



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

Special Attention of:

**All Multifamily Hub Directors
All Multifamily Program Center Directors
All Multifamily Operations Officers
All Directors of Project Management
All Field Counsel**

Notice H 2012-8

Issued: May 4, 2012

**Expires: This notice remains in effect until
amended, revoked, or
superseded**

**Cross References: H 2002-16
H 2004-21
H 2010-26
H 2011-03
H 2012-04**

SUBJECT: Updated Requirements for Prepayment and Refinance of Section 202 Direct Loans

I. Purpose

This Notice provides guidance for the prepayment and refinancing of Section 202 Direct Loan projects. This Notice supersedes all outstanding policy regarding Section 202 Direct Loan prepayments, including Housing Notice 02-16 and Housing Notice 10-14.

II. Authority

General authority for the prepayment of a Section 202 Direct Loan is provided by Section 811 of the American Homeownership and Economic Opportunity (AHEO) Act of 2000, as amended, and by 24 CFR 891.530. The Section 202 Supportive Housing for the Elderly Act of 2010 ("the 2010 Act")(Public Law 111-372), signed into law on January 4, 2011, made significant changes to Section 811 of AHEO and, as a result, to policy governing the prepayment of Section 202 Direct Loans.

III. Background

The Section 202 Supportive Housing for the Elderly program provides rental housing to households in which the head of household is aged 62 and above. Over the 50 year history of the Section 202 program, the system of providing financing shifted from loans to grants, and the population served changed from moderate-income elderly households to very low-income elderly

households. The program has also shifted from serving elderly households, to serving elderly and disabled households and returning to serving elderly households exclusively.

Today, HUD oversees a portfolio of more than 2,600 properties with active Section 202 Direct Loans, many of them also supported with project based Section 8 Housing Assistance Payment (HAP) Contracts. Owners of Section 202 Direct Loan properties have the option of prepaying the Section 202 Direct Loan and/or refinancing the Section 202 property for the purpose of reducing the interest rate and debt service, and/or making capital improvements.

Properties financed during different stages of the Section 202 Direct Loan program have different needs and are governed by AHEO, as amended over time, and contractual requirements. Over the years, HUD has issued a series of policy directives (Housing Notices 2002-16, 2004-21 and 2010-14) to provide guidance to Owners requesting approval for Direct Loan prepayment and refinance, and to Multifamily Housing staff processing such requests.

The 2010 Act was signed into law in January 2011 and made significant changes to provisions of AHEO governing Section 202 Direct Loan prepayment and refinance. The 2010 Act applies to all Section 202 properties constructed prior to 1992 for which the Secretary's consent to prepay is required. However, it makes a distinction between prepayment requirements for those projects demonstrating a reduction in debt service (which generally applies to Section 202 Direct Loan projects constructed between 1975 and 1992), and those projects wishing to refinance to address the physical needs of the project, but that will face an increase in debt service, which generally are projects constructed between 1959 and 1974 that have Section 202 mortgage interest rates of six (6) percent or less.

IV. Applicability

This Notice applies to the prepayment and refinance of all Section 202 Direct Loans for which the Secretary's approval of mortgage prepayment is required. This Notice supersedes all prior HUD guidance on Direct Loan prepayment and refinance, including Housing Notices 2002-16 and 2010-14.

Owners whose Section 202 Direct Loan documents do not require HUD approval are not required to comply with this Notice. However, these owners may elect to voluntarily comply with this Notice. Administrative procedures for processing prepayment requests for such properties are outlined in Section VI of this Notice.

Section IX of this Notice (Re-Refinancing of Section 202 Properties) provides guidance on "Refinanced 202s." These are properties where the Owner has previously prepaid and/or refinanced a Section 202 Direct Loan and are "re-refinancing" the subsequent loan to place new debt on the property.

This Notice does not apply to Transfers of Physical Assets (TPAs) where the Section 202 Direct Loan remains in place at the project.

If the Section 202 prepayment involves the sale of a project, all provisions of this Notice apply, with the exception of Section VII, and Section VIII, Paragraph D. In all prepayments of Section 202 loans involving a sale of the project assisted with a Section 8 Housing Assistance Payment (HAP) contract, an Assignment of HAP Contract is required but a TPA is not required.

This Notice does not alter the underwriting requirements for FHA Multifamily Mortgage Insurance. Owners who are refinancing Section 202 Direct Loans using FHA-insured Section 223(a)(7), 207/223(f), Section 231 or Section 221(d)(4) loans should comply with the terms of this Notice related to prepayment of the Direct Loan, and should also refer to the *Multifamily Accelerated Processing (MAP) Guide*¹ and Housing Notice 2004-21 for specific underwriting instructions.

