordable housing for the public. The Commissioner's review of Previous Participation shall consider compliance with applicable statutes, regulations and program requirements. HUD would clarify that the FHA Commissioner must consider the Controlling Participant's

² See 24 CFR 207.254, pertaining to mortgage insurance premiums; 24 CFR 203.605, pertaining to tier ranking systems and methodology applicable to loss mitigation performance; 24 CFR 290.9, pertaining to setting rental rates for certain multifamily housing projects; 24 CFR 570.712(b) pertaining to setting a fee for the Section 108 Loan Guarantee Program; and 24 CFR part 902, pertaining to scoring notices for HUD's Public Housing Assessment System.

previous financial and operational performance in HUD programs that may indicate a financial or operating risk in approving the Controlling Participant's participation in the subject Triggering Event. HUD would further provide that at the FHA Commissioner's discretion, as necessary to determine financial or operating risk and to the extent the FHA Commissioner determines such information to be reliably available, the FHA Commissioner may consider the Controlling Participant's participation and performance in any federal, state or local government program. In addition, HUD would provide that the FHA Commissioner may exclude any previous participation the FHA Commissioner determines to be irrelevant in evaluating risk and/or any previous participation in which the Controlling Participant did not exercise, actually or constructively, control. Finally, the definition would provide that any information collection in connection with review of previous participation must follow all applicable requirements for information collection.

Dated: May 9, 2016.

Edward L. Golding,

Principal Deputy Assistant Secretary for Housing.

Appendix

Processing Guide for Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs' Participants

Purpose

This Processing Guide (Guide) supplements HUD's Previous Participation Review regulations in 24 CFR part 200, subpart H. The Guide defines controlling participants for previous participation review, new flag approval, and rejection guidance and flag protocols in federal programs of certain participants seeking to take part in multifamily housing and healthcare programs administered by HUD's

Office of Housing. The Guide aids in clarifying and simplifying the process by which HUD reviews previous participation of participants that have decision making authority over their projects as one component of HUD's responsibility to assess financial and operational risk to projects in these programs.

This Guide updates and clarifies previous procedures and supersedes outstanding policy and guidance concerning previous participation review found in the following: Multifamily Accelerated Processing (MAP) Guide Handbook 4430.G, Multifamily Asset Management and Project Servicing Handbook 4350.1, Healthcare Mortgage Insurance Program Handbook 4232.1, and Mortgage Insurance for Hospitals 4615.1. HUD will incorporate elements of this Guide into these handbooks. In addition, the Guide supersedes the Previous Participation (HUD-2530) Handbook 4065.1.

Applicability of the Previous Participation Review

This Guide applies to Covered Projects administered by the Office of Multifamily Housing, the Office of Grant Administration and the Office of Healthcare Programs, as listed in HUD's regulations in 24 CFR part 200 subpart H.

The Covered Projects are those that are insured under the following sections of the National Housing Act: Sections 213, 220, 231, 223(d), 221(d)(4), 241(a), 223(f), 232/223(f), 242/223(f), 223(a)(7), 232, 232(i), 242, 542(b) and 542(c).

The Guide also applies to non-insured projects that include Section 202 or Section 811 Capital Advances or Direct Loans, Section 236 loans, or Subsidized Projects in which 20 percent or more of the units now receive or will receive a subsidy in the form of:

- Interest reduction payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1);
- Rental Assistance Payments under section 236 of the National Housing Act (12 U.S.C. 1715z-1); Rent Supplement payments under section 101 of the Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); or

- Project based rental assistance pursuant to housing assistance payment contracts under Section 8 of the Housing Act of 1937 (but not including project-based assistance provided under the Housing Choice Voucher program administered by HUD's Office of Public and Indian Housing).

For the Sections 223(a)(7), 223(f), 241(a), 232(i) and 223(d) programs Controlling Participants are only subject to previous participation review if they were not previously approved to participate in that project.

Change in Controlling Participants

Any new Controlling Participant of a Covered Project requires consent by HUD.

Waiver Authority

Program offices may waive any portion of this Guide that is not regulatory subject, however, to a good cause justification as required by HUD for all waivers. HUD expects waivers to be rare and in response to unique circumstances meeting the intent of HUD's Previous Participation Review regulations.

