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Special Attention of

Notice H 2010-

All Multifamily Hub Directors
All Program Center Directors
All Housing Project Managers

Issued:

Expires:

Cross References
Handbooks 4571.2,
4571.3 REV-1, 4571.4 and
4571.5
Notice H96-102

SUBJECT: Updated Processing Guidance for the Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs

The Department has developed some revised procedures pertaining to processing activities after selection of Section 202 and Section 811 applications for fund reservations including mixed-finance transactions. The Notice is divided into three parts. The first part addresses general issues that concern all Section 202 and Section 811 proposals in which the Owner has not submitted a firm commitment application. The second and third parts of this Notice specifically address mixed-finance transactions. Section 202 and Section 811 applications that have started firm commitment processing shall proceed to initial closing and start of construction based on administrative instructions in place before the issuance of this Notice.

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PART A - GENERAL ISSUES

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5I. **NONPROFIT DEVELOPER'S FEE.**

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HUD will include in the estimated replacement cost of a project a nonprofit developer's fee. This fee is in addition to the legal, organizational and audit fees normally included in the estimated replacement cost of a project.

A. The nonprofit developer's fee.

1. For traditional Section 202/811 projects the maximum nonprofit developer's fee will be the greater of \$40,000 or 8 percent of the estimated development cost of the project. To compute the Developer's Fee use the following formula.

1

Total for All Improvements - Line G50 from the HUD 92264	\$0
Total Carrying Charges - Line G63 from the HUD 92264	\$0
Total Legal, Organizational & Audit Fees - Line G67 from the HUD 92264	\$0
Supplemental Management Fund - Line G70 from the HUD 92264	\$0
Contingency Reserve - Line G71 from the HUD 92264	\$0
Subtotal	\$0
Multiply the Subtotal by	8%
Result equals Developers Fee	\$0
Add the subtotal and the Developer's Fee to computed Total Estimated Development Cost	\$0

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2. For mixed-finance Section 202/811 projects, discussed in Part B, there is no nonprofit developer's fee paid from the capital advance. However, the project may include a maximum developer's fee that is capped at the lesser of:

a. The maximum amount allowed by the State tax credit-allocating agency in the State where the project is located; or

b. 15 percent of the total project replacement cost.

Note: See Part B Section V for additional information about the developer's fee in a mixed-finance transaction.

B. The **nonprofit** developer's fee **may be** pledged to meet the estimated financial requirements to close.

1. In traditional Section 202/811 projects the deferred nonprofit developer's fee may be represented by a residual receipts note approved by HUD.

2. In mixed-finance Section 202/811 projects the deferred developer's fee may be represented by a surplus cash note payable from surplus cash generated by the unassisted units during the term of the capital advance mortgage.

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- C. No capital advance amendment funds will be considered unless the developer's fee, discussed in A.1. and 2., is first used to meet the project's projected costs.
- D. HUD controls the expenditure of unused nonprofit developer's fee funds during the construction phase of the project. It may be used for project related expenses. At final closing any unused funds will be released to the Owner. The money belongs to the Owner, and expended at their discretion.
- E. A separate housing consultant's fee **is not permitted**, as the activities of the consultant are part of the developer's duties. However, a consultant is an allowable use of the developer's fee.

ORGANIZATIONAL EXPENSES.

- A. The Hub/Program Center may increase the organizational line item in Section G, Replacement Cost, of Form HUD-92264 to reflect the Owner's third party technical costs that are not included in the developer's fee:
 - Environmental studies.
NOTE: These are environmental studies discussed in the NOFA.
 - The Appraiser.
 - Market Analyst.
 - The Cost Analyst.
 - Needs Assessor.
 - Financial Consultant used in a tax credit transaction.
- B. In a mixed-finance transaction these costs must be pro-rated between the assisted units and, if applicable, unassisted units and additional costs in the project. Some costs that are not eligible in the traditional Section 202/811 programs should be assigned directly to the unassisted units and therefore, should not be prorated such as the financial consultant, developer's fee the cost to construct any excess amenities and the cost to maintain and operate the excess amenities.

1 C. The third party costs are exempted from the 65 percent
2 initial closing disbursement rule for organizational
3 expenses found in Section 8-8.C.7. of HUD Handbook 4470.1.
4

5 **5III HOUSING CONSULTANT.**

6
7 **A. Use of Consultants.**

- 8
9 1. Consultants are used to:
10
11 a. Expedite development of the application;
12
13 b. Improve quality of the development through
14 the recommendation of an architect, a
15 contractor, and other development team
16 members; and
17
18 c. Assist the Sponsor and Owner in handling all
19 aspects of project development through to
20 final closing and rent-up during the first
21 year of occupancy.
22
23 2. Consultant efforts must be directed exclusively
24 towards serving the nonprofit Sponsor and the
25 Owner when formed.
26
27 a. As a general rule the consultant may not
28 have any other role on the development team.
29
30 b. Exception to the general rule is permitted
31 where the contracts for consultant services
32 is between the Owner and Sponsor (or
33 Sponsor's nonprofit affiliate) if no more
34 than two persons salaried by the Sponsor or
35 its nonprofit affiliate serve as non-voting
36 directors on the Owner's board of directors.
37 (24 CFR §891.130(a)(2))
38
39 3. A consultant ***is not*** required for participation in
40 the Section 202 and/or Section 811 programs. The
41 Sponsor/Owner may perform these services with in-
42 house staff. If a Sponsor is going to contract
43 with a consultant, consideration should be given
44 to contracting with a consultant who has
45 familiarity with the local jurisdiction's
46 processing requirements.
47

- 1 4. More than one consultant may be hired by the
2 Sponsor. The Sponsor may choose to hire one
3 consultant to manage the application process and
4 another consultant to manage the development
5 process. However, the Sponsor is responsible for
6 assuring long term viability or success of the
7 project.
8
- 9 5. In the traditional Section 202 and 811 programs
10 the maximum fee for consultant services for a
11 project is established by the General Section of
12 the NOFA for the year under which the project was
13 funded.
14
- 15 6. Consultants are required to meet all civil rights
16 requirements and to affirmatively further fair
17 housing.
18

19 B. Responsibility of a Sponsor.

20
21 Selection of a housing consultant(s) is the
22 responsibility of the Sponsor. If a housing
23 consultant is used, then within 14 days from the date
24 of the Agreement Letter, the Sponsor must submit an
25 original HUD-2530, Previous Participation
26 Certification, and the consultant's résumé to the
27 Program Center. Use of The Active Partner Performance
28 System (APPS) by all participants is strongly
29 recommended. The system provides a method for
30 participants to store and manage all data pertaining
31 to their participation in HUD Multifamily Programs and
32 to submit future APPS Previous Participation
33 Certificates (APPCs) online, in HUD's secure web based
34 environment. Participants may opt to file a paper
35 form HUD-2530 with the Program Center subject to
36 further guidance.
37

- 38 C. No individual or entity having an identity of interest
39 with the Sponsor/Owner may earn a fee beyond their
40 normal compensation for services that would otherwise
41 be provided on a fee basis by a housing consultant
42 (for example, an Executive Director or other employee
43 of the Sponsor/Owner)
44
45
46

1 D. Responsibility of Program Center.

2 HUD reviews but does not approve a housing consultant
3 contract nor determine compensation limits. The
4 Program Center will make a recommendation to the
5 Sponsor based on the following:
6

- 7
- 8 1. Evaluate the previous experience of the
9 consultant based on its resume and Form HUD-2530,
10 Previous Participation Certification;
11
 - 12 2. Conduct a credit investigation of the consultant;
13
 - 14 3. Review Form HUD 2013 SUPP, Supplement to
15 Application for a Multifamily Housing Project.
16 The only portion of the signed and dated Form
17 that must be filled out is the 4 questions near
18 the bottom of the page dealing with:
 - 19 • Delinquent Federal debt.
 - 20 • Lawsuits or legal actions
 - 21 • Bankruptcy
 - 22 • Judgments

23
24 Where delinquent Federal debt exists, the Sponsor
25 shall include:
26

- 27 a. A detailed written explanation from the
28 individual or firm with a prior Federal
29 default or claim or whose credit report
30 contains conflicting or adverse information.
31
- 32 b. A letter from the affected agency, on agency
33 letterhead and signed by an officer, stating
34 the delinquent Federal debt is current or
35 satisfactory arrangements for prepayment
36 have been made.
37
- 38 c. A statement from the Sponsor explaining why
39 it wants to use this consultant.
40

41 ***Note: A consultant with outstanding delinquent***
42 ***Federal debt and without satisfactory repayment***
43 ***arrangements is automatically disqualified***
44

- 45 4. Consider the Program Center's working experience
46 with the potential consultant;

- 1 5. Determine if conflicts or identities of interest
- 2 exist;
- 3
- 4 6. Inform the Sponsor/Owner of the strengths and
- 5 weakness of the housing consultant.
- 6
- 7 7. Confirm that the schedule for release of
- 8 consultant fees conforms with the following
- 9 minimum thresholds:
- 10
- 11 a. At initial closing: up to a total of 50
- 12 percent.
- 13
- 14 b. During the construction period: up to a
- 15 total of 65 percent.
- 16
- 17 c. At final closing, up to a total of 85
- 18 percent.
- 19
- 20 d. One year after final closing, provided the
- 21 project is not having any financial
- 22 difficulties, 100 percent of the remainder
- 23 of the fee may be release.
- 24

25IV. NONPROFIT WORKING CAPITAL DEPOSIT.

26
27 At initial closing, the Owner must post, in cash, a
28 nonprofit working capital deposit.

- 29
- 30 A. The working capital deposit is 2 percent of the
- 31 replacement cost of the project.
- 32
- 33 B. The working capital deposit will:
- 34
- 35 1. Cover shortfalls in interest, taxes, property
- 36 insurance premiums, ground rents and assessments
- 37 during construction after funds available under
- 38 the Capital Advance Agreement are exhausted.
- 39
- 40 2. Defray cost of initial marketing and rent-up.
- 41 This includes: sales and advertising, model
- 42 furnishings including furnishings for public
- 43 areas, and equipment and supplies essential to
- 44 initial rent-up, etc.
- 45
- 46 3. Set up accruals for items due during the first
- 47 operating year that project income is not

1 expected to cover, including real estate taxes,
2 permanent property insurance premiums, ground
3 rents and assessments.
4

5 C. The Owner will place these funds with a financial
6 institution acceptable to HUD. The release of said
7 funds will be under HUD's control.
8

9 D. Final release of the working capital deposit.
10

11 1. HUD will release any remaining funds to the Owner
12 one year after completion if the project is not
13 financially stressed **and** the project has reached
14 final closing.
15

16 2. HUD will continue to hold any remaining funds
17 until the financial problems are resolved (e.g.
18 has not reached sustaining occupancy, has poor
19 liquidity or high payables, is operating at a
20 deficit or is near default).
21

22 3. HUD will use the remaining balance of the working
23 capital deposit to fund an operating deficit or
24 cure a default before releasing the remaining
25 funds to the Owner.
26

27 E. In a mixed-finance transaction it is possible that
28 other funding sources/lien holders or investors may
29 require a similar type escrow. HUD may accept the
30 other escrow in lieu of the working capital deposit
31 provided HUD's interests as outline in items A through
32 D above are protected.
33

34V. **CONTINGENCY RESERVE - NEW CONSTRUCTION ONLY.**
35

36 A. At initial closing the Owner must post a project
37 contingency reserve equal to 2 percent of line G50,
38 Total All Improvements, of Form HUD 92264, to cover
39 the cost of necessary changes orders approved before
40 substantial completion of the project.
41

42 B. At initial closing, the Owner will place these funds
43 with a financial institution acceptable to HUD. The
44 release of said funds will be under HUD's control.
45

46 C. Processing during Construction. HUD will accept the
47 contractor's estimate of cost for change orders (Form

1 HUD-92437, Request for Construction Changes on Project
 2 Mortgages) as approved by the project architect. All
 3 necessity change orders will be funded from the 2
 4 percent contingency escrow or from the Owner's other
 5 financial sources.

