

Loan Purchases and Federal Loan Guarantee Programs

By Ruth Sparrow, Future Unlimited Law PC

Several federal loan guarantee programs facilitate lending to disadvantaged businesses and communities and can be combined with new markets tax credit (NMTC) financing. These include guarantees of the Health Resources and Services Administration (HRSA), an agency within the U.S. Department of Health and Human Services to finance health-care facilities, and guarantees provided by the U.S. Department of Agriculture (USDA) to support development of essential community facilities in rural areas. Also included are Small Business Administration (SBA) loan guarantee programs.

A preliminary consideration in combining loan guarantees with new markets tax credits is the eligibility of the community development entity (CDE) to be a lender in the program. The specifics of each program have to be reviewed to determine eligibility as well as the approval process. An alternative to qualifying the CDE as an eligible lender, subject to review of the applicable federal loan guarantee program requirements, is for the CDE to purchase the loan from an eligible lender.

Section 45D of the Internal Revenue Code provides that a "qualified low-income community investment" (QLICI) includes (i) loans made by a CDE to a "qualified active low-income community business" and (ii) loans purchased from another CDE that qualify as a QLICI. Treasury Regulations provide that a loan is treated as made by a CDE provided that the CDE purchases the loan from the originator within 30 days after the date the originator makes the loan and if, at the time the loan is made, there is a legally enforceable written agreement between the originator and the CDE which required the CDE (i) to approve the loan either directly or by imposing specific written underwriting criteria and (ii) to purchase the loan within 30 days after

the date the loan is made. Provided these requirements are satisfied, a CDE can purchase a loan from an eligible lender without regard to whether the originator is a CDE.

The ability of an eligible lender to sell a loan depends on the specific requirements of the federal loan guarantee program. Pursuant to the USDA Community Programs Loan Guarantee, the originator can sell up to a 95 percent participation interest in the loan. There are no specific authorities under Section 45D with respect to whether the purchase of a loan participation interest qualifies as the purchase of a loan by the CDE. However, depending on the terms of the participation, based on authorities in other areas the CDE should be treated as the lender for federal income tax purposes with respect to its participation interest in a loan.

Federal loan guarantee programs impose additional requirements, including restrictions with respect to the use of loan proceeds; loan terms; agency approval of loan documents and collateral; information, notices and reporting to be provided by the CDE and borrower to the government agency; consent rights; and certain rights and remedies exercisable upon an event of default by the government agency. The specific program's requirements should be reviewed to confirm compliance with the NMTC program's requirements and the CDE's allocation agreement.

The combination of these programs with new markets tax credits furthers the intent of the NMTC program to target highly distressed communities. The complexity of these transactions is a reflection of what it takes to finance disadvantaged businesses and communities that lack access to private capital, and that require a combination of governmental subsidies. ❖

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Loan Purchases

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