Program Requirements

The below sections outline who is subject to a previous participation review, submission requirements, review procedures, approval and rejection processes as well as participant flagging.

A. Controlling Participants for Previous Participation Review Purposes

Previous Participation Review is required for Controlling Participants. In connection with each Triggering Event, Mortgagees in insured projects and entities serving in the Specified Capacities listed below in non-insured projects shall provide to HUD a list of all Controlling Participants. Controlling Participants are those entities and individuals (i) serving as a Specified Capacity with respect to a Covered Project and (ii) the entities and individuals in control of the Specified Capacities. At least one natural person must be identified as a Controlling Participant for each Specified Capacity. The chart below shows the Specified Capacities for the listed programs.

SPECIFIED CAPACITIES

	Multifamily housing	Office of residential care facilities	Office of hospital facilities
Borrower or Owner	X	X	X
Management Agent	X	X	
Operator		X	X
General Contractor	X	X	X
Construction Manager			X
Master Tenant/Landlord		X	

Controlling Participants. The entities serving as a Specified Capacity are Controlling Participants of the Covered Project for the programs listed. In addition, the individuals and entities determined by HUD to exercise financial or operational control over these entities are also

Controlling Participants. Controlling Participants require Previous Participation Review and must complete Previous Participation Review submissions. Any individual or entity who exercises financial or operational control of a Specified Capacity is considered to be a Controlling Participant

and required to complete a Previous Participation Review submission, unless excluded below. Controlling Participants include both entities and natural persons. If a Controlling Participant is an entity, the submission must include the people who exercise the day-to-day control for that entity.

Notwithstanding the foregoing or anything else in this Guide, if HUD determines that an individual or entity does not actually exercise financial or operational control of a Covered Project or Specified Capacity, such individual or entity shall not be considered a Controlling Participant.

List of Controlling Participants: For purposes of Previous Participation Review, unless excluded below or otherwise determined by HUD not to be a Controlling Participant, the following shall be considered Controlling Participants:

1. Entities and individuals owning, directly or indirectly, 25% or more of a Specified Capacity.

2. Any officers and other executive management (including Executive Director and other similar capacities) of the Specified Capacity.

3. The controlling owners (entities and/or individuals) of the entity that controls the Specified Capacity.

4. Managers or managing members of Limited Liability Companies (LLCs).

5. General partners of limited partnerships, including "administrative" general partners or other general partners if they exercise day-to-day control over the entity.

6. Partners in a general partnership.

7. Executive Director (or equivalent position) of a non-profit sponsor of a Specified Capacity.

8. With respect to non-profit Borrowers under the Section 242 program, the executive management of the Borrower and the members of the Board of Directors that HUD determines have control over the finances or operation of the hospital.

9. Officers of a for-profit corporation's Board of Directors.

10. Controlling stockholders of a corporation.

11. Trustees of a trust.

12. For real estate investment trusts (REITs), the REIT itself, the chief executive officer (or equivalent position) and all company officers (except those officers determined by HUD not to exercise day-to-day control over the REIT, the Specified Capacity or the Covered Project) must file.

13. For insured projects, if applicable, the person (people) and/or entity (entities) to be listed on the Regulatory Agreement Non-Recourse Debt section.

14. Any other person or entity determined by HUD to exercise day-to-day control over a Specified Capacity. This may include any officers, directors or members of an executive management team (even of excluded entities) who would otherwise not be required to make a submission if they are exercising control over the Specified Capacity.

If the applicant or Mortgagee has any reason to believe that any Controlling Participant is not of sound mind or body or is otherwise incapacitated, such information must be disclosed to HUD to review and determine whether another individual is acting as a Controlling Participant.

List of Exclusions: Except that any Specified Capacity is a Controlling Participant, and unless otherwise determined in writing by HUD in a specific transaction to exercise day-to-day control of a Covered Project or Specified Capacity, Controlling Participants do not include the following:

1. *Wholly-owned entities.* Any entity that is 100% owned or controlled by one individual or entity is excluded. Such entities are not exercising control; the individual or entity that wholly owns them is exercising control. An organizational chart may include one or more tiers of wholly-owned entities. All wholly-owned entities in all tiers are excluded.