This Notice will take effect on the date of publication and will apply to all prepayment requests where HUD approval has not yet been granted.

V. Approval of Prepayment of Debt which Requires HUD Consent

This section applies to all prepayments of Section 202 Direct Loans that require HUD consent.

AHEO, as amended, states: “Upon request of the project sponsor of a project assisted with a loan under Section 202 of the Housing Act of 1959 for which the Secretary’s consent to prepayment is required, the Secretary shall approve the prepayment of any indebtedness to the Secretary relating to any remaining principal and interest under the loan as part of a prepayment plan under which the project sponsor agrees to operate the project until at least 20 years following the maturity date of the original loan under terms at least as advantageous to existing and future tenants as the terms required by the original loan agreement or any project-based rental assistance payments contract, or any successor project-based rental assistance program relating to the project.”

AHEO, as amended, indicates that Section 202 prepayment may involve refinancing of the loan if such refinancing results in a reduction in debt service related to such loan. It also authorizes HUD to approve the prepayment and refinance of Section 202 Direct Loans originally financed with interest rates of six (6) percent or less where no debt service savings are anticipated if, as part of the refinance, the project Owner will address the physical needs of the project.

All Section 202 Direct Loan prepayments that require prior approval of the Secretary must meet all the requirements listed below. In addition to the requirements listed in this section of the Notice, Section 202 Direct Loan prepayments and refinancing where debt service savings are anticipated must also comply with the requirements listed in Section VII (Refinancing Resulting in Reduction in Debt Service) of this Notice. Section 202 Direct Loan projects with original interest rates of six (6) percent or less, where no debt service savings are anticipated, must also comply with the specific requirements in Section VIII of this Notice.

¹ The MAP Guide is available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/map/maphome

Requirements for all Section 202 Direct Loan prepayments requiring HUD approval include:

- A. Use Agreement. The Owner must execute the Section 202 Use Agreement provided as Attachment 1 to this Notice that will ensure the continued operation of the project until at least 20 years following the maturity date of the original loan under terms at least as advantageous to existing and future tenants as the terms required by the original loan agreement. The Use Agreement must be executed by the Owner and HUD and recorded upon HUD approval of the prepayment transaction.
1. Attachment 1 provides a copy of the Use Agreement that will be used under this Notice.
 2. The proposed Use Agreement must be submitted with the application for prepayment.
 3. The Owner and HUD shall execute the Use Agreement after prepayment approval is granted by the Hub/PC Director and HUD Headquarters. The Owner must provide the Hub/PC with evidence of recordation at the time of prepayment.
 4. The Use Agreement must be recorded in a superior position to any financing. If the Section 202 property will be refinanced using an FHA-insured loan and Low Income Housing Tax Credits (LIHTCs), HUD may consent, on a case-by-case basis, pursuant to guidance in the MAP Guide, to the LIHTC Use Agreement being in first position. If the Section 202 Use Agreement is not in first position, the Section 202 Use Agreement must make clear that the 202 Use Agreement in second place cannot be extinguished by the extinguishment of the Use Agreement in first place.
 5. The Use Agreement runs with the land and binds all subsequent Owners and creditors until the date of expiration of the Use Agreement, and survives foreclosure.
 6. The Use Agreement must extend a minimum of 20 years beyond the original mortgage maturity date. The Use Agreement may include a longer term at the Owner's election, for example to match the terms of a LIHTC use restriction.
- B. Reporting Requirements. Pursuant to 24 CFR 5.107 and 24 CFR 5.801, starting from the date the Owner assumes financial responsibility for the Project (as determined by HUD) and ending on the last day of the fiscal year for the Owner, and for each successive year thereafter, the Owner shall, based on an examination of the books and records of the Owner, prepare a financial report for the completed reporting period in accordance with Generally Accepted Accounting Principles (GAAP), segmented by project, certified to by an authorized representative of the Owner, in such other form and substance as specified by HUD.

1. Except for those not-for-profit and public body Owners exempted from having their financial reports audited based on the amount of federal assistance received, as specified in OMB Circular A-133 or its successor, or otherwise exempted in writing, by HUD, the Owner shall:
 - a. engage a person or firm, licensed or otherwise permitted to practice public accounting by the governing political jurisdiction, to audit the Owner's financial report and to issue an audit report produced in accordance with General Accepted Auditing Standards, Government Auditing Standards, and the additional requirements appropriate for the type of ownership entity as specified in either HUD OIG Handbook 2000.04, or OMB Circular A-133, or their successors;
 - b. engage a person or firm, licensed or otherwise permitted to practice public accounting by the governing political jurisdiction, to perform an agreed-upon procedure (attestation) to compare the financial report data submitted electronically to HUD with the data contained in the Owner's audited financial report and to issue a report, in such form and substance as specified by HUD, to the Owner and HUD on the results of the procedure; and
 - c. furnish HUD, electronically via the internet, with the data contained in the owner's financial report, the audit report, and the attestation report, in such form and substance as specified by HUD within ninety (90) days after the Owner's fiscal year end; except for not-for-profit and public-body Owners, who shall have nine (9) months from the Owner's fiscal year end to complete this requirement.
2. For those Owners exempted from having to submit audited financial report data, the Owner shall furnish HUD, electronically via the internet, with the data contained in the Owner's financial report in such form and substance as specified by HUD within ninety (90) days after the Owner's fiscal year end.