6
 7 D. At the final closing HUD will release any remaining
 8 funds to the Owner.
 9

10VI. **NON-REALTY ITEMS NOT INCLUDED IN CAPITAL ADVANCE MORTGAGE**
 11 **FOR GROUP HOMES.**

12
 13 A. The Owner will escrow \$500 per bed to cover the
 14 purchase of dishes and eating utensils and other item
 15 with a short-lived life cycle such as office and
 16 maintenance supplies.

17
 18 B. The Owner will place these funds with a financial
 19 institution acceptable to HUD. The release of said
 20 funds will be under HUD's control.

21
 22 C. At the final closing HUD will release any remaining
 23 funds to the Owner.
 24

25VII. **MINIMUM CAPITAL INVESTMENT.**

26
 27 The Owner must deposit one-half of one percent (0.5%) of
 28 the HUD-approved capital advance amount not to exceed
 29 \$10,000 in a special escrow account to assure the Owner's
 30 commitment to the housing. At initial closing the minimum
 31 capital investment (MCI) will be placed in escrow and will
 32 be held by a HUD-approved escrow agent.
 33

- 34 • Under the Section 202 program, if the owner has a
 35 National Sponsor or National Co-Sponsor, the MCI shall be
 36 one half of one percent (0.5%) of the HUD approved
 37 capital advance, not to exceed \$25,000.
- 38 • If the project reaches initial closing (or construction
 39 starts in a capital advance upon completion project)
 40 within the initial 18 months of the fund reservation, HUD
 41 will waive one-half of the MCI.
- 42 • HUD will release to the Owner all remaining funds not
 43 used to cover operating deficits during the first three
 44 years of operation. The funds will be released at the
 45 end of the three year period provided the project is
 46 financially sound and has been finally closed.

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lviii. SAVINGS INCENTIVE.

- A. If actual development costs including land are less than the amount of the initial fund reservation, the Owner is entitled to retain 50 percent of the savings in the replacement reserve account.

- B. The percentage shall be increased up to 75 percent for Owners that add energy efficiency features which:
 - 1. Under FY 2009 and earlier NOFA
 - a. Exceeds the energy efficiency standards promulgated by the Secretary in accordance with Section 109 of the National Affordable Housing Act;
 - b. Substantially reduces the life-cycle cost of the housing;
 - c. Reduces gross rent requirements; and
 - d. Enhances tenant comfort and convenience.
 - 2. Received full points under a post FY 2009 NOFA "energy efficiency" rating factor.

- C. The saving may be used:
 - 1. To supplement services provided to the residents of the housing or funds set aside for replacement reserves; or
 - 2. For such other purpose as determined by HUD.

- D. The shared cost savings **cannot** be applied to offset costs associated with the inclusion of ineligible amenities for which the Owner is required to pay for with other than capital advance funds. For example, if an Owner wishes to include a prohibited amenity, i.e., individual balconies, it may do so, but the cost associated with the amenity must be funded by the Owner at initial closing.

1IX. ASSURANCE OF COMPLETION FOR OFFSITE IMPROVEMENTS.

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A. Require one of the following:

- 1. Public Body Agreement acceptable to HUD from the controlling jurisdiction giving assurance for installation of utilities, streets or other facilities without cost to the Owner. Require the jurisdiction's attorney's opinion that the agreement is binding on the public body and succeeding administrations.
- 2. Cash Escrow (use Form FHA-2446, Escrow Agreement for Offsite Facilities) deposited with an escrow agent acceptable to HUD, or an unconditional irrevocable letter of credit. The amount must equal or exceed HUD's estimate of cost of offsite facilities.

B. Where additional security is deemed necessary, require as additional assurance, a surety company bond or bonds equal to HUD's estimate of the cost of the offsite facilities using Form FHA-2479, Offsite Bond.

HAZARD INSURANCE POLICY.

The Owner must provide hazard insurance and the policy must contain a loss payable clause with HUD, the contractor and if applicable other lien holders named as their interests may appear. The Owner may elect or the other lien holder(s) may require a higher amount, but the insurance must at least equal 100 percent of the replacement value of structures as determined by HUD.

(See Handbook 4450.1 REV-1.)

A. Property Insurance Requirements and Schedule.

The Owner must provide an original and one copy of Form FHA-2447, Property Insurance Requirements with Form HUD-92329, Property Insurance Schedule-Insurable Values for Property Insurance Coverage attached.

B. Effective Coverage Date.

Require the Property Insurance Requirements, Form FHA-2447, to bear the Capital Advance Mortgage (or Deed of Trust) Note date.

1 XI. DAVIS-BACON REQUIREMENTS - 202/811 PROJECTS

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A. Applicability.

Davis-Bacon wage and reporting requirements are applicable to all Section 202 and Section 811 new construction, substantial rehabilitation and projects that contain 12 or more units. Section 202 and Section 811 projects that contain less than 12 units and 811 group home projects are exempt from Davis-Bacon coverage. (See 24 CFR §891.155(d).)

B. Prevailing Wage Rates.

1. To make sure that Labor Relations staff is aware of pending applications in the pipeline, Program Center staff will provide the Regional/Field Labor Relations staff with a copy of the Section 202/811 Fund Reservation Letter. A list of the Regional/Field Labor Relations staff and the jurisdictions they serve may be found at:

<http://www.hud.gov/offices/olr/laborrelstf.cfm>

2. Labor Relations will provide a copy of the applicable Davis-Bacon wage decision to the Program Center staff who will provide it to the Sponsor/Owner noting that the applicable wage decision may be updated (wage rates may change) between application processing, firm commitment and initial closing/start of construction. The Sponsor/Owner should remain in contact with Labor Relations staff for any wage rate modification.

C. Locking-in the Davis-Bacon wage determination.

When the applicable wage decision "locks-in" for a particular project, any subsequent modification to the wage decision is not applicable to that project. The "locked-in" wage decision remains in effect for that project for the duration of the construction work contained in that contract. The following rules apply to Section 202/811 projects.

1. Modifications to Davis-Bacon wage decisions are effective for a particular project if the

1 modification is published before contract award
2 or start of construction if there is no award.

3
4 **Note: A ribbon-cutting and ceremonial shovel-**
5 **full of dirt do not equal construction start.**

6
7 2. At this point (contract award or start of
8 construction), the wage decision "locks-in"
9 **except:**

10
11 a. In cases where the Sponsor/Owner awards the
12 contract based on competitive bidding,
13 modifications published less than 10 days
14 before bid opening are effective *unless* it
15 is determined that there is not a reasonable
16 time to notify bidders of the modification.
17 A record of this determination must be
18 retained with the contract.

19
20 b. Further, if under competitive bidding the
21 contract is not awarded within 90 days after
22 bid opening, any modification(s) published
23 before contract award or start of
24 construction is effective for that project.

25
26 D. Initial Closing - Release of Capital Advance Funds
27 During Construction.

28
29 Program Center and Labor Relations staff must make
30 certain that the correct Davis-Bacon wage decision and
31 the Supplementary Conditions of the Contract for
32 Construction (Form HUD-2554) are contained in the
33 contract specifications. Program Center staff must
34 secure Labor Relations' clearance prior to initial
35 closing. (See also Paragraph G, *Initial/Final Closing*
36 *- Release of Capital Advance Upon Completion.*)

37
38 1. Program Center staff must notify Labor Relations
39 in advance of each initial closing or
40 preconstruction conference (whichever is earlier)
41 to secure Labor Relations' clearance. Typically,
42 3 to 5 business days is sufficient lead-time for
43 Labor Relations' review. If the field Labor
44 Relations staff is not available, clearance may
45 be secured from the Regional Labor Relations
46 Officer.

47

- 1 2. Labor Relations will inspect the contract
2 specifications to determine whether the correct
3 and current Davis-Bacon wage decision and HUD-
4 2554 are incorporated. Where the servicing Labor
5 Relations staff are located in another HUD
6 office, the Labor Relations staff shall consult
7 remotely (e.g., by telephone or e-mail) with
8 Program Center staff to make such determination.
9 The Labor Relations staff shall provide written
10 or e-mail clearance to Program Center staff.
11 3. The Hub/Program Center Director shall make sure
12 that Labor Relations' clearance has been received
13 and that any clearance conditions have been fully
14 satisfied before s/he endorses the capital
15 advance note.

16
17 E. The Preconstruction Conference.
18

19 At the preconstruction conference, the Program Center
20 staff will provide to the participants the contact
21 information for the Labor Relations staff that will be
22 responsible for Davis-Bacon support, compliance
23 monitoring and enforcement, and shall include the
24 following basic Davis-Bacon guidance in its
25 discussions with the participants.
26

- 27 1. Following the Preconstruction Conference, any
28 further inquiries concerning Davis-Bacon
29 requirements should be directed to the assigned
30 Labor Relations staff.
31
- 32 2. The Supplementary Conditions of the Contract for
33 Construction (Form HUD-2554) contain the labor
34 standards provisions applicable to the
35 construction of the project. The labor standards
36 provisions include the payment of not less than
37 the wage rates contained in the applicable wage
38 decision, the proper compensation for overtime
39 hours, and the timely submission to HUD, through
40 the general contractor, of weekly certified payroll
41 reports and any other documents required by HUD to
42 establish labor standards compliance.
43
- 44 3. The general contractor is responsible for the
45 full compliance with these provisions on its own
46 behalf of and on the behalf of all subcontractors
47 at all tiers. The Sponsor/Owner is responsible

1 for ensuring that the general contractor meets
2 all of its obligations required under the
3 contract.
4

- 5 4. The general contractor is responsible for
6 displaying a copy of the applicable wage decision
7 and the Department of Labor (DOL) Davis-Bacon
8 poster (Form WH-1321) at the job site in a place
9 that is easily accessible to all of the
10 construction workers employed at the project and
11 where the wage decision and poster won't be
12 destroyed by wind or rain, etc. The general
13 contractor may also post a properly prepared
14 Project Wage Rate Sheet (Form HUD-4720).
15

16 ***Note: There are two versions of the Davis-Bacon***
17 ***poster (WH-1321), one in English and the other in***
18 ***Spanish.***
19

- 20 5. The general contractor is responsible for
21 ensuring that all subcontracts at all tiers
22 contain the applicable wage decision and the
23 Supplementary Conditions of the Contract for
24 Construction (Form HUD-2554).
25
- 26 6. The general contractor must ensure that all
27 laborers and mechanics employed in the construction
28 of the project are made available at the job site
29 for interview by authorized representatives of HUD
30 or DOL.
31
- 32 7. In the event of violations of the labor standards
33 provisions, disbursements from capital advance
34 funds may be withheld or reduced in order to ensure
35 the full correction of any wage or reporting
36 discrepancies. Additionally, willful or aggravated
37 violations may be grounds for debarment.
38
- 39 8. The general contractor and all subcontractors are
40 encouraged to obtain a copy of HUD's "A
41 Contractor's Guide to Prevailing Wage
42 Requirements for Federally-Assisted Construction
43 Projects." The Guide is available at:

44 <http://www.hud.gov/offices/olr/library.cfm>
45
46

1 F. During Construction.

2
3 HUD inspectors have three key responsibilities with
4 regard to Davis-Bacon enforcement on HUD construction
5 projects.