2. *Shell entities.* Entities that do not take actions themselves but only serve as legal vehicles through which the partners, members or owners of such entity take actions are excluded. These entities are not exercising control, the partners, members or owners of such entity are controlling. The "middle tiers" of an organizational chart are often shell entities. For example, if a Borrower LLC's managing member ("MM A") is a joint venture partnership ("JV B") of two entities ("P 1" and "P 2") and that joint venture's organizational documents indicate that the day-to-day control of the joint venture is exercised by one of the two partners (P 1), then all of those entities, except P 1 is excluded. None of MM A, JV B or P 2 are Controlling Participants of the Borrower.

3. *Tax credit investors.* Syndicator and direct investor entities in Low-Income Housing Tax Credits, Historic Tax Credits, New Markets Tax Credits or other tax credits (if HUD determines such credits are substantially similar to the listed tax credits) are excluded unless such entities exercise day-to-day control or seek other involvement that would trigger the need for previous participation review. HUD may still require a so-called "LLCI certification," an "Identification and Certification of Eligible Limited Liability Investor Entities," "Passive Investor Certification" or any other such certification.

4. *Passive participants.* If an entity's organizational documents specify which members, partners or owners are authorized to exercise day-to-day control of that entity, then any other members, partners or owners who are not authorized to exercise state day-to-day control of an entity are excluded.

5. *Minor officers.* If HUD determines that an officer of a corporation or other entity does not have significant involvement in a Covered Project, such officers are excluded. If all the officers of the entity certify as to who have significant and insignificant involvement, this certification shall be evidence of the significant and insignificant involvement.

6. *Members of a Board of Directors.* Members of a non-profit or for-profit corporation's board of directors who do not exercise control over the corporation in another capacity (for example, as Executive Director or other manager or officer of the non-profit corporation) are excluded. This exclusion does not apply to the members of boards of directors of hospitals, the rule for which is specified in the Regulation and captured in #8 within the Listing of Controlling Participants above.

7. *Less than 25% ownership interest.* Unless exercising control through another capacity, members, partners, stakeholders and owners of entities with less than a 25% interest in an entity are excluded. This

exclusion does not apply to any such member, partner, stakeholder or other owner of an entity ("Proposed Excluded Member") who would have an interest greater than 25% if the combined percentages of all other members, partners, stakeholders or other owners (including beneficial interests in trusts) with whom the Proposed Excluded Member has an "Identity of Interest" or other conflict of interest because of familial relation or common financial interest exceeds 25%. Whether an Identity of Interest or other conflict of interest exists is determined by HUD. If the program requirements of the applicable program in which the Covered Project is participating speak to Identify of Interest or other conflict of interest, those program requirements control.

8. *Nursing Homes and Assisted Living Facilities.* With respect to projects under the Section 232 program, the nursing home administrator of nursing homes and equivalent positions in assisted living facilities are excluded.

9. *Publicly Held Companies.* For publicly held companies, the chief executive officer (or equivalent position), the controlling shareholder (if any), and project manager(s) or other individual(s), if any, identified as must having day-to-day control over a Specified Capacity or Covered Project must file but the publicly held company shall otherwise be treated as an individual without need for other individual shareholders to file certifications in their individual capacity or identify their social security or tax identification numbers.

10. *No Exercise of Financial or Operational Control.* Any individual or entity determined by HUD not to exercise financial or operational control of a Covered Project or Specified Capacity shall not be considered a Controlling Participant.

B. Organization Charts

An organization chart must be submitted for each Specified Capacity and for any entity within the organization chart if requested by HUD. Organization charts are visual representations of the ownership structure of an organization. All organization charts submitted in connection with a Triggering Event are considered part of the application for HUD review and subject to the certifications stating that the application is true and complete. The organization chart must be clear enough so that a person unfamiliar with the Covered Project and the entities involved can understand the ownership and control structure. The organization chart must include the following:

1. Clearly show all tiers of the ownership structure, including the members or owners of the entities listed.

2. Show all participants, not just those who the Lender or Applicant considers to be principals or Controlling Participants. To the extent ownership interests are identified as widely held, the Applicant must provide any information requested by HUD regarding such interests.

3. Shows percentages of ownership and role in the entity (e.g. Limited Partner, General Partner, Managing Member, Tax Credit Syndicator/Investor, etc.).

4. At least one natural person, and not just entities.

5. Each Specified Capacity must be shown on a separate organization chart (*e.g.* Borrower, Operator, Management Agent, Master Tenant, etc.).

