Statement of Robert Rozen

Low-Income Housing Tax Credit Attorney

Federal Housing Finance Agency Listening Session

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* Thank you for convening this session to discuss two very important issues affecting affordable housing with the LIHTC program. I am a housing credit policy attorney who has been working on the program since its enactment in 1986.
* You’ve heard from other speakers about the threats to the integrity of the LIHTC program and the loss of affordable housing resources due to the abuse associated with Qualified Contracts (“QC”) and the nonprofit right of first refusal (“ROFR”).
* I will not go into detail on the nature of the problems with those two provisions. Instead, I will focus on additional steps that the GSEs can take to protect nonprofit sponsored affordable housing.
* I have been working intensely on these issues for the last few years in an attempt to educate the Housing Credit community and federal policy makers about the implications of these abuses.
* Solutions can be found in federal legislation, changes to state HFA policies, and private sector initiatives by nonprofits and affordable housing advocates.
* We are working on federal legislation – which has the strong support of both current tax-writing committee chairmen – but we are not optimistic about the prospects for enactment. We are also working intently with state HFAs, many of whom have recently changed their QC policies and instituted changes to increase the ROFR protections of nonprofits. Through our educational efforts, more and more nonprofits are insisting on tighter language in their LPAs to protect the ROFR.
* We are particularly pleased that the NYC tax credit allocator – the agency for Housing Preservation and Development – has a new QAP which requires all LIHTC deals in NYC to include new language that ensures that nonprofits will be able to realize their ROFR rights regardless of the desire of a Limited Partner to frustrate that right. The Virginia HFA – Virginia Housing – has adopted a new QAP this year which requires every nonprofit sponsored project in VA to use its ROFR language which will also guarantee the ROFR rights of nonprofits. These are excellent efforts which we are attempting to have more HFAs adopt, but this has been slow going.
* There is no question that Fannie Mae and Freddie Mac are a positive force in the Housing Credit industry. We have no question about the intent of both organizations to invest equity to ensure long-term affordability of the property.
* Focusing first on ROFR issues, as you know in its new DTS plan, Freddie Mac has pledged to insist on language for inclusion in its partnership agreements involving non-profit sponsors “to prohibit the LP interest from being sold to a party that has a history of attempting to frustrate” the ROFR rights of nonprofits. That is welcome although of course it is Freddie that holds the LP interest so it must remain committed to enforcing this language against itself.
* It is my understanding that it is the practice of Fannie Mae in its proprietary deals to insist on language that there can be no transfer of interests at the upper tier (fund level) or lower tier (property level) without the approval of Fannie Mae. Fannie Mae also invests in multi-investor funds where insisting on such language is more difficult because other investors are also involved.
* These policies by Freddie Mac and Fannie Mae are welcomed and should be helpful in protecting the ability of nonprofits to exercise their ROFRs. The Fannie language applying to transfers by the upper tier fund sponsor should be particularly meaningful in getting control of this issue.
* However, one of the lessons we have learned over the last few years with regard to these issues, is that the intentions of the parties to these agreements -- the understandings that the parties have when the LPA is reached -- are no guarantee of what will happen 15 years later.
* The essential ROFR problem is poorly drafted or too conservatively- interpreted Limited Partnership Agreements (“LPAs”) based on unclear federal law which the IRS has never clarified.
* In spite of the best intentions of the current personnel at the GSEs -- and their government regulators -- without the strongest contractual protections there is always a possibility that the current practices could change, even with the LPA language currently insisted on by the GSEs.
* While I don’t believe this would ever be an issue when the GSEs finance properties through nonprofit syndicators since there is no risk the funds will be sold to outside investors, it remains a risk when other syndicators are used.
* The best protections for nonprofit ROFRs would be for the GSEs in their proprietary deals, and to the extent possible in Fannie Mae’s multi-investor deals with for-profit syndicators, to use language based on the ROFR agreement language required by HPD in New York City and Virginia Housing.
* With regard to the QC issue, Freddie Mac and Fannie Mae should insist on language in their LPAs which require that the property be operated in compliance with the Extended Use period.

* The GSEs should also object to any language found in some LPAs which compel the general partner to go through the Qualified Contract process if requested by the limited partner.
* Thank you for this opportunity to discuss these issues today and I welcome any questions you have today or in the future.