6
7 1. To make sure that the applicable Davis-Bacon wage
8 decision and poster "Notice to Employees" are
9 displayed on the job site at a location
10 accessible to the laborers and mechanics employed
11 in the construction of the project. The first
12 inspection report should contain a notation to
13 this effect.

14
15 2. Perform interviews with the construction laborers
16 and mechanics and report the results of the
17 interview on Form HUD-11, Record of Employee
18 Interview.

19
20 a. Attach the completed employee interview
21 records to the HUD Representative Trip
22 Report, Form HUD 5379 and provide to the
23 construction coordinators so that they can
24 monitor inspector performance and better
25 coordinate with field Labor Relations staff.

26
27 b. The construction coordinators will forward
28 the original copy HUD-11s to Labor
29 Relations. In addition the construction
30 coordinator will keep a copy of each
31 completed Form HUD-11 in the Construction
32 Record Binder.

33
34 3. Report to the Labor Relations staff any
35 activities or other indications of labor
36 standards violations, which may come to their
37 attention.

38
39 G. Final Closing.

40
41 The Labor Relation staff must ensure that all labor
42 standards issues are resolved or that provisions are
43 made to ensure the payment of wage restitution that
44 may be found due and the payment of liquidated damages
45 that may be imposed for overtime violations.
46

- 1 2. Program Center staff must notify Labor Relations
2 at least 10 days in advance of each final
3 closing. If the field Labor Relations staff is
4 not available, clearance may be secured from the
5 Regional Labor Relations Officer.
6
- 7 2. Labor Relations shall conduct such reviews needed
8 to determine whether any and all labor standards
9 issues are resolved. The Labor Relations staff
10 shall provide written or e-mail clearance to
11 Program Center staff and will advise whether
12 there are any conditions that must be met before
13 final closing. If the clearance is conditioned,
14 Labor Relations will explain what documents
15 and/or actions are needed to satisfy the
16 conditions.
17
- 18 3. If issues remain that cannot be resolved in
19 advance of final closing, Labor Relations shall
20 require a deposit to the U.S. Treasury of an
21 amount equal to the of any wage restitution and
22 any other standards liabilities that have been or
23 may be found due. The Labor Relations staff
24 shall prepare and provide to Program Center staff
25 a deposit agreement, a schedule for the deposit
26 and wire transfer instructions for the
27 depositor's financial institution.
28
- 29 4. The Hub/Program Center Director shall make sure
30 that Labor Relations' clearance has been received
31 and that any clearance conditions have been fully
32 satisfied before s/he finally endorses the
33 capital advance note.
34

35 H. Initial/Final Closing - Release of Capital Advance
36 Upon Completion (CAUC).

37
38 In some cases, the Sponsor/Owner will undertake the
39 construction work with its own financing sources
40 rather than capital advance funding. The
41 Sponsor/Owner proceeds with a commitment from HUD that
42 the capital advance will be approved and paid over to
43 the Sponsor/Owner, **provided**, that all HUD
44 requirements, including Davis-Bacon requirements, are
45 met to HUD's satisfaction. Labor Relations staff will
46 perform the same support, compliance monitoring and
47 enforcement functions for such projects as for those

1 where capital advance funds are released during
2 construction.

3
4 1. Prior to construction start, Program Center staff
5 must secure Labor Relations' concurrence that the
6 contract specifications contain the correct
7 Davis-Bacon wage decision and the Supplementary
8 Conditions of the Contract for Construction (Form
9 HUD-2554) are contained in the contract
10 specifications. (See Labor Relations initial
11 closing clearance procedures, above)

12
13 2. After construction completion, Program Center
14 staff and Labor Relations staff will follow the
15 Final Closing procedures (above) for the
16 initial/final closing.

17
18 **XII. SUBSIDY LAYERING REVIEW.**

19
20 A. All Section 202 and Section 811 projects must undergo
21 a subsidy layering review in accordance with Notice
22 HUD 95-4, Subject: Subsidy Layering Reviews (SLR's -
23 Implementing Instructions).

24
25 B. HUD can accept subsidy layering reviews performed by
26 Housing Finance Agencies (HFAs) and Housing Credit
27 Agencies (HCAs).

28
29 **XIII. COST CERTIFICATION.**

30
31 Follow the instructions contained in Chapter 11 of HUD
32 Handbook 4470.1 REV-2 except as modified below.

33
34 A. A simplified (unaudited) cost certification is
35 permitted for Section 202 projects with 40 assisted
36 units or less for all Section 811 projects.

37
38 ***Note: Do not include a cost certification audit fee***
39 ***on Line G 66 of HUD Form 92264 where the project is***
40 ***eligible for a simplified cost certification.***

41
42 B. The Owner will be required to cost certify the actual
43 costs of the project unless the property contains Low
44 Income Housing Tax Credit (LIHTC) equities and has a
45 capital advance to cost ratio of less than 80 percent.

46
47 1. If LIHTC are included in the project development

1 costs and the Secretary determines at the time of
2 Firm Commitment issuance that the ratio of
3 capital advance proceeds to the estimated cost of
4 the projects is less than 80 percent, the Owner
5 will not be required to certify actual costs to
6 HUD. For example, when the Capital advance is
7 less than 80 percent of the Total Estimated
8 Replacement Cost of Project derived under section
9 G. of Form HUD-92264, the Owner will not be
10 required to cost certify to HUD.

- 11
- 12 2. For projects that are exempt from providing a
13 cost certification, when the project reaches
14 100 percent substantial completion, as deemed
15 by the HUD Inspector, the Owner will be
16 notified of the substantial completion date.
17 This date will be used as the cost
18 certification cut-off date for data purposed in
19 Development Application Processing (DAP).
20
- 21 3. The Owner must account for all operating income
22 during construction and ending three months
23 before final closing.
- 24
- 25 a. The income and expense statement must
26 cover the period from first occupancy (if
27 occupancy occurred during construction) or
28 from the date of substantial completion
29 (as deemed by the HUD Inspector) up
30 through the period ending three months
31 before final closing.
- 32
- 33 b. The statement must be submitted to HUD, at
34 least 30 days before the date scheduled
35 for final closing.
- 36
- 37 c. If the income and expense statement
38 evidences receipt of income (Excess Funds)
39 during this period, the Owner will be
40 required to deposit the Excess Funds into
41 the reserve fund for replacements
42 established under the Regulatory
43 Agreement, unless the housing finance
44 agency (HFA) has notified HUD that the
45 funds must be used in another manner to be
46 in compliance with IRC Section 42, low-
47 income housing tax credit requirements.

1XIV. **OWNER/ARCHITECT AGREEMENT.**

2
3 AIA Document B181 has been replaced by AIA Document B108-
4 2009 *Standard Form of Agreement Between Owner and Architect*
5 *for a Federally Funded or Federally Insured Project.*
6 Additionally, HUD has revised the HUD Amendment to the
7 Owner/Architect Agreement found in Appendix 12B.2 of the
8 MAP Guide and Handbook 4460.1 REV-2, Appendix 2.

Part B - MIXED-FINANCE TRANSTACTIONS

11
12I. **INTRODUCTION.**

13
14 This Part provides a general overview of the Mixed-Finance
15 Development for Supportive Housing for the Elderly or
16 Persons with Disabilities Program.

- 17
18 A. Developments built with mixed-finance funds may
19 combine Section 202 or Section 811 units with other
20 affordable and/or market rate units.
21
22 1. The number of Section 202/811 assisted units in
23 the project cannot be more or less than the
24 number specified in the capital advance agreement
25 letter.
26
27 2. The additional unassisted units:
28
29 a. May benefit from other forms of federal
30 assistance.
31
32 b. Cannot cause a Section 811 mixed-finance
33 project to exceed the applicable Section 811
34 project size limit if they will also provide
35 housing to persons with disabilities.
36
37 B. The mixed-finance program permits the use of other
38 sources of funding, including tax credits to raise
39 additional funds for a project. Some types of
40 funding, such as tax credits add a new layer of
41 complexity but should not frighten away the less
42 experienced nonprofits that might be considering
43 sponsoring a Section 202 or Section 811 mixed-finance
44 project.
45

1 The Internet contains a wealth of information
2 concerning tax credits. One source is the Housing
3 Assistance Council at <http://www.ruralhome.org>. They
4 publish, in both electronic and hard copy formats, a
5 tax credit primer titled "Utilizing the Low Income
6 Housing Tax Credit for Rural Rental Projects: A Guide
7 for Nonprofit Developers."
8

9 **9II. HISTORY AND GOALS OF THE MIXED FINANCE PROGRAM.**

- 10
11 A. The American Homeownership and Economic Opportunity
12 Act of 2000 created the Mixed-Finance Program.
13
14 B. The intent of the Mixed-Finance Program is to:
15
16 1. Leverage the capital and expertise of the private
17 developer community by allowing for-profit
18 participation in the Section 202 Supportive
19 Housing Program for the Elderly and the Section
20 811 Supportive Housing Program for Persons with
21 Disabilities;
22
23 2. Leverage private and public capital;
24
25 3. Expedite the production of this scarce housing;
26 and
27
28 4. Expand the supply of supportive housing for the
29 elderly or persons with disabilities.
30

31 **9III. WHAT IS A MIXED-FINANCE PROJECT?**

- 32
33 A. The mixed-finance project must have a for-profit
34 limited partnership with a nonprofit organization as
35 the sole general partner.
36
37 1. The general partner may be a private nonprofit
38 organization or an institution or foundation and
39 includes a corporation (for-profit or nonprofit)
40 wholly owned and controlled by a nonprofit
41 organization meeting the requirements of 24 CFR
42 §891.205 or §891.305.
43
44 2. HUD may waive 24 CFR §891.805 to permit as a
45 general partner a limited liability company with
46 a single member that is a nonprofit organization

1 meeting the requirements of 24 CFR §891.205 or
2 §891.305.

3
4 B. The mixed-finance project **may have** (but is not
5 required to have) a combination of assisted units and
6 unassisted units.
7

8IV. SWITCHING DESIGNATIONS BETWEEN A MIXED-FINANCE PROJECT AND
9 A REGULAR SECTION 202/811 PROJECT.

10
11 A. Under certain circumstances a Section 202/811 project
12 may switch designations.

13
14 1. For approved applications involving the
15 development of additional units, the Program
16 Center must refer to the appropriate Notice of
17 Funding Availability (NOFA) to determine whether
18 the applicants received any points for their
19 mixed-finance proposal.

20
21 a. If a proposal received bonus points under
22 the NOFA selection process, the Sponsor
23 **cannot** switch back to a regular Section
24 202/811 project designation.

25
26 b. If a proposal did not receive bonus points
27 under the NOFA selection process, the
28 Sponsor **can** switch back to a regular Section
29 202/811 project designation.

30
31 2. A regular Section 202/811 project **may** switch its
32 designation to that of a mixed-finance project at
33 any time up to the submission for firm commitment
34 application.

35
36 B. Program Centers are reminded to update the Section
37 202/811 tracking module of DAP whenever a project's
38 designation changes.
39

40V. ADDITIONAL GUIDANCE FOR THE NONPROFIT DEVELOPER'S FEE IN A
41 MIXED-FINANCE TRANSACTION.