6. Anyone on an organizational chart that is debarred, suspended, or is subject to a Limited Denial of Participation (LDP), a voluntary abstention or a voluntary exclusion may not participate in the Covered Project.

7. With respect to each entity on the organization chart, the executive management teams (for example, all officers such as CEO, CFO, President, Executive

Director, etc., but not department heads or lower level management) and any members of a Board of Directors must be disclosed to HUD even if such individuals are not considered to be Controlling Participants and do not need to file Previous Participation Review submissions.

C. Filing the Previous Participation Certification

To fulfill the Previous Participation Review requirements, applicable controlling participants must file a Previous Participation Certification. Participants may utilize either the electronic Active Partners Performance System (APPS) or a paper

alternative. Participants should not file both an APPS submission and a paper form. HUD strongly encourages participants to utilize the APPS system. As part of the Previous Participation Certification, participants are only required to list all projects which they have participated in over the previous 10 year period. However, HUD reserves the right to review and consider a participant's previous participation in a federal project beyond the 10 year period when determining whether to approve participation in the project associated with an application.

The following chart indicates which filing options are available for which programs.

Filing method	Multifamily housing & grant administration projects	Office of residential care facilities	Office of hospital facilities
Active Partners Performance System (APPS) Submission	X	X	X
OR			
Form HUD-2530 (paper)	X		X
Consolidated Certification ³ Previous Participation Section (paper)		X	

ACTIVE PARTNERS PERFORMANCE SYSTEM (APPS) SUBMISSION INSTRUCTIONS

HUD has made several upgrades to the system to improve the applicant submission process. For example, HUD now allows for electronic signatures of APPS submissions, ability to upload submission packages, and has improved the baseline submission to allow for edits. HUD encourages participants to utilize the APPS system when filing the Previous Participation Certification as it saves a substantial amount of time and allows for faster review of submissions by HUD reviewers.

Here is a link to the APPS resources: http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/apps/appsmfhm.

For questions about the APPS system contact the Multifamily Housing Systems Help Desk by phone at (800) 767-7588 or *Apps-F24p@hud.gov*.

Step 1: System Registration	This step registers Controlling Participants in the APPS system. See the APPS Quick Tips for detailed instructions on the registration process: http://portal.hud.gov/hudportal/documents/huddoc?id=appsquicktips.pdf .
Step 2: Create a Baseline	This step establishes the organization structure and previous participation of Controlling Participants. See Chapter 2 of the APPS Userguide for specific instructions and screen shots: http://portal.hud.gov/hudportal/documents/huddoc?id=chapter2.pdf .
Step 3: Create a Property Submission.	This step creates a submission for a Controlling Participant's role in a specific project. See Chapter 3 of the APPS Userguide for specific instructions and screen shots: http://portal.hud.gov/hudportal/documents/huddoc?id=chapter3.pdf .
Step 4: Complete the Certification and Submit to HUD.	In this step Controlling Participants electronically certify to previous participation certifications and send the submission to HUD for review. See Chapter 7 of the APPS Userguide for specific instructions and screen shots: http://portal.hud.gov/hudportal/documents/huddoc?id=CHAPTER7.PDF .
Step 5: Upload the Organization Chart with the Signature Pages.	The user uploads the Organization Chart and Signature Pages into the APPS system. See Section B for a description of what the organization chart must include.

FORM HUD-2530 COMPLETION INSTRUCTIONS⁴

[It is the participant's responsibility to assure that the Form HUD-2530 is correct, complete and accurate.]

Form section	Instructions
Review certification language	The participant should assure that compliance with the certification is met. If there is a certification that a controlling participant cannot certify to, the participant must strikethrough that particular certification, initial the strikethrough and attach a signed letter of explanation. This situation should be rare.
Block 2	List Project Name and Number.
Block 7	Controlling Participants on the organization chart must match Block 7.
Blocks 8 and 9	Write "See Organization Chart."
Block 10	Insert Social Security Number or Tax ID Number for each Controlling Participant.
Bottom of Page 1	The Controlling Participants listed in Block 7 must also be listed in the signature block at the bottom of Page 1.

