

Instructions for Pre-Approval of Special Limited Partners As Interim Replacement GP/MM for LIHTC Transactions

Background

In LIHTC transactions, the Investor may request a rider to the Security Instrument allowing its affiliated entity to take control of the Borrower under certain triggering default conditions set forth in the Borrower's partnership or operating agreement. Such transfer of control would typically require HUD consent at the time of such transfer, but pre-approval may be given in advance, either at closing or after closing, subject to the requirements below.¹ Such affiliated special limited partner, special investor member, or other entity seeking pre-approval is referred to herein as an SLP. Once pre-approved, neither HUD consent nor 2530 re-clearance shall be required at the time of the triggering event for the SLP to serve as an Interim Replacement GP/Managing Member,² subject to the limitations set forth in the LIHTC Rider to the Security Instrument. Pre-approval applies only for the particular project for which pre-approval is sought.

I. Requirements to Pre-Approve SLP Prior to Closing

Attaching the LIHTC Rider to the Security Instrument provides evidence of and gives effect to the pre-approval. The LIHTC Rider to the Security Instrument may be executed and attached to the Security Instrument if the items below are received and approved by Housing and the HUD closing attorney. This is basically a modified TPA process. Housing may waive receipt of certain documents if it has recently received such materials in connection with another pre-approval request.

- 1) **Synopsis of the transaction.** Investor shall provide a written request to pre-approve the SLP as a temporary replacement GP/MM. This request shall give an overview of the transaction and contain an organizational chart that includes the relationship between the proposed interim GP/MM and the parent organization requesting approval. This request may be sent via email.
- 2) **2530 clearance.** The SLP shall complete the APPS or Previous Participation Certification (Form HUD-2530).
- 3) **Organizational documents.** The HUD closing attorney shall review Borrower's organizational documents in accordance with Program Obligations and shall note the default events that may trigger the removal and replacement of the GP/MM. In addition, the HUD closing attorney shall review the SLP's organizational documents.
- 4) **Legal opinion.** A legal opinion acceptable to the HUD closing attorney shall be submitted stating that removal of the GP/MM and replacement with the SLP does not cause the dissolution of the Borrower under applicable state law. The attorney giving the opinion must not have an identity of interest with the Borrower and must be licensed within the applicable state.
- 5) **Other evidence of determinative criteria.** SLP shall submit for the HUD closing attorney's review such other evidence of the determinative criteria discussed below, as appropriate, including any financial information Housing deems relevant.

¹ Note that this pre-approval process is only for SLPs seeking pre-approval; unless pre-approval is requested, the SLP shall be treated as a passive investor and this process is not necessary.

² As stated in the LIHTC Rider, this approval is for a limited duration. If the SLP seeks to act as a long-term replacement GP/MM, the SLP may apply for such approval at the time of the GP/MM's removal.

II. Determinative Criteria for SLP Pre-Approval

Housing shall approve the SLP as a temporary replacement GP/MM unless Housing, with the advice of the HUD closing attorney, reasonably determines that the SLP would not be an appropriate temporary replacement general partner/managing member, or that such pre-approval is otherwise not in HUD's interests. In making such determination, Housing and the HUD closing attorney shall consider the following factors:

- 1) The number of projects the SLP and/or affiliated entities have under asset management.
- 2) The number of times SLP and/or affiliated entities have replaced general partners/managing members and the results of such replacement. Specific examples should be provided and considered, to the extent possible.
- 3) The process the SLP and/or affiliated entities follow to monitor projects and determine whether replacement of the general partner/managing member is appropriate.
- 4) How the asset management unit of the SLP and/or affiliated entities is staffed in relation to the number of projects it oversees.

III. Requirements to Pre-Approve SLP after Closing

If the closing timeline does not allow for this process to be completed prior to closing, the investor may ask for such approval to be given after closing.

- 1) **Same requirements and determinative criteria.** The same requirements apply to pre-approval prior to closing and to pre-approval after closing.
- 2) **Revise LIHTC Rider to the Security Instrument.** Revise paragraph 2(c) of the LIHTC Rider to the Security Instrument to read:

Borrower has requested that HUD and Lender pre-approve the replacement of the Borrower's GP/MM in accordance with Program Obligations and pre-approve [*SPECIAL LIMITED PARTNER ENTITY*] ("Interim Replacement GP/MM") to act as a temporary replacement general partner/managing member of Borrower, in the event Equity Investor removes Borrower's GP/MM for cause in accordance with Borrower's organizational documents. If granted, HUD shall send a letter to Interim Replacement GP/MM giving effect to and providing evidence of such pre-approval. Such approval of such Interim Replacement GP/MM is expressly limited to a period of only 90 days that commences the date of such removal, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days.

- 3) **HUD actions upon completion of review.** If the SLP secures approval, HUD shall send the Investor and SLP a letter indicating pre-approval. Sample language for such letter follows below. If the SLP fails to secure approval, HUD shall send written notice to the Investor and SLP that the SLP has not been pre-approved and that paragraph 2 of the LIHTC Rider to the Security Instrument is inoperable because the conditions stated therein have not been met. This notice does not preclude the SLP from curing any deficiencies that caused such denial of pre-approval and re-submitting a request for pre-approval.

IV. Sample language for post-closing letters, if necessary**1) Sample language for letter indicating SLP pre-approval post-closing:**

This letter authorizes approval for [*Special Limited Partner Entity*], to serve as the interim general partner/managing member of [*Name of Borrower*] (the “Borrower”) in accordance with the terms set forth in, and as expressly limited by, the Rider to Security Instrument LIHTC Properties (“LIHTC Rider to Security Instrument”) attached to that certain [*Name of Security Instrument*] dated as of [*date*]. HUD review of the request for preapproval has been analyzed in accordance with the modified transfer of physical assets (“modified TPA”) process.

Should [*Special Limited Partner Entity*] wish to serve as general partner/managing member for more than the interim period specified in the LIHTC Rider to Security Instrument, it must: (1) submit a request for approval to serve as replacement general partner/managing member, (2) certify that none of the documents submitted pursuant to this preapproval request have changed (i.e., organizational documents have not been further amended, etc.), and (3) complete an updated Previous Participation Clearance through HUD’s APPS system or HUD Form 2530.

2) Sample language for letter denying SLP pre-approval post-closing:

This letter denies pre-approval of [*Special Limited Partner Entity*] to serve as the interim general partner/managing member of [*Name of Borrower*] (the “Borrower”). [*Special Limited Partner Entity*] had requested such pre-approval in accordance with the terms set forth in the Rider to Security Instrument LIHTC Properties (“LIHTC Rider to Security Instrument”) attached to that certain [*Name of Security Instrument*] dated as of [*date*]. [*Special Limited Partner Entity*] has not the requirements necessary for such pre-approval. As a result, because the conditions stated therein have not been met, paragraph 2 of the LIHTC Rider to Security Instrument is of no force or effect.