42
43 A. The HUD Program Center must refer to the State tax
44 credit-allocating agency's qualified allocation plan
45 (QAP) to identify the maximum developer fee the agency
46 permits and determine if any costs associated with the

1 transaction are required to be paid from the
2 developer's fee.

3
4 B. This review:

5
6 1. Conforms the standards for the nonprofit
7 developer's fee in mixed-finance projects
8 developed in that particular State even if there
9 are no tax credits associated with a project.

10
11 2. Gives HUD a comfort level that certain
12 transaction costs are not counted twice.

13
14 C. The developer's fee in the mixed-finance transaction
15 is paid from project funds other than the capital
16 advance, the PRAC or the tenant contribution
17 associated with the assisted units. (24 CFR
18 §891.815(c))

19
20 D. The developer's fee may be split between the nonprofit
21 general partner and the joint venture developer.

22
23 1. The general partner will have ongoing tax credit
24 monitoring and compliance requirements after the
25 project is operational. Therefore, the general
26 partner should make sure they are adequately
27 compensated for these duties from the developer's
28 fee. In addition, these are eligible project
29 expenses and must be pro rated between the
30 assisted units and unassisted units that
31 benefited from the tax credits.

32
33 2. HUD does not regulate the division of funds.

34
35 E. Release of funds for the developer's fee.

36
37 1. There will be a Developer's Agreement, which
38 contains a schedule of performance measures that
39 must be met before any portion of the developer's
40 fee may be released.

41
42 2. HUD reviews the schedule to assure that in no
43 case will all the money be released until the
44 project is completed **and** successfully operating.

45

- 1 3. A separate housing consultant's fee ***is not***
2 ***permitted***, as the activities of the consultant
3 are part of the developer's duties.
4

5 **VI. THE JOINT VENTURE DEVELOPER IN A MIXED-FINANCE TRANSACTION.**
6

7 A joint venture developer (also referred to as a co-
8 developer) may be an individual or a for-profit or a
9 nonprofit entity.

10 A. The joint venture developer:

- 11
- 12 • Should be experienced in real estate development and
13 tax credit projects;
 - 14 • Should have expertise in managing multifamily and
15 tax credit projects;
 - 16 • Should have good relations with lenders, syndicators
17 and/or investors;
 - 18 • Should be an acceptable financial and credit risk;
 - 19 • May receive a portion of the developer's fee; and
 - 20 • May provide pre-development money that may be repaid
21 as the proposal is finalized.
- 22

23 B. If a joint venture developer is used:

- 24
- 25 1. No more than 30 days after acceptance of the
26 funding award, the nonprofit Sponsor/general
27 partner should identify the joint venture
28 developer and submit the following documentation
29 on the entity to the Hub/Program Center.
30

31 a. An electronic or paper Form HUD 2530,
32 Previous Participation.

33

34 b. Form HUD 2013 SUPP, Supplement to
35 Application for a Multifamily Housing
36 Project. The only portion of the signed and
37 dated Form that must be filled out is the 4
38 questions near the bottom of the page
39 dealing with:

- 40
- 41 ▪ Delinquent Federal debt
 - 42 ▪ Lawsuits or legal actions
 - 43 ▪ Bankruptcy
 - 44 ▪ Judgments
- 45

- 1 c. The joint venture developer's financial
2 statements if they are funding some pre-
3 development costs.
4
5 1) For an individual Form HUD-92417,
6 Personal Financial Statement; or
7
8 2) For a business entity, three years of
9 audited financial statements. If the
10 firm lacks audited financial statements
11 it may submit unaudited statements that
12 contain the criminal certification
13 found on Form HUD-92417.
14
15 d. The joint venture developer's resume
16 including a detail list of projects where
17 the entity was the developer.
18
19 2. The Hub/Program Center will immediately order a
20 credit report and review the joint venture
21 developer for previous participation, credit and
22 financial acceptability.
23
24 C. The Hub/Program Center should issue a recommendation
25 of acceptability or a rejection of the joint venture
26 developer within 30 days of receiving the
27 documentation.
28
29 The mixed-finance owner is free to accept or disregard
30 HUD's recommendation except in the case of 2530 and
31 delinquent federal debt issues.
32
33 D. If qualified, the joint venture developer or its
34 affiliate **may** provide the following services:
35
36 • Seller of the land and/or buildings
37 • Design architect
38 • Engineering services
39 • Construction administration
40 • General contractor
41 • Management agent for the project
42 • Tax Credit Syndication
43

44 **Note: The Sponsor/Owner will have to request a**
45 **regulatory waiver of 24 CFR 891.130(b).**
46

1 E. The joint venture developer, even if qualified, **cannot**
2 provide the following services nor can they have an
3 identity of interest with others providing these
4 services:

- 6 • Accounting
- 7 • Appraisal
- 8 • Supervisory Architect
- 9 • Bond Underwriting
- 10 • Legal Services
- 11 • Market Analysis
- 12 • Mortgage Banking

13
14 **VII. RENT.**

15
16 The rent on the unassisted units are not subject to any
17 Section 202 and 811 requirements.

18
19 **VIII. EXCESS AMENITIES.**

- 20
- 21 A. The assisted units should be modest in design and
22 still meet the requirements of other funding sources.
- 23
- 24 1. Excess amenities defined in 24 CFR §891.120(c)
25 are not eligible for HUD funding.
 - 26
 - 27 2. The use of durable materials to control or reduce
28 maintenance, repair and replacement costs **is not**
29 an excess amenity
 - 30
 - 31 3. Excess amenities must be designed with
32 appropriate safeguards for the residents' health
33 and safety.
 - 34
 - 35 4. The tenants in assisted units cannot be required,
36 but may voluntarily choose, to use, participate
37 in, or pay a fee for the use or maintenance of
38 the excess amenities.
 - 39
 - 40 5. Any fee charged for the use, maintenance, or
41 access to excess amenities by residents must be
42 reasonable and affordable for all residents of
43 the development.
 - 44

Note: The Owner may use a tiered pricing structure for the excess amenities based on the financial ability of the tenants.

- B. An Owner may include excess amenities to appeal to market-rate tenants. However, they must pay:
 - 1. For the cost of the excess amenities from funding sources other than the capital advance; and
 - 2. For the continuing operating costs associated with excess amenities from other than the PRAC and the tenant contribution associated with the capital advance-assisted units.
- C. The assisted units must look like the unassisted units in the project. If the project contains both assisted and unassisted units, the assisted units must be floating units.

21IX. PROHIBITED FACILITIES AND CHARGES.

- A. Projects may not have facilities for infirmaries, nursing stations or spaces for overnight care (24 CFR § 891.220 or 315, 813(c) and 848).

However, if the mixed-finance owner believes that prohibited facilities are needed to attract market rate tenants HUD may consider a waiver of 24 CFR §891.813(c) and 848 dealing with §891.220. The costs of developing and operating the prohibited facilities cannot be paid for with Capital Advance or PRAC rental subsidy and the tenant portion on the rent on the assisted units.
- B. Projects cannot charge: "founders fees;" "life care fees;" or similar charges.

39X. TRANSIENT HOUSING/HOTEL SERVICES PROHIBITION.

The mixed-finance Owner cannot:

- A. Execute leases for less than 30 days; nor
- B. Provide occupants with hotel services such as maid service, furnishing and laundering of linens, room service and bellboys.

1XI. COMMERCIAL SPACE.

2
3
4
5
6
7
8
9
10
11
12

- A. Commercial facilities for the benefit of the residents of the project and the community may be located and operated in the mixed-finance project but cannot be supported with capital advance funds, PRAC funds nor tenant rents.
- B. Commercial space is considered public accommodations and must meet all accessibility requirements under Title III of the Americans with Disabilities Act.

13XII. BEDROOM TYPE.

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46

- A. Mixed-finance project for the elderly.
 - 1. May have the following bedroom types:
 - 0-bedroom
 - 1-bedroom
 - 2-bedroom
 - 2. If the project has a 2-bedroom type:
 - a. The 2-bedroom type cannot be used as a assisted unit unless provided for the resident manager's unit (24 CFR § 891.210), and
 - b. The 2-bedroom type can be built as unassisted units. There is no restriction on the number of 2-bedroom unassisted units that may be built.
 - c. The mixed-finance program does not impose any income restrictions on the unassisted units. However, other funding sources such as LIHTCs may impose restrictions.
- B. Mixed-finance project for persons with disabilities may have:
 - 1. For Group Homes a minimum of 2 and a maximum of 6 residential spaces with an additional 1 bedroom resident manager's suite.

1 2. For an Independent Living project a minimum of 5
 2 apartments and a maximum of 14 apartments in
 3 addition to either a 1 or 2 bedroom apartment for
 4 the manager.

5
 6 Independent Living Units may have the following
 7 bedroom types:

- 8
- 9 0-bedroom
- 10 1-bedroom
- 11 2-bedroom
- 12 3-bedroom
- 13 4-bedroom
- 14

15 3. While the overall size of the project may exceed
 16 this limitation, the limitation still applies for
 17 the units set aside for persons with
 18 disabilities.

19
 20 **XIII. OPERATING RESERVE IN A MIXED-FINANCE TRANSACTION.**

21

22 A. The operating reserve functions as an operating
 23 deficit escrow for the unassisted units in a mixed-
 24 finance transaction.

25

26 B. Before initial closing the mixed-finance Owner will
 27 establish the operating reserve account.

28

29 1. The mixed-finance Owner determines the initial
 30 adequacy of the escrow; however it must be
 31 sufficient to cover the operating expenses of the
 32 unassisted units **for at least** a three-month
 33 period.

34

35 2. If the project is operationally sound, the
 36 operating reserve terminates with the release of
 37 the minimum capital investment and HUD will
 38 release to the Owner all remaining funds.

39

40 C. Mixed-finance Owner must supply funds as a firm
 41 commitment condition to meet project expenses during
 42 the mixed-finance Owner's estimated period required to
 43 establish and maintain a sustaining level of
 44 operation.

45

46 1. Use Form HUD-92476-A-CA, Additional Contribution
 47 by Sponsors/Mortgagors, to set the reserve.

- 1 2. The reserve must be funded with cash.
- 2
- 3 D. No monies derived from the assisted units (i.e.
- 4 capital advance funds, project rental assistance
- 5 (PRAC) and the tenant portion of the rent) can be used
- 6 to fund or replenish this account.
- 7
- 8 E. The limited partner or, if applicable, other secured
- 9 lien holders may impose more stringent requirements
- 10 relative to the operating reserve.

11

12**XIV. RESERVE FOR REPLACEMENTS ACCOUNT.**

- 13
- 14 A. HUD requires deposits to the Reserve for Replacements
- 15 for the assisted units. The mixed-finance Owner is
- 16 not required to set up a replacement reserve for the
- 17 unassisted units. However, if work is required, only
- 18 the assisted units' portion of the cost is funded out
- 19 of the replacement reserve. The mixed-finance Owner
- 20 will be responsible for obtaining the additional money
- 21 from other sources.
- 22
- 23 B. As an alternative, the mixed-finance Owner may accept
- 24 HUD's formula for computing the monthly deposit to the
- 25 replacement reserve for all the units in the project.