³ Consolidated Certifications are the following forms: HUD 90013-ORCF, Consolidated Certification-Borrower, HUD 90014-ORCF,

Consolidated Certification-Principal of the Borrower, HUD 90015-ORCF, Consolidated Certification-Operator, HUD 90017-ORCF,

Consolidated Certification-Management Agent, and HUD 90018-ORCF, Consolidated Certification-General Contractor.

FORM HUD-2530 COMPLETION INSTRUCTIONS⁴—Continued

[It is the participant's responsibility to assure that the Form HUD-2530 is correct, complete and accurate.]

Form section	Instructions
Schedule A	The Controlling Participants must sign and date the submission. Authorized person(s) may sign on behalf of other person(s) or entities. It is the signer's responsibility to assure that they are authorized to sign on behalf of others. Each signature block must include a signature. All principals listed in Block 7 must be listed in Column 1 Column 2 must include all previous participation from the past 10 years in: (a) Covered Projects, (b) housing projects with current flags under the U.S. Department of Agriculture's previous participation review system and (c) any other housing project participating in a federal, state or local or government program if during the Controlling Participant's participation in the housing project (i) the housing project was foreclosed upon; (ii) the housing project was transferred by a deed in lieu of foreclosure; or (iii) an event of default, or similarly termed event, was declared against the housing project or the Controlling Participant pursuant to the government program's project documents. Controlling Participants with No Previous Participation should write "No Previous Participation, First Experience." Principal roles must be included in Column 3 The Status of the Loan must be listed in Column 4. Note: This section is not applicable for General Contractors that did not have ownership interest in the project. Identify (checkbox) whether the project was ever in default during the participant's participation in Column 5. If the "yes" box is checked a detailed explanation of the circumstances (including mitigating factors) must be provided. Note: This section is not applicable for General Contractors that did not have ownership interest in the project. List the latest Management Review and Physical Inspection dates and scores in Column 6. If there are no scores, write "None." Note: This section is not applicable for General Contractors that did not have ownership interest in the project.
Business Partner Registration System (BPRS) Registration.	Each Controlling Participant must be registered in the BPRS System. Here is a link: https://hudapps2.hud.gov/apps/part_reg/apps040.cfm
Organization Chart	Attach an organization chart. See Section B for a description of what the organization chart must include.

CONSOLIDATED CERTIFICATION COMPLETION INSTRUCTIONS

[It is the participant's responsibility to assure that the Consolidated Certification is correct, complete and accurate.]

Form Section	Instructions
Review certification language in the Consolidated Certification ⁵ . Attachment 1	The participant should assure that compliance with the certification is met. Participants with Previous Participation must complete Attachment 1 of the Consolidated Certification for projects participated in over the past 10 years. Include all previous participation from the past 10 years in: (a) Covered Projects, (b) housing projects with current flags under the U.S. Department of Agriculture's previous participation review system and (c) any other housing project participating in a federal, state or local or government program if during the Controlling Participant's participation in the housing project (i) the housing project was foreclosed upon; (ii) the housing project was transferred by a deed in lieu of foreclosure; or (iii) an event of default, or similarly termed event, was declared against the housing project or the Controlling Participant pursuant to the government program's project documents.
Business Partner Registration System (BPRS) Registration.	Each Controlling Participant must be registered in the BPRS System. Here is a link: https://hudapps2.hud.gov/apps/part_reg/apps040.cfm
Organization Chart	Attach an organization chart with Social Security Numbers or Tax ID numbers for Controlling Participants. See Section B for a description of additional items the organization chart must include.

D. Approval of Participants

If there are no flags in the system and the applicant is able to make all the certifications or HUD has approved any reason why a certification cannot be made, the Previous Participation Review is considered complete and the submission will be approved.

If there are current flags in the system, HUD staff will review:

- The comments in the system related to the flag
- The lender or participant's explanation of the flag and any mitigation of risk associated with the flag.
- Whether flags need to be resolved.
- The flag history in the system to assess patterns of misconduct and risk to the Department.

