

Refunding of Tax-Exempt Multifamily Revenue Bonds

Legal Opinion: GHM-0069

Index: 3.400

Subject: Refunding of Tax-Exempt Multifamily Revenue Bonds

February 1, 1993

MEMORANDUM FOR: Philip J. Salamone, Deputy Assistant Secretary
Multifamily Housing Programs, HM

FROM: John J. Daly, Associate General Counsel
Insured Housing and Finance, GH

SUBJECT: Handbook 4350.1, Chapter 15, "Refunding of Tax-Exempt
Multifamily Revenue Bonds"

The purpose of this memorandum is to bring to your attention certain ambiguities in a multifamily handbook which have caused confusion as to the authority of Field staff to approve bond refunders.

The source of this confusion is Chapter 15 of HUD Handbook 4350.1 REV-1, 9/92, "Refunding of Tax-Exempt Multifamily Revenue Bonds," (the "Handbook"). Paragraph 15-2.a) of the Handbook permits the Director of the Housing Management Division in HUD Field Offices to approve refunding of tax-exempt bonds for insured projects where "the project is financially troubled as evidenced by a notice of default, financial statement demonstrating the project's inability to make debt service payments, or analyses revealing significant physical improvement needs beyond the availability of the project's cash flow...." Paragraph 15-3.a) provides that Chapter 15 covers only bond refunders for projects "which are in default under the mortgage." The latter paragraph seems to conflict with the former since paragraph 15-2.a) includes in its definition of "financially troubled" projects, those which are current under the mortgage, but which require significant physical improvements.

In addition, paragraph 15-2.b) excludes from Chapter 15, "other bond transactions involving current loans, defeasance of existing bonds, etc." No guidance is provided as to which current loans cannot be approved by the Field Offices or what "defeasance of existing bonds, etc." means.

Paragraph 15-3.c) provides that "this chapter does not cover Section 8 financing Adjustment Factor (FAF) refundings; 103(b) or 11(b) refundings or non-FAF advance/current refundings." Since all tax exempt refundings involve either Section 103(b) or 11(b) bonds, the exception would seem to override, in its entirety, the authority granted, in paragraph 15-2.a), to the Field Offices. However, it is our understanding that paragraph 15-3.c) was intended to exclude from the authority granted to the Field

Offices in paragraph 15-3.a) only tax-exempt refundings involving projects that have project-based Section 8 assistance, regardless of whether FAF is involved. In addition, as currently drafted, the authorization would appear to include default refundings where GNMA holds the mortgage and is resecuritizing mortgage backed securities.

In at least one instance, this ambiguous language has resulted in a Field Office approving a bond refunder which it did not have authority to approve. Holly Creek Apartments has an insured 221(d)(4) mortgage, which is current, and two Section 8 contracts. The Director of the Housing Management Division in the Houston Office approved the bond refunder on October 20, 1992 and forwarded the Modification to the Note to Field Counsel. Field Counsel forwarded the Modification to Regional Counsel who apparently approved it without even knowing that a bond refunding was part of the transaction. The mortgagee for Holly Creek had intended to close the refunding by January 29, 1993 and was not aware that the Houston Office's approval was not authorized. The mortgagee is threatening to sue the Department if this transaction is delayed and he suffers damage due to that delay.

Because the ambiguous language of Chapter 15 is obviously causing some confusion which could result in litigation against the Department, we strongly recommend that the Office of Housing provide Field Offices with a clarification of the scope of their authority to approve bond refunders. My staff is available to assist in developing the content of the clarification.

In addition, we are interested in meeting with you, or your representatives, to discuss the role of Field Counsel in reviewing and approving legal documents connected with bond refundings. In Appendix 3 of Chapter 15, a letter from the Director of Housing Management to the mortgagee authorizing the bond refunder, states that "HUD Field Counsel will provide you with further instructions about the necessary documents and other closing requirements." It seems that the extent of Field Counsel's review and the types of documents that must be reviewed appear to vary depending on the type of transaction (FAF refunder, or project-based Section 8 project), whether the mortgage is current or in default, insured or held. We would like to discuss this matter with you prior to advising Field Counsel and developing written guidance. Please let me know when it would be convenient for us to meet.