26

27**XV. REGULATORY AGREEMENT.**

- 28
- 29 A. The mixed-finance Owner executes a HUD Regulatory
- 30 Agreement governing the operation of the assisted units
- 31 in the project.
- 32
- 33 B. HUD does not dictate the operation of the unassisted
- 34 units.
- 35
- 36 C. The Regulatory Agreement for Capital Advance Mixed
- 37 Finance Program, Form HUD 92466.1CA, must be recorded
- 38 ahead of the release of capital advance funds and any
- 39 other security interests in the project.

40

41**XVI. USE AGREEMENT.**

42

43 The mixed-finance Owner executes a Capital Advance Mixed-

44 Finance Program Use Agreement, Form HUD 90163.1CA, to protect

45 current and future residents living in the assisted units.

46

47

- 1 A. The Use Agreement.
- 2
- 3 1. **General Rule.** The Use Agreement has a 40-year
- 4 term.
- 5
- 6 2. **Exception to the General Rule.** If the Sponsor
- 7 lends the Capital Advance funds to the project
- 8 and the debt is still outstanding at the end of
- 9 normal 40 year period, then the Use Agreement
- 10 will be extended for an additional 15 years.
- 11
- 12 B. The Use Agreement must be recorded before the release
- 13 of any capital advance funds.
- 14
- 15 C. The Capital Advance Use Agreement is subordinate to
- 16 any tax credit Use Agreement.
- 17

18 **XVII. SINGLE ASSET ENTITY.**

19
20 The project must be the only asset of the mixed-finance
21 Owner. This requirement will not be waived.

22
23 **Note: The single asset entity requirement does not apply**
24 **to the general partner. It may be involved in other**
25 **business ventures.**

26
27 **XVIII. INTEREST RATE AND TERM ON OTHER FUNDING SOURCE LOANS.**

28
29 The interest rate and term is negotiated between the mixed-
30 finance Owner and the lender. It may be fixed or may float
31 during the term of the loan.

32
33 **XIX. AMORTIZATION PLAN.**

- 34
- 35 A. HUD does not dictate the terms and conditions of any
- 36 other financing.
- 37
- 38 B. PRAC and the tenant contribution to the rent in the
- 39 assisted units cannot be used to payoff other
- 40 financing.
- 41

42 **XX. FAIR HOUSING AND EQUAL OPPORTUNITY.**

- 43
- 44 A. The mixed-finance Owner and all contractors, and
- 45 subcontractors must comply with all applicable fair
- 46 housing and civil rights requirements in 24 CFR
- 47 §5.105(a), including, but not limited to, the Fair

1 Housing Act and implementing regulations at 24 CFR
2 Part 100, Title VI of the Civil Rights Act of 1964 and
3 implementing regulations at 24 CFR Part 1, Section 504
4 of the Rehabilitation Act of 1973 and implementing
5 regulations at 24 CFR Part 8, Section 3 of the Housing
6 and Urban Development Act of 1968 and implementing
7 regulations at 24 CFR Part 135, and Title II of the
8 Americans with Disabilities Act to the extent
9 applicable. See 24 CFR §5.105(a) and 24 CFR §891.820.

10
11 B. The mixed-finance Owner and all contractors and
12 subcontractors must comply with all applicable federal
13 accessibility requirements. For covered multifamily
14 dwellings designed and constructed for first occupancy
15 after March 13, 1991, the design and construction
16 requirements of the Fair Housing Act and HUD's
17 implementing regulations at 24 CFR Part 100 apply. In
18 addition, HUD's Section 504 regulations at 24 CFR Part
19 8 require affirmative physical accessibility
20 requirements for certain new construction and
21 substantial alteration projects. In many cases,
22 properties constructed with HUD funds must meet both
23 Section 504 and the Fair Housing Act design and
24 construction requirements.

25
26 C. The mixed-finance Owner and all contractors and
27 subcontractors must comply with "Affirmative Fair
28 Housing Marketing" (24 CFR Part 200.600, 24 CFR
29 §891.155 and Handbook 8025.1 Revision 2).

- 30
31 • Owner/sponsors are responsible for data collection
32 based on race, color, religion, sex, national
33 origin, age, handicap, and family characteristic of
34 persons and households, as stated in 24 CFR 121 and
35 program requirements.

36
37 D. FHEO Violations. The Program Center staff will advise
38 the Director of FHEO of continuing minor violations
39 that cannot be resolved or of any identified or
40 suspected major violations.

41
42 **XXI. FIRM COMMITMENT APPLICATION.**

43
44 Under traditional processing HUD requires commitment
45 letters or letters on intent as proof that other sources of
46 funds are available before accepting a firm commitment
47 application for processing.

1 In a mixed-finance transaction the capital advance award
 2 usually does not line up with application deadline for
 3 other funding sources, specifically the application for a
 4 tax credit reservation. Instead of holding up processing
 5 until an application can be made and either a commitment
 6 letter or a letter of intent from the funding source is
 7 available, the following will be used.

- 8
- 9 A. The Sponsor provides a simple statement that it
- 10 intends to apply for tax credit and/or any additional
- 11 funding.
- 12
- 13 B. The Program Center:
- 14
- 15 1. Accepts the Sponsor's statement;
- 16
- 17 2. Processes the firm commitment; and
- 18
- 19 3. Issues the firm commitment conditioned on the
- 20 Sponsor/Owner providing evidence of the ability
- 21 to cover the estimated financial requirements to
- 22 close the project.

23 **XXII. UNDERWRITING INSTRUCTIONS.**

- 24
- 25 A. HUD's main concerns in a mixed-finance transaction
- 26 are:
- 27
- 28 1. The capital advance funds are equal to or less
- 29 than the funds needed to construct the assisted
- 30 units;
- 31
- 32 2. The Owner has raised enough additional funds when
- 33 combined with the capital advance funds to build
- 34 and operate the entire project; and
- 35
- 36 3. Establishing the cost of items that will be
- 37 recognized for cost certification purposes as
- 38 payable from capital advance funds.
- 39
- 40 B. Prohibited identities-of-interest.
- 41
- 42 1. The general contractor cannot have any identity-
- 43 of interest, regardless of how slight, with the
- 44 Owner including family members, employees,
- 45 officers, directors, stockholders or partners of
- 46 the mixed-finance Owner. The only construction

- 1 contract permitted will be a lump sum
2 construction contract.
- 3
- 4 2. The design architect cannot have an identity-of-
5 interest with the Owner including family members,
6 employees, officers, directors, stockholders or
7 partners.
- 8
- 9 3. The supervisory architect cannot have an
10 identity-of-interest with the mixed-finance
11 Owner, the developer, or the general contractor
12 or with family members, officers, directors,
13 stockholders or partners of the mixed-finance
14 Owner.
- 15
- 16 C. Reserve for replacement account(s).
- 17
- 18 1. For assisted units the annual deposits to the
19 reserve for replacement for the assisted units
20 shall be calculated by the following formulas:
- 21
- 22 a. New construction: $0.006 \times \text{Total Structure}$
23 Cost
- 24
- 25 b. Substantial rehabilitation: $0.004 \times \text{Total}$
26 All Improvements.
- 27
- 28 c. Purchase of an existing project with or
29 without repairs the Owner will hire a Needs
30 Assessor to conduct a PCNA for long-term
31 capital needs. Based on HUD's review there
32 may be an initial and annual deposits to the
33 reserve for replacement account. This is
34 modeled on the Section 223(f) mortgage
35 insurance program. See Appendix 5.5M of the
36 MAP Guide for guidance in establishing the
37 PCNA.
- 38
- 39 2. For the unassisted units the Owner may use a
40 different methodology for computing the deposits
41 to the Replacement reserve. If the mixed-finance
42 Owner:
- 43
- 44 a. Chooses a different methodology it may but
45 is not required to set up a separate
46 replacement reserve account.

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b. Accepts HUD's methodology the replacement reserve funds can be commingled in one account under HUD's control.

D. The Program Center prepares three Form HUD-92264's, Multifamily Summary Appraisal Report, to properly allocate costs of the project

1. The first HUD-92264 is the composite of the entire project.

2. The second HUD 92264 represents the unassisted units, if any, and all costs not associated with the development and operation of the capital advance/PRAC-assisted units. Some examples include but are not limited to:

- Cost to construct any excess amenities;
- The cost associated with the operation and maintenance of the excess amenities;
- All financing fees associated with interim and/permanent loans;
- The developer's fee and any transaction fees paid or to be paid from the developer's fee;
- All consulting costs associated with obtaining grants, loans, tax credits, and tax-exempt bonds;
- Financial Consultant; and
- Pro rata share of third party technical contractors (Appraiser, Environmental Analyst Construction Analysis/Architect, etc) unless included in the development fee.
- Inspection fees charged by the construction lender.
- Cost of the monthly reserve for replacement deposits for the unassisted units, if any.

3. The third HUD-92264 represents the assisted units and the prorated share of hard cost, soft costs, and market value of the land fully improved for a proposed new construction project or the "As Is" value of a proposed substantial rehabilitation project.

- 1 • Do not recognize any housing consultant fees,
- 2 as these costs are included in the developer's
- 3 fee.
- 4 • Recognize in the proposed operating cost the
- 5 monthly reserve for replacement deposits for
- 6 the assisted units.
- 7
- 8 E. Mortgage Credit will analyze the general contractor's
- 9 financial statements and the mixed-finance Owner's
- 10 detailed sources and uses statement and perform the
- 11 required credit investigations.
- 12

13**XXIII. TAX CREDIT ISSUES.**

- 14
- 15 A. If the Sponsor lends the capital advance to the
- 16 project it may result in related part issues with the
- 17 Internal Revenue Service. To avoid this issue, HUD
- 18 will permit the Sponsor and an unaffiliated 501(c)(3)
- 19 nonprofit organization to form a third nonprofit
- 20 organization that will wholly own and control the sole
- 21 general partner of the limited partnership.
- 22
- 23 B. In many tax credit transactions the investor(s)
- 24 retains the right to remove the existing general
- 25 partner and replace it with another. Often they have
- 26 a subsidiary available to step in if necessary.
- 27 However, in a Section 202 or Section 811 mixed-finance
- 28 transaction HUD must first review and approve the
- 29 replacement general partner entity. HUD's approval
- 30 rights are limited to confirming conformance between
- 31 the new entity and the statutory and regulatory
- 32 requirements of the Section 202 or 811 programs.
- 33

34**XXIV. EARLY START OF CONSTRUCTION.**

- 35
- 36 A. The Owner, general contractor and if applicable, other
- 37 lien holders must execute Form FHA 2415, Request for
- 38 Permission to Commence Construction Prior to Initial
- 39 Endorsement for Mortgage Insurance, without change.
- 40
- 41 B. In a mixed-finance transaction only, the Hub or
- 42 Program Center Director may permit an early start of
- 43 construction once HUD has approved a project's plans
- 44 and specifications and, there is good cause to approve
- 45 the request. Good cause means being a responsible
- 46 partner and recognizing the needs or other funding
- 47 sources that are providing a significant amount of

1 funding to the project. The most common example of
 2 good cause is the need to meet the 10 percent
 3 expenditure requirement under the low income housing
 4 tax credit guidelines. However, notwithstanding any
 5 of the above, the Director must consider the potential
 6 risk to the Department when considering the Owner's
 7 early start request
 8

9 C. If an early start is permitted, a preconstruction
 10 conference must be held before the start of any
 11 construction.
 12

13**XXV. FIRST LIEN POSITION.**

14 In a mixed-finance transaction, HUD does not require the
 15 capital advance mortgage to be in first lien position. The
 16 Program Center should consider the needs of the other lien
 17 holders who are providing significant additional funding
 18 for the project.
 19
 20
 21
 22