At HUD's request, the Owner shall furnish, within 10 business days, monthly occupancy reports and provide documentation and answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operations, and conditions of the property and the status of the insured or HUD-held mortgage.

- C. **Renewal of HAP contract.** If there is a Section 8 project-based HAP contract in place at the property, the Hub/PC Director or designee must ensure that the Owner executes a Renewal Contract with a 20-year term. The Owner and Hub/PC Director must mutually agree to terminate the existing HAP contract and execute a 20-year Renewal Contract, which includes the "Preservation Exhibit" that is provided in Attachment 2 of this Notice. The term of the Renewal Contract must be equal to 20 years. The Preservation Exhibit must be completed to provide that upon expiration, the 20-year Renewal Contract shall automatically renew for an additional term at least equal to the number of years remaining on the existing HAP contract that is being terminated by mutual agreement of HUD and the Owner. The Owner will execute the Renewal Contract at or before the closing.

- D. Section 8 Rents. When a Section 202 Direct Loan is prepaid and the project is refinanced for the first time pursuant to the terms of this Notice, the refinanced 202 is initially exempt from debt-restructuring under MAHRA, regardless of whether the new financing is conventional or FHA-insured, so long as that particular loan is in place. When the HAP contract expires, the Owner may renew the HAP contract as an “Exception” project under Option 4 of the *Section 8 Renewal Policy Guide* (“*Renewal Guide*”).² Section 202 projects anticipating a reduction in debt service costs as a result of the prepayment may receive a Section 8 rent increase to fund operational needs other than increased debt service if the rent increase can be justified under a budget-based rent increase calculation following the process described in the *Renewal Guide*.
- E. Energy efficiency in capital repairs. In its plans for repair, rehabilitation and retrofit, as well as construction or rehabilitation of related facilities, the Owner must consider the use of “ENERGY STAR” appliances and components. If the Owner elects not to use ENERGY STAR appliances, the Owner should provide information on how the financial feasibility of “ENERGY STAR” was considered.
- F. Unit conversions. As part of the refinance, and in accordance with the policies and procedures detailed in Housing Notice 11-03, “*Conversion of Housing Units to Reduce Vacancies*,” the Owner may modernize or retrofit the project structures, common areas or individual dwelling units, including reducing the number of units by reconfiguring units that are functionally obsolete, unmarketable, or not economically viable. Where the Owner can document difficulties in renting efficiency units, it may propose conversion of efficiency units into one-bedroom units.
- G. Additions. As part of the refinance, the Owner may consider the addition or rehabilitation of related facilities. This includes new structures suitable for use as cafeterias or dining halls, community rooms or buildings, or infirmaries or other inpatient or outpatient health facilities or for other essential service facilities; and structures suitable for the above uses by rehabilitation, alteration, conversion or improvement of existing structures which are otherwise inadequate for such uses. Rehabilitation plans should be developed with consideration for the purpose of extending utility of the project for frail elderly. The Owner must carefully consider the financial feasibility of any planned additions, in particular considering the impact that increased costs of additions may have on Section 8 rental income over the life of the new loan.
- H. Accessibility for persons with disabilities. The Section 202 program can offer elderly persons with disabilities a community-based living alternative to institutionalization. The nondiscrimination and equal opportunity requirements set forth at 24 CFR 5.105(a) apply to Section 202 projects. If the addition or rehabilitation of the Section 202 project results in substantial alterations as defined by 24 CFR 8.23 of the Department’s regulations implementing Section 504 of the Rehabilitation Act of 1973, then the accessibility

² The Section 8 Renewal Policy Guide may be accessed at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/mfhsec8

requirements of Section 504 apply. Moreover, if the addition or rehabilitation results in a covered multifamily dwelling as defined at 24 CFR 100.201, then it must also meet the design and construction requirements at 24 CFR 100.205, which implement the Fair Housing Act (42 U.S.C. 3601-3619).