Based upon this review, including review of the certifications, HUD will determine whether or not the Controlling Participant poses an unacceptable Risk to the Covered Project, in accordance with the definition in 24 CFR 200.212, namely whether the Controlling Participant could be expected to participate in the Covered Project in a

manner consistent with furthering the Department's purpose of supporting and providing decent, safe and affordable housing for the public. Based on this determination, HUD may approve, disapprove, limit, or otherwise condition the continued participation of the Controlling Participant in the Triggering Event. HUD will disapprove a Controlling Participant if the Controlling Participant is suspended, debarred or subject to other restriction pursuant to 2 CFR part 180 or 2 CFR part 2424. HUD may disapprove a Controlling Participant if HUD determines: (i) The Controlling Participant is materially restricted, including voluntarily, from doing business with HUD (other than the restrictions listed above) or any other

⁴ Until further notice, if using the paper Form HUD-2530, use these instructions.

⁵ If there is a certification that a controlling participant cannot certify to, the participant must strikethrough that particular certification, initial the strikethrough and attach a signed letter of explanation. This situation should be rare.

department or agency of the federal government if the Commissioner determines that such restriction demonstrates a significant risk to proceeding with the Triggering Event; or (ii) HUD determines that the Controlling Participant's record of Previous Participation reveals significant risk to proceeding with the Triggering Event. In lieu of disapproval, HUD may (1) condition

or limit the Controlling Participant's participation; (2) temporarily withhold issuing a determination in order to gather more necessary information; or (3) require the Controlling Participant to remedy or mitigate outstanding violations of HUD requirements to the Commissioner's satisfaction in order to participate in the Triggering Event. A remedy or mitigation

may include resolving any underlying issues that caused the existing flags or other measures that demonstrate to HUD's satisfaction that the Controlling Participant could be expected to participate in the Covered Project in a manner consistent with furthering the Department's purpose of supporting and providing decent, safe and affordable housing for the public.

APPROVAL OF PARTICIPANTS WITH FLAGS

	Office of Multifamily Housing & Assisted Housing Oversight Division, 220, 221(d)(4), 223(a)(7), 223(f), 231, 241(a) Programs		Office of Residential Healthcare Facilities	Office of Hospital Facilities
	Production	Asset management		
Participants with Tier 1 Flags.	Director of Multifamily Housing Production (HQ).	Director of Asset Management Division (HQ).	Director, Office of Residential Care Facilities or Delegate.	Director, Office of Hospital Facilities.
Participants with Tier 2 Flags.	Production Division Director.	Asset Management Division Director.	Supervisory Account Executive.	Director, Office of Hospital Facilities.
Participants with Tier 3 Flags.	Branch Chief		Supervisory Account Executive.	Director, Office of Hospital Facilities.

E. Rejection of Participants

If a recommendation for rejection is proposed, HUD staff will notify the

participant, or lender, if applicable, in advance of the recommendation. This notification will allow an opportunity for the participant to provide additional arguments

for HUD's consideration to preserve processing efficiency and cut down on requests for reconsideration.

REJECTION OF PARTICIPANTS WITH FLAGS

	Office of Multifamily Housing & Assisted Housing Oversight Division, 220, 221(d)(4), 223(a)(7), 223(f), 231, 241(a) Programs		Office of Residential Healthcare Facilities	Office of Hospital Facilities
	Production	Asset management		
Participants with Tier 1, Tier 2 or Tier 3 Flags.	Regional Director or Delegate		Division Director, Office of Residential Care Facilities or Delegate.	Division Director, Office of Hospital Facilities.

F. Reconsideration of a Rejection

Participants have the right to request a reconsideration of HUD decisions rejecting participants. Requests for reconsideration

must be filed in writing. Participants may provide support for their reconsideration or additional information that was not previously provided. Please see the below table for the officials responsible for

rendering reconsideration decisions applicable to each program area. The decision rendered by the officials below is final agency action.

RECONSIDERATION OF A REJECTION

Office of Multifamily Housing & Assisted Housing Oversight Division	Office of Healthcare Programs	
	Office of Residential Healthcare Facilities	Office of Hospital Facilities
Director, Office of Asset Management and Portfolio Oversight or Delegate.	Director, Office of Residential Care Facilities or Delegate.	Director, Office of Hospital Facilities or Delegate.

G. Flag Placement and Resolution

HUD utilizes flags in the APPS system as a way to assess risk associated with participants in Office of Multifamily Housing and Office of Healthcare Programs projects. A flag does not automatically exclude an applicant from participation in HUD's programs; however, flags are considered risk factors that require appropriate mitigation, where possible. Flags are to be a meaningful representation of risk, and therefore, they should not be placed for minor infractions

that do not pose a risk to HUD. HUD will notify participants in writing when flags are placed.