23**XXVI. CONSTRUCTION MONITORING AND REPORTING.**

24 It assures that the completed project provides an
 25 acceptable risk upon closing of the capital advance
 26 mortgage.
 27
 28

29 A. Assignments.

- 30
- 31 1. The Hub construction coordinator assigns a staff
- 32 or contract HUD representative to the project
- 33 once the CAUC firm commitment is issued or there
- 34 is a request for an early start of construction;
- 35 or
- 36
- 37 2. The Hub construction coordinator agrees to accept
- 38 inspections from a State or local housing finance
- 39 agency. (See the Note in Section VII.D. above.)
 40

41 B. HUD Representative's Duties. The assigned HUD
 42 representative or the inspections from the State or
 43 local housing finance agency visits the site twice a
 44 month or more frequently where warranted by problems.
 45 The HUD representative conducts monitoring following
 46 provisions of Handbook 4460.1 REV-1, and reports
 47 project findings on the HUD Representative's Trip

1 Report, Form HUD-5379, in accordance with Multifamily
2 Underwriting Forms Catalog. Reporting is required on
3 the following:

- 4
5 1. Contractor's organization, operations and
6 supervision.
- 7
8 2. Architect's supervision and services.
- 9
10 3. Special circumstances, occupancy, delays, claims,
11 disputes, etc. The HUD representative must
12 specifically identify when the slow start or
13 progress of offsite work may delay occupancy of
14 completed units.
- 15
16 4. Noncompliance in the work.
- 17
18 5. Labor and Equal Employment Opportunity (EEO)
19 provisions, including the number of Davis-Bacon
20 wage interviews conducted and reported on Form
21 HUD-11.
- 22
23 6. Percentage of project completion and scheduled
24 completion. Percentage of completion for each
25 additive change order and percentage of
26 completion for offsite work.
- 27
28 7. Start of initial and permanent construction.
- 29
30 8. Serious construction problems. See paragraph
31 C.3. below.

32
33 C. Construction coordinator's duties are discussed under
34 the heading Chief Architect's Duties detailed in
35 Handbook 4460.1 REV-1, paragraph 3-3, and include:
36 assignment of inspectors, review inspectors' reports,
37 review change orders, field supervise inspectors'
38 performance by making at least two field review
39 inspections for each project.

- 40
41 1. The construction coordinator is authorized to
42 deputize a member of the construction analysis
43 staff in the local Program Center to perform
44 certain functions, as warranted.
 - 45 a. However, the construction coordinator is
46 responsible for keeping the Program Center
47 Director informed on the general progress of

1 all project work, problems, and the general
2 quality of inspections and inspector
3 performance.
4

5 b. The deputy may perform the review inspection
6 duties.
7

8 2. The construction coordinator may secure required
9 engineering assistance for the inspection
10 function, e.g., through use of Hub/Program Center
11 engineers not under the construction
12 coordinator's control, Regional engineers,
13 contract engineers, etc.
14

15 3. The construction coordinator reports to the
16 Program Center Director serious construction
17 problems as they occur and prepares a referral
18 memorandum to the Office of Multifamily Housing
19 Assistance and Grant Administration in
20 Headquarters, and provides status reports as
21 appropriate.

22 Serious construction problems that may delay
23 completion include but are not limited to:
24

- 25 • Work stoppages for 20 calendar days;
- 26 • Slow or non-payments to the general contractor
27 and/or subcontractors;
- 28 • Contractor abandons the job;
- 29 • Contractor, owner or Architect changes during
30 construction;
- 31 • Imbalance between construction funds and
32 construction progress;
- 33 • Correction of any construction deficiency is
34 not started within 30 days of the first
35 notification to the contractor; and Contractor
36 can't or won't correct any construction defect
37 or latent defect.
38

39 4. The construction coordinator advises the mixed-
40 finance Owner and the construction lender of
41 critical deficiencies in a supervisory
42 architect's performance, and provides a file
43 supporting the findings.
44

45 The file should include copies of applicable HUD
46 Representative's Trip Reports, Form HUD-5379,

1 Supervisory Review Reports, Form HUD-5379,
2 correspondence and minutes or summaries of
3 meetings.
4

5 **5XXVII. PERMISSION TO OCCUPY.**

6
7 HUD executed Form HUD-92485, Permission To Occupy, is
8 required before the mixed-finance owner permits occupancy
9 of any dwelling unit. The physical completion and required
10 documentation are outlined on the form and in paragraphs A.
11 and B. below.
12

13 A. Physical Completion. The work or portion thereof for
14 which a Permission To Occupy is approved must be
15 sufficiently completed in accordance with the contract
16 documents so the mixed-finance owner can occupy or
17 utilize the identified portion of work for its
18 intended use.
19

20 1. Support facilities (utilities, disability access,
21 vehicular access and parking, fire life-safety
22 equipment, etc.) must be in place.
23

24 2. Acceptability of each unit for which a permission
25 to occupy is requested must be established:
26

27 a. Property must be inspected and Form HUD-
28 92485 signed by the mixed-finance owner,
29 supervisory Architect, contractor, and HUD
30 Representative.
31

32 b. Minor items that do not preclude occupancy
33 are permitted but must be listed as an
34 attachment to Form HUD-92485.
35

36 c. The contractor is fully responsible for any
37 incomplete or improperly performed contract
38 work whether or not listed.
39

40 B. Signatures, Approval, and Permission:
41

42 1. The mixed-finance Owner, supervisory Architect,
43 contractor, construction lender and HUD
44 representative sign Form HUD-92485.
45

46 2. Approval: The Construction Coordinator or a
47 designated staff person in the Program Center

1 signs as Chief, Architecture and Engineering
2 Section. The HUD Team Leader signs as Chief
3 Underwriter.
4

5 3. Permission to Occupy: The Hub Director or
6 his/her designee will sign the form as the FHA
7 Authorized Agent.
8

9 C. Submission Documents. The construction lender must
10 sign Form HUD-92485 agreeing with the request and
11 stating that insurance risks have been covered for the
12 project. The mixed-finance Owner must include the
13 following documents with the completed Form HUD-92485:
14

- 15 1. A Certificate of Occupancy, Temporary Certificate
16 of Occupancy, or equivalent permit from the
17 governing municipal authority for all units and
18 facilities listed on the Permission to Occupy;
19 and any other required permits or authorizations;
20
- 21 2. A certificate of property insurance form from the
22 mixed-finance Owner's insurance company.
23
- 24 3. Rent Schedule and Information on Rental Project,
25 Form HUD-92458, for the non-capital advance-
26 assisted units.
27
- 28 4. Affirmative Fair Housing Marketing Plan (AFHMP),
29 Form HUD-935.2,
30
- 31 5. Certificate of Management Agent, Form HUD-9839-C,
32 for the Capital Advance-assisted units, and
33
- 34 6. Management Agent Profile, Form HUD-9832, or
35 certification that one is already on file with
36 the particular Field Office.
37

38 **Note: Items 3 through 6 above must only be submitted**
39 **with the first submission of a Permission To Occupy.**
40

41
42
43
44
45 D. Partial Occupancy Approval.
46

- 1 1. Favorably consider partial occupancy of units as
2 they become available, where:
3
4 a. Vandalism could be minimized, or
5
6 b. Needed project income is provided, or
7
8 c. An earlier rent-up date could be achieved,
9 or
10
11 d. The capital advance mortgage security would
12 otherwise be enhanced, and
13
14 e. Utility and heating/cooling costs for the
15 occupied units can be metered separately
16 from the contractor's usage during
17 continuation of construction, or an
18 acceptable predetermined arrangement for
19 occupied unit utility and heating/cooling
20 costs is established.
21
- 22 2. Approve a series of Permissions to Occupy as units
23 or facilities become available, e.g. individual
24 buildings on multi-building projects, or individual
25 floors or wings on larger buildings.
26
- 27 3. Approve a single Permission to Occupy for all
28 units where dictated by management
29 considerations, e.g. very small projects.
30
- 31 E. Preparation of the PRAC, Part II of the Project Rental
32 Assistance Contract, Form HUD-90173-A-CA:
33
34 1. Immediately after review and acceptance of the
35 project as set forth in C.4. above, the
36 Multifamily Housing Representative ("MHR") will
37 prepare a memorandum to the Legal Division for
38 the Program Center Director's signature,
39 requesting that the PRAC be prepared.
40
41 2. The Legal Division must prepare one original and
42 two copies of the PRAC based on the Contract
43 previously prepared as an exhibit to the PRAC
44 Agreement.
45
46 3. Any change to the PRAC at this stage may be made
47 only if authorized by the regulations or the

1 Agreement, and must be explained and justified to
2 the Owner in the transmittal letter.

3
4 4. The effective date of the PRAC will be the date
5 the permission for occupancy is granted on Form
6 HUD 92485. The initial term of the contract
7 shall be for either 60 or 36 months, depending on
8 the Fiscal Year the NOFA was awarded.

9
10 5. The transmittal letter will require the owner to
11 submit with the executed Contract, a list of
12 leased and unleased units along with
13 justification for any unleased units for which
14 vacancy payments will be requested.

15
16 6. The MHR will transmit the PRAC to the Owner for
17 execution.

18
19 F. Execution of the PRAC.

20
21 1. The Mixed-Finance Owner executes all copies of
22 the PRAC and returns them to HUD together with
23 the information regarding leased and unleased
24 units.

25
26 2. The MHR routes the PRAC to the Legal Division for
27 final review and the information regarding leased
28 and unleased units to Asset Management.

29
30 3. Asset Management will advise Production whether
31 any unleased units qualify for vacancy payments.

32
33 4. When approved by the Legal Division, the
34 Hub/Program Center Director will sign the
35 original and two copies of the PRAC for HUD.

36
37 5. MHR, in the letter transmitting the PRAC, will
38 advise the Mixed-Finance Owner of any unleased
39 units qualifying for vacancy payments.

40
41 6. The executed PRAC will be distributed as follows:

42
43 a. Original will be sent to the Ft. Worth
44 Accounting Center.

45
46 b. One executed copy to the Owner
47

c. One executed copy to Asset Management

G. The Mixed-Finance Owner may immediately request from HUD the monthly rental assistance payments under PRAC.

H. Beginning with the effective commencement of rental assistance payments under the PRAC or at such later date as may be agreed to by the Mixed-Finance Owner in writing, HUD will require a monthly deposit with in a depository satisfactory to HUD of one-twelfth (1/12) of the sum set forth in the Commitment to Release Capital Advance Funds during Construction Completion constituting a "Reserve Fund for Replacements" which fund will be subject to HUD's control and from which fund withdrawals may be made only upon the receipt of your written permission. These funds will be deposited with the construction lender or an escrow agent satisfactory to HUD by the mixed-finance Owner in the form of cash or in the form of obligations of or guaranteed as to principal by the United States of America. HUD will, upon appropriate request by the mixed-finance Owner, permit the conversion of the whole or a substantial part of such cash deposits into the form of obligations of, or fully guaranteed as to principal by, the United States of America. Notice of any failure to receive the deposits required herein will be forwarded to HUD within 60 days.

29 **XXVIII. FINAL HUD REPRESENTATIVE'S TRIP REPORT AND ITEMS OF DELAYED COMPLETION.**

A. Final HUD Representative's Trip Report. Require accomplishment of the following:

1. Contractor's preparation and submission to the architect and HUD representative of a comprehensive list (punch list) of work to be completed or corrected before project review for issuance of the "final trip report." Require the list 15 days before the anticipated construction completion date.
2. Architect's review of the contractor's punch list against observed job conditions, appropriate modification and distribution of the modified list to the contractor and HUD representative.

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- 3. Contractor's completion of the itemized work, and any other required work whether or not listed, before the scheduled site visit for issuance of the "final trip report."
- 4. HUD representative's review of the completed project, preferably accompanied by the contractor, supervisory architect, and mixed-finance Owner. Require an additional site visit where the work is not acceptably complete.
- 5. HUD representative's preparation of the "final trip report" on Form HUD-95379, HUD Representative's Trip Report (Multifamily), where the work is found acceptable.
 - a. The report must be completed and dated on the site visit date.
 - b. The report must include the following statements:
 - 1) "Construction acceptably completed," or "Construction acceptably completed subject to withholding disbursement or escrowing funds for completion of the listed items of delayed completion."
 - 2) "Utility services: (list services including electricity, gas, water, sanitary sewer, storm sewer, telephone, and cable TV as applicable), are complete, connected, and operable." Where connection is precluded by incomplete offsite work, add to the statement, "Connection for (list) is awaiting installation of offsite lines."
 - c. The report must list any items of delayed completion, the estimated cost for completing the work, and a recommended completion date(s) for the listed work.

B. Items of Delayed Completion.

- 1 1. Are work items beyond the contractor's control to
- 2 complete, e.g.:
- 3
- 4 a. Inability to install landscaping during
- 5 freezing conditions.
- 6
- 7 b. Unavailability of items due to strike or
- 8 other temporary outage.
- 9
- 10 2. May not preclude the mixed-finance Owner from
- 11 occupying or utilizing the project and its
- 12 facilities for the intended use.
- 13
- 14 3. May not exceed two percent of the Contract
- 15 amount.
- 16
- 17 4. If such work is not completed by final closing,
- 18 HUD will retain 150 percent of the amount
- 19 estimated by the HUD representative for
- 20 completion of items of delayed completion as an
- 21 escrow for completion of the work.
- 22
- 23 5. Must be completed within 12 months of the date of
- 24 the final HUD Representative's Trip Report.
- 25

26**XXIX. GUARANTEE PERIOD.**

27
28 Require that a HUD representative make a 9- and 12-month
29 inspection in accordance with Handbook 4460.1 to identify
30 and report on latent defects, failures, items of delayed
31 completion and any casualty damage.

32
33 A. Inform the secured lien holder, if any, mixed-finance
34 Owner and contractor in writing of identified
35 deficiencies before the contractor's 1 year warranty
36 expires.

- 37
- 38 1. Require correction from the contractor for
- 39 construction deficiencies, including remedy
- 40 through equipment and materials warranties, and
- 41
- 42 2. Notification of the insurance underwriter for
- 43 extended hazard or casualty damage as
- 44 appropriate.
- 45

46 B. Seek remedy through surety or use of retainage, or
47 cash escrow where available, if the contractor does

1 not correct construction deficiencies in a timely
2 fashion.

3
4 C. Invite the Project Management Director (PMD) to
5 participate at all levels of guarantee period
6 activities, and forward a copy of all HUD
7 representative reports, and correspondence to the PMD,
8 secured lien holders, if any, mixed-finance Owner,
9 contractor and surety relating to guarantee period
10 construction deficiencies.

11
12**XXX. PROPERTY INSURANCE SCHEDULE AND REQUIREMENTS.**

13
14 Before final closing, HUD must prepare a Property Insurance
15 Schedule, Form HUD-92329, that:

- 16
17 A. Correctly shows the insurable value of the completed
18 structures.
- 19
20 B. Reflects any changes in cost occurring after issuance
21 of firm commitment.

22
23**XXI. BUILDER'S WARRANTY.**

24
25 A. If the general contractor used a performance bond the
26 Program Center Director must make sure that the bond
27 contains a guarantee against any defects due to faulty
28 materials or workmanship which appear within a period
29 of one year following completion. The date of
30 completion is defined as the date on which the HUD
31 inspector signs the final HUD Representative's Trip
32 Report, Form HUD-95379, provided that the Construction
33 Manager subsequently endorses the trip report.
34 Construction must be complete, except for acceptable
35 items of delayed completion.

36
37 B. If item A above does not apply then at closing the
38 general contractor must provide one of the following
39 to assure correction of any latent defects.

- 40
41 1. Cash Escrow Deposit of 2 1/2 percent of the total
42 amount of the construction contract, to be
43 retained in escrow under HUD's control for a
44 period of 15 months (if applicable, other secured
45 lender(s) may require escrow amount and/or term
46 to be increased), or

47

- 2. Surety Bond in the amount of 10 percent of the cost of construction or substantial rehabilitation (running for 2 years after project completion). The bond must be on Form HUD 3259, Surety Bond Against Defects Due To Defective Materials and/or Faulty Workmanship.

PART C - MIXED FINANCE CAPITAL ADVANCE UPON COMPLETION (CAUC)

12I. DURATION AND EXTENSION OF SECTION 202/811 FUND RESERVATION.

- A. The term of the fund reservation is 18 months from the date the Notification of Selection Letter is issued to the date of initial closing. For CAUC projects this means fund reservation must run to the date of initial/final closing.
- B. Extension by Program Center. A Program Center may extend a fund reservation up to 24 months, if it determines that the mixed-finance Owner is making satisfactory progress toward the start of construction, rehabilitation or acquisition of an existing property.
- C. Extension by Headquarters. Headquarters may grant a waiver to permit additional extensions up to the estimated initial/final closing date of the project.

31II. INITIAL CLOSING GOAL.

Currently, each Program Center has a goal based on a count of the number of initial closing reached during the fiscal year. In a CAUC project, there is no closing until after the project is built or rehabilitated. In order for a Program Center to get "credit" towards this goal the Program Center must issue a firm commitment and the project must start construction. The start of construction is deemed the equivalent of initial closing for the goal.

43III. ITEMS NOT REQUIRED IN CAPITAL ADVANCE UPON COMPLETION TRANSACTION.

- A. Assurance of Completion.

- 1
- 2 B. Blanket Fidelity Bond covering all the Owner's
- 3 officers and employees, including non-compensated
- 4 officers, during the construction period.
- 5
- 6 C. A working capital deposit.
- 7
- 8 D. An escrow to fund approved change orders.
- 9
- 10 E. Approval of the surety when approved change orders
- 11 increase cost by 10 percent or more.
- 12

13IV. **CONSTRUCTION STAGE FOR CAPITAL ADVANCE UPON COMPLETION**
14 **PROJECTS.**

- 15
- 16 A. Basic requirements for CAUC projects during the
- 17 construction stage are generally the same as for
- 18 projects with advances. However, because HUD does not
- 19 disburse any portion of the capital advance during
- 20 construction, HUD does not monitor the construction
- 21 lender's disbursements. Additionally, because HUD has
- 22 no risk exposure until closing, HUD does not become
- 23 involved in the workout of problems during
- 24 construction. For example:
- 25
- 26 1. Construction Problems due to:
- 27
- 28 a. Work stoppage,
- 29 b. Contractor abandons job,
- 30
- 31 c. A change in the contractor or architect
- 32 during construction,
- 33
- 34 d. Construction defects untreated for 30 days,
- 35 and
- 36
- 37 e. Extended periods of bad weather, strikes,
- 38 etc.
- 39
- 40 2. Financing Problems due to:
- 41
- 42 a. Contractor's inability to complete because
- 43 of under financing.
- 44
- 45 b. Overruns in carrying charges due to
- 46 circumstances beyond the contractor's and
- 47 mixed-finance Owner's control.

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- c. Overruns in construction hard costs caused by:
 - 1) Mandatory changes,
 - 2) Voluntary changes, and
 - 3) Price escalation.
- 3. Inadequate Income due to:
 - a. Underestimated operating expenses,
 - b. Overestimated rents and long-term occupancy levels, and
 - c. Inadequate or lack of operating deficit

COMMITMENT TO RELEASE CAPITAL ADVANCE UPON PROJECT COMPLETION.

The commitment must be valid and outstanding until project closing, i.e., endorsement of the permanent capital advance mortgage.

- A. No Initial Closing.
 - 1. Construction/Rehabilitation must start within 90 days from the date the firm commitment is issued.
 - 3. Construction must continue thereafter diligently to completion.
 - 4. HUD does not release Capital Advance funds during the construction period; therefore, there is no initial closing only a final closing.
- B. The term of the commitment at a minimum must be sufficient to include the required construction period.
- C. Extensions.
 - 1. There are two types of extensions.
 - a. If construction/rehabilitation is not started within the 90-day period, the firm

1 commitment shall terminate unless HUD
2 extends the time for commencement of
3 construction/rehabilitation in writing
4

5 b. If the project does not reach initial/final
6 closing by the firm commitment expiration
7 date, all rights and obligations of the
8 respective parties shall cease unless HUD
9 extends the expiration date in writing.

10
11 2. If an extension is necessary, the Program Center
12 Director may grant an extension if the current
13 fund reservation as amended would not exceed 24
14 months to reach construction completions and the
15 Capital Advance loan closing. Otherwise s/he
16 will have to request a regulatory waiver of 24
17 CFR §891.165, from Headquarters.

18
19 a. In all cases, the basis for the extension
20 must be set forth in the project docket and
21 the Program Center Director must make sure
22 that costs and expenses are current.
23

24 b. It is the responsibility of each Office to
25 assure that prolonged extensions or
26 commitments do not affect the soundness of
27 the underwriting decisions upon which the
28 original issuance of a commitment was based.
29 For this reason, any time extension beyond
30 the Program Center's discretionary periods
31 set forth above must be accompanied, at a
32 minimum, by the following documentation:
33

34 1) The date of the original commitment;

35
36 2) The construction start date, if
37 applicable;

38
39 3) The current date of expiration of the
40 commitment;

41
42 4) The extenuating circumstances which
43 justify additional extension(s) of the
44 commitment;

45
46 5) An estimate of the time needed to bring
47 the case to a closing; and

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15VI.
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6) The Program Center Director's statement that the requested delay is not likely to change significantly the underwriting data on which the commitment was based or to undermine the feasibility of the project due to a change in the market, inflation or other cost-effecting factors.

c. If the Program Center needs a waiver of 24 CFR §891.165, allow one month for Headquarters to process the request.

REQUIRED DOCUMENTS.

Note: Any item with a * must be filed with HUD before the start of construction.

A. Lump Sum Construction Contract. The HUD Form of Construction Contract need not be used; however, the following must be made a part of the contract used:

- 1. The current version of the General Conditions, AIA Document A201;
- 2. Supplementary General Conditions, Form HUD-2554; and
- 3. Davis-Bacon Wage Rates.

*B. A Complete Master Set of Drawings and Specifications and two duplicate sets.

*C. The Agreement and Certification, Form HUD 93566.1-CA executed by the mixed-financing Owner, general contractor and HUD.

*D. Parts I and II of the Agreement to Enter Into a Project Rental Assistance Contract, Forms HUD-90172-A-CA and 90172-B-CA.

E. A Title Policy or title evidence showing:

- 1. The property free of all encumbrances other than the capital advance mortgage, HUD approved use restrictions, if applicable other secured and

1 unsecured liens approved by HUD, and acceptable
2 reservations of title.

3
4 2. Proof that no unpaid obligations exist except as
5 previously approved by HUD.

6
7 3. Title policy continued to date of credit
8 instrument endorsement.