H. Types of Flags

HUD has developed three flag tiers, which provide for varying levels of risk to HUD. Tier 1 flags are elevated risk to HUD. HUD considers Tier 1 flags to be a significant long-term risk to HUD and warrant significant mitigation in new transactions. Tier 2 flags are considered an ongoing risk to HUD. For

Tier 2 flags that have a resolution date (as listed in the chart below), flags will not be removed until the time period has expired even if the action has been resolved earlier. This is considered a risk factor in production and asset management transactions. Tier 3 flags are considered a single risk to HUD and will be removed when the reason for the flag is corrected.

Tier 1 Flags: Elevated Risk to the Department

Participants for their participation in triggering events.

Tier 1 flags warrant permanent consideration when reviewing Controlling

Flag type	Reason	Duration of flag
Mortgage Assignment/Conveyance of Title	Mortgage assigned title or conveyed property to HUD	Permanent flag.*
FHA Claim	Claim payment by HUD	Permanent flag.*
HUD Property Disposition	Foreclosure, loan sale, or other property disposition effort by HUD.	Permanent flag.*
Mortgagee in Possession (MIP)	HUD becomes the MIP	Permanent flag.*
Deed in Lieu of Foreclosure	HUD receives a deed in lieu of foreclosure	Permanent flag.*
Limited Denial of Participation (LDP)—Current or Past	Participant is currently or has previously been placed on the LDP list.	Permanent flag.
Suspension or Debarment—Current or Past	Participant is currently or has previously been placed on the Debarment list or the participant is or was temporarily suspended from participation in HUD programs.	Permanent flag.
Voluntary Abstention or Exclusion—Current or Past	Participant is currently or has previously been subject to a voluntary abstention.	Permanent flag.
Conviction for fraud or embezzlement of funds	Participant has been convicted of fraud or embezzlement of funds.	Permanent flag.

* Unless otherwise determined by HUD due to mitigating circumstances.

Tier 2 Flags: Ongoing Risk to the Department

Tier 2 flags warrant consideration for an extended period of time when reviewing

Controlling Participants for their participation in Triggering Events, even after the underlying reason for the flag is resolved.

A “Repeated” Offense means there are three or more occurrences.

Flag type	Reason	Duration of flag
Violation of Business Agreements-Unauthorized Distributions.	Repeated incidents of Unauthorized Distributions.	Retained for five (5) years after the placement date of the flag.
Violation of Business Agreements-Unacceptable Physical Condition.	Below 30 Real Estate Assessment Center (REAC) score, two consecutive REAC scores below 60, Repeated REAC scores below 60, or other Repeated failures to maintain decent, safe and sanitary conditions.	Retained for five (5) years after placement of the flag, so long as the most recent REAC score is greater than 59 or the failure to maintain decent, safe and sanitary housing is deemed cured by HUD.
Violation of Business Agreements-Repeated Failure to File Financial Statements.	Repeated Failure to File Financial Statements for three or more occurrences.	Retained for five (5) years after the placement date of the flag.
Violation of Business Agreements-Conversion to Unapproved Use.	Project was converted to a use that is not permitted under the program obligations.	Retained for five (5) years after the placement date of the flag.
Violation of Business Agreements-Unauthorized Alteration to Facility.	Project or part of the project completed a significant addition/alteration/construction/licensure status without prior approval.	Retained for five (5) years after the placement date of the flag.
Violation of Business Agreements-Repeated Unresolved Audit Findings.	Repeated Unresolved Audit Findings	Retained for five (5) years after the placement date of the flag provided that audit findings have been resolved.
Violation of Business Agreements-Miscellaneous.	Repeated violations of business agreements (e.g., breaking use agreement or affordability restrictions, non-compliance with program requirements, non-responsive to HUD requests).	Retained for five (5) years after the placement date of the flag.
Default-Financial	60 days or more behind on loan payments	Retained for five (5) years after the placement date of the flag.
Unauthorized Transfer of Physical Assets (TPA)	When a TPA is completed without prior HUD approval.	Retained for five (5) years after the placement date of the flag.
Suspension/Termination of Payments	When HUD suspends subsidy payments due to non-compliance with Program Obligations.	Retained for five (5) years after the placement date of the flag.
Unauthorized Secondary Financing	When Secondary Financing is utilized without prior HUD approval.	Retained for five (5) years after the placement date of the flag.
General Contractor Performance—Construction Compliance.	Material failure to build project in accordance with approved Plans and Specifications (During Construction Period).	Retained for five (5) years after the placement date of the flag provided that noncompliance has been cured to HUD’s satisfaction.
General Contractor Performance—One Year Warranty.	Failure to correct material warranty issues identified in HUD’s Nine-Month and 12-Month Warranty Inspections (After Construction Period).	Retained for five (5) years after the placement date of the flag provided that noncompliance has been cured to HUD’s satisfaction.