9
10 F. Survey and Surveyor's Certificate, Form HUD-92457.

11
12 G. Contractor's Requisition Project Mortgages, Form HUD-
13 92448. The Contractor's Prevailing Wage Certificate
14 must be submitted to HUD at the time the Capital
15 Advance mortgage is presented for closing pursuant to
16 a CAUC commitment.

17
18 H. Warranty Against Latent Defects, see Section XVI
19 below.

20
21 **VII. THE PRECONSTRUCTION CONFERENCE.**

22
23 The conference is required before the initial start of
24 construction, including early start of construction
25 projects.

- 26
27 A. Required Attendees:
 - 28 1. Representative(s) of the mixed-finance Owner and
 - 29 construction lender,
 - 30
 - 31 2. Mixed-finance Owner's supervisory architect,
 - 32
 - 33 3. Contractor,
 - 34
 - 35 4. Major subcontractor(s),
 - 36
 - 37 5. HUD construction representative (staff, in all
 - 38 cases, plus contract personnel, where
 - 39 applicable),
 - 40
 - 41 6. HUD mortgage credit analyst, and
 - 42
 - 43 7. HUD labor standards specialist.
 - 44
 - 45 8. A representative from Fair Housing and Equal
 - 46 Opportunity (FHEO).
 - 47

1 **NOTE: Maintain the attendance list for the Washington**
2 **Docket.**

3
4 B. Supplementary Conditions of the Contract for
5 Construction, Form HUD-2554. Address Davis-Bacon Wage
6 Rates, Federal labor standards and equal employment
7 provisions, including:

- 8
9 1. Contractual obligations of the contractor and
10 subcontractors, including contractor's
11 certification of compliance with Davis-Bacon wage
12 rates.
13
14 2. Davis-Bacon Wages rates apply to the entire
15 project.
16
17 3. Start of construction will lock in the Davis
18 Bacon wage decision.
19
20 4. Statement of sanctions imposed for not complying
21 with the supplemental conditions.
22
23 5. Requirement that Form HUD-2554 must be made part
24 of the subcontracts for all tiers.
25
26 6. Give extra copies of Form HUD-2554 and applicable
27 Davis-Bacon wage determinations to the contractor
28 for any subcontractors not attending the meeting.
29
30 7. Emphasize the importance of Federal wage
31 payments, prompt payroll submissions and record
32 keeping. Instruct that Form WH-1321, Wage Notice
33 to All Employees, must be conspicuously posted on
34 the job site.
35
36 8. Indicate who in HUD will review for labor
37 standards compliance.
38
39 9. Give copies of the Equal Opportunity poster to
40 the contractor and each subcontractor to post
41 conspicuously at the construction site.

42
43 C. Contract Administration. Explain the procedures for:
44
45 • Change orders and architect's supplemental
46 instructions;

- 1 • Handling latent site or rehabilitation building
- 2 conditions;
- 3 • Requesting construction document clarifications and
- 4 handling job problems;
- 5 • Shop drawings and sample approvals;
- 6 • Noncompliant work and its correction;
- 7 • Substantial completion of the work or portion
- 8 thereof;
- 9 • Permissions to occupy including management plans and
- 10 rent rolls;
- 11 • Job meetings
- 12 • Maintenance of test logs;
- 13 • The architect's log; and
- 14 • The HUD representative's on-site facilities.

15
 16 D. HUD will inspect the project during construction as if
 17 capital advance funds were being released. The
 18 Program Center will give the mixed-finance Owner and
 19 the construction lender copies of the HUD inspector's
 20 trip reports, Form HUD 5379, as they become available.

21
 22 ***Note: The Multifamily Hub/Program Center may accept***
 23 ***inspection reports prepared by either a State or local***
 24 ***housing finance agency provided the reports meet HUD's***
 25 ***requirements.***

- 26
 27 E. Cost Certification.
- 28
 - 29 1. Explain that cost certification requirements
 - 30 apply to the entire project and not just the
 - 31 assisted units.
 - 32
 - 33 2. Explain that the mixed-finance Owner must cost
 - 34 certify.
 - 35
 - 36 3. Explain the time limits for submitting cost
 - 37 certification.
 - 38

39 **VIII. CONSTRUCTION MONITORING AND REPORTING.**

40
 41 See Section XXVI of Part B of this Notice.

42 **IX. CONTRACTOR'S MONTHLY REQUISITIONS.**

43
 44 Monthly requisitions are not applicable to CAUC projects.

45

1X. OFFSITE CONSTRUCTION.

2
3 Advance of Funds monitoring by HUD is not applicable for
4 CAUC projects.
5

6XI. CONSTRUCTION CONTRACT CHANGES.

7
8 The mixed-finance Owner and the construction lender must
9 advise HUD of any construction contract changes (change
10 orders) to the scope of contract work, contract price or
11 contract time on Form HUD-92437, Request For Construction
12 Changes. Form HUD-92437 must be completed and supported in
13 accordance with instructions on the form.
14

- 15 A. HUD approval of a change order is not required,
16 however, staff may comment on:
17
18 1. Technical acceptability of the requested changes.
19
20 2. Affects arising because of error, omission or
21 negligence on the part of the architect,
22 contractor or owner.
23
24 3. Affects to the marketability, value, income, or
25 maintenance and/or operating cost of the project.
26
27 4. Changes in the applicable codes, ordinances or
28 other workings of the law after firm commitment
29 for CAUC projects.
30

31 Such comments should be provided within 10 days of
32 receipt of a change order
33

- 34 B. Additive Change Orders.
35
36 1. No escrow is required for additive change orders,
37 because HUD has no risk exposure until final
38 closing. The mixed-finance Owner must be able to
39 provide the additional funds required and must
40 not have any outstanding obligation in connection
41 with construction other than the capital advance
42 mortgage and prior approved secured and non-
43 secured liens at the time the mortgage is
44 presented for closing.
45
46 2. Additive change orders are not a basis for an
47 increase in the capital advance mortgage.

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- C. Deductive Change Orders. For any estimated decrease in contract price resulting from the aggregation of change orders:
 - 1. Reduce the Contractor's "Final" Requisition, Form HUD-92448, by the appropriate amount.
 - 2. The reduction may adversely affect the capital advance amount at cost certification. See section 5-4 of HUD Handbook 4571.4 concerning shared savings.

- D. Distribution.
 - 1. Mortgage Credit will maintain a Change Order Summary Sheet for all change orders. See Handbook 4470.1 REV-2 for detailed information.
 - 2. After signature, Mortgage Credit will disburse the original and six copies as follows:
 - a. Forward the original and three copies along with staff comments to the construction lender;
 - b. Keep the processing copy with Mortgage Credit; and
 - c. Forward two copies to the construction coordinator, one for inclusion with the Master Set of drawings and specifications and one copy for the HUD representative.
 - 3. The construction lender retains the original for its files and forwards one copy each to the mixed-finance Owner, contractor and supervisory architect.

ARCHITECT'S SUPPLEMENTAL INSTRUCTION, AIA Document G710.

- A. Uses of AIA Document G710:
 - 1. Issue directives to the contractor to bring construction into compliance with the contract documents.

- 1 2. Interpret or clarify the contract drawings and
- 2 specifications.
- 3
- 4 3. Order minor changes in the work, not involving
- 5 cost or time e.g., relocating a door or window
- 6 opening, etc.
- 7
- 8 4. Accept specified equivalents, e.g., add
- 9 makes/models to the list of specified equipment.
- 10
- 11 B. Monitor usage closely, for compliance with paragraph
- 12 A. above, and require replacement of the supervisory
- 13 architect where the Architect's Supplemental
- 14 Instructions are chronically or egregiously misused.
- 15 See chapter 6 of HUD Handbook 4435.1 for details on
- 16 replacement of the supervisory architect.
- 17
- 18 C. Distribution. Require that for each AIA Doc G710
- 19 issued to the contractor that the architect include
- 20 one copy in the architect's job log, and forward one
- 21 copy each to the mixed-finance owner and construction
- 22 lender, and two copies to the construction
- 23 coordinator. The construction coordinator retains one
- 24 copy with the Master Set of Drawings and
- 25 Specifications, and forwards one copy to the HUD
- 26 representative.
- 27

28**XIII. PERMISSION TO OCCUPY.**

29
30 Follow the outstand instructions found in Section XXVII of
31 Part B of this Notice except as modified below.

32
33 PRAC funds will not be available before HUD closes on the
34 capital advance. Once the mixed-finance Owner reaches
35 initial/final closing and the Regulatory Agreement is
36 recorded, HUD will sign the PRAC, Part I of the Project
37 Rental Assistance Contract, Form HUD-90173-A-CA, and Part
38 II of the Project Rental Assistance Contract, Form HUD-
39 90173-B-CA, and provide retroactive rental assistance back
40 to the date of the initial permission to occupy.

41
42**XIV. FINAL HUD REPRESENTATIVE'S TRIP REPORT AND ITEMS OF DELAYED**
43 **COMPLETION.**

44
45 See Section XXVIII of Part B of this Notice.

46
47**XV. GUARANTEE PERIOD.**

1
2 See Section XXIX of Part B of this Notice.

3
4**XVI. REQUISITION FOR DISBURSEMENT OF CAPITAL ADVANCE FUNDS.**

5
6 A. HUD is not involved in the release of construction
7 funds.

8
9 B. Form HUD 2403CA, Requisition for Disbursement of
10 Capital Advance Funds, is submitted as part of the
11 closing documents. The amount disbursed will be based
12 on HUD's review and approval of the mixed-finance
13 Owner's cost certification.

14**XVII. WORKING CAPITAL DEPOSIT.**

15
16 A 2 percent working capital deposit is not required in CAUC
17 projects.

18
19**XVIII. MINIMUM CAPITAL INVESTMENT AND OPERATING RESERVES.**

20
21 At final closing the mixed-finance Owner must escrow the
22 required:

23
24 A. Minimum capital investment for the assisted units; and

25
26 B. Operating reserve escrow for the unassisted units.

27
28**XIX. PROPERTY INSURANCE SCHEDULE AND REQUIREMENTS.**

29
30 See Section XXX of Part B of this Notice except as modified
31 below.

32
33 Article 4, Insurance During Construction, of the Property
34 Insurance Requirements, Form HUD-90164-CA, is not
35 applicable.

36
37**XX. COST CERTIFICATION.**

38
39 Follow outstanding instructions found in Section XIII found
40 in Part A of this Notice, as modified below, for reviewing
41 the mixed-finance Owner's cost certification and the
42 contractor's cost certification, if required.

43
44 HUD's review is to close out the capital advance. Mortgage
45 Credit only recognizes those costs associated with the
46 assisted units as reflected in the third 92264, discussed
47 in Part B above, as adjusted by the prorated portion of

1 approved change orders. All other costs will be
2 disallowed, for example financing fees and construction
3 loan interest.
4

5**XXXI. CLOSING.**

6
7 Closing must occur within the period provided in the
8 commitment unless HUD extends the commitment in writing.
9 (See I.B. and C. above.)
10

11**XXII. BUILDER'S WARRANTY.**

12 See Section XXXI in Part B of this Notice.
13
14

15 Questions regarding this Notice may be directed to Kerry
16 Mulholland of the Grant Administration Policy and Management
17 Division, Office of Housing Assistance and Grant Administration,
18 HTH at 202.402.2649.
19

20 _____
21 David H. Stevens
22 Assistant Secretary for Housing-
23 Federal Housing Commissioner