Tier 3 Flags: Temporary Risk to the Department

Tier 3 flags relate to a single and/or less serious incident of non-compliance and can be resolved and removed.

Flag type	Reason	Duration of flag
Failure to File Financial Statements	Automatically Flagged when the Annual Financial Statements are overdue.	Removed when the missing Annual Financial Statements are filed or five (5) years after the placement date of the flag, whichever is sooner.
Delinquent three or more times in the last year	Flagged when borrower fails to remit mortgage payment by the fifteenth of the month, three or more times in a given one-year period.	Removed when there is a one-year period of time in which borrower has made all mortgage payments by the fifteenth of each respective month, or five (5) years after the placement date of the flag, whichever is sooner.
Unacceptable Physical Condition	Most recent REAC score is below 60, and additional (does not need to be consecutive) REAC score(s) below 60 over the past five years..	Removed when the most recent REAC score is above 59.
Unsatisfactory Management Review	Flagged when there is an Unsatisfactory Management Review.	Removed when there is a Satisfactory Management Review, or five (5) years after the placement date of the flag whichever is sooner.
Violation of Business Agreements-Unauthorized Distributions.	One incident of Unauthorized Distributions	Removed when the unauthorized distribution is repaid or five (5) years after the placement date of the flag whichever is sooner.
Violation of Business Agreements-Material Unresolved Audit Findings.	Material Unresolved Audit Findings	Removed when the finding is resolved or five (5) years after the placement date of the flag whichever is sooner.
Failure to Provide or Comply with Action Plan ..	Failure to provide or comply with a HUD required action plan and/or certification in a timely manner..	Removed when the action plan is received and in good standing or five (5) years after the placement date of the flag whichever is sooner.

Significant Changes to the Guide

HUD will not make any significant changes to the Guide without first offering advance notice and the opportunity for comment for a period of not less than 30 days.

[FR Doc. 2016-11346 Filed 5-16-16; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 165**

[Docket Number USCG-2016-0370]

RIN 1625-AA00

Safety Zone; Annual Roy Webster Cross-Channel Swim, Columbia River, Hood River, OR

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a safety zone on the Columbia River in Hood River, OR. This action is necessary to help ensure the safety of the maritime public during a cross-channel swimming event and would do so by prohibiting unauthorized persons and vessels from entering the safety

zone unless authorized by the Sector Columbia River Captain of the Port or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before June 16, 2016.

ADDRESSES: You may submit comments identified by docket number USCG-2016-0370 using the Federal eRulemaking Portal at <http://www.regulations.gov>. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Ken Lawrenson, Waterways Management Division, Marine Safety Unit Portland, Coast Guard; telephone 503-240-9319, email msupdxwww@uscg.mil.

SUPPLEMENTARY INFORMATION:**I. Table of Abbreviations**

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section

U.S.C. United States Code

II. Background, Purpose, and Legal Basis

The Roy Webster Cross-Channel Swim is an annual event that has been occurring for the last 74 years on the Columbia River in the vicinity of Hood River, OR. Registered participants attend the event on Labor Day each year and are ferried across the Columbia River from the Hood River Marina to the Washington shore to start the event. From there the swimmers jump off the ferry and swim back across the river, following a swim lane that is lined with volunteers in sailboats, kayaks and paddleboards. Approximately 300 swimmers participate in this event annually.

The Captain of the Port, Columbia River (COTP) has determined that potential hazards associated with cross-channel swims could be a safety concern for the event participants, any other mariners transiting the area during the event hours, and a potential threat to the marine environment.

The purpose of this rulemaking is to ensure the safety of event participants, the marine environment and the protection of the navigable waterway during the scheduled event. The Coast