- I. Acceptable project ownership. In the event of a sale, prepayment or refinance, the project must be owned and maintained by the current ownership entity, or may be owned by a For-profit Limited Partnership, the sole General Partner of which is: (1) the current project Owner or another nonprofit entity; (2) for-profit corporation wholly owned and controlled by one or more non-profit entity; or (3) a limited liability company wholly owned and controlled by one or more non-profit entity. If the project is supported with a Section 8 project based rental assistance contract, where there is a sale, the sale will necessitate the Assignment of HAP Contract and HUD will review the qualifications of the new ownership in accordance with the requirements of Assignment of HAP Contracts in Chapter 13 of HUD Handbook 4350.1, *Transfer of Physical Assets*.
- J. Use of project Resources. Pursuant to AHEO, as amended, and to the extent that such funds are available, HUD may allow a project sponsor to use any Residual Receipts held for that project in excess of \$500 per unit, or any Reserve for Replacement funds in excess of \$1,000 per unit for the cost of activities designed to increase the availability or provision of supportive services, or for other purposes. Allowable purposes for Reserve for Replacement and Residual Receipts funds are those listed in HUD Handbook 4350.1, *Multifamily Project Servicing*, and any subsequent guidance regarding Residual Receipts and Reserve for Replacement funds.
- K. Tenant involvement in prepayment or refinance. All prepayments must meet tenant involvement requirements detailed in Section XI (Tenant Involvement in Prepayment and Refinancing) of this Notice.
- L. Environmental review. The prepayment transaction may require an environmental review pursuant to the requirements at 24 CFR Part 50. If the transaction involves an FHA insured loan application, the environmental review will be conducted by HUD Multifamily Development staff in accordance with the MAP Guide as part of the FHA loan processing. If the prepayment transaction does not involve an FHA insured loan, the Hub/PC may be required to perform a Part 50 environmental review if the transaction involves substantial rehabilitation or new construction.
- M. Temporary Relocation. If significant repair work or substantial rehabilitation is planned as part of the Section 202 Direct Loan prepayment, the proposal may require the temporary relocation of tenants for the period of rehabilitation. To permit rehabilitation to proceed, an owner may temporarily relocate a tenant or permanently relocate a tenant within the same building or complex. Section 202 projects are subject to the relocation requirements at 24 CFR 891.155(e). However, there may be no permanent displacement (i.e., permanent moves from the real property) of any tenant as a result of the proposed transaction.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) prescribes that relocation assistance be offered to persons that move from real property as a direct result of a federally-funded program or project involving acquisition, rehabilitation or demolition. If a person is permanently displaced in connection with a unit conversion (see paragraph F), the relocation requirements and tenant notifications required under the URA are more specific and extensive than those is required in this Notice or in 24 CFR Part 245. Please see the URA regulations at 49 CFR Part 24.

In the event that the conversion will involve the temporary relocation of tenants, a relocation plan must be submitted that identifies the affected units and tenants, estimates the relocation costs and provides a timetable for the relocation. The Owner must also indicate what steps will be taken to minimize the temporary relocation of the tenants. The Multifamily Hub/PC staff will coordinate with the Hub Tenant Relocation Specialist. If necessary, the Tenant Relocation Specialist must review and approve any relocation plans.

NOTE: Temporary relocation should not extend beyond one year before the person is returned to his or her previous unit or location. Should a residential tenant be temporarily relocated for a period beyond one year, the Owner must contact the person and offer all permanent relocation assistance in accordance with the URA. This assistance would be in addition to any assistance the person has already received for temporary relocation, and may not be reduced by the amount of any temporary relocation assistance.

For tenants that must relocate temporarily, the owner must provide:

1. Reimbursement for all actual reasonable expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied housing and any increase in monthly rent or utility costs.
2. Appropriate advisory services, including reasonable advance written notice of:
 - (a) The date and approximate duration of the temporary relocation;
 - (b) The suitable, decent, safe, and sanitary housing to be made available for the temporary period;
 - (c) The terms and conditions under which the tenant may lease and occupy a suitable, decent, safe, and sanitary dwelling in the building/complex following completion of the repairs; and
 - (d) The right to the financial assistance described in paragraph 1 above.
3. All other conditions of the temporary relocation that the tenant undergoes must be reasonable.
4. Permanent move within building/complex. A tenant who is required to move to another unit in the same building/complex must be offered reimbursement for all

out-of-pocket expenses incurred in connection with the move. All other conditions of the relocation that the tenant undergoes must be reasonable. Relocating an elderly person with a disability requires locating a unit that is appropriate to their physical needs. A temporary relocation must be to an accessible unit that provides equal or greater accessibility as the current unit.

5. A relocated tenant will be given the first right of refusal to the rehabilitated unit. Further, the notification to tenants should be provided in appropriate formats as necessary to meet the needs of all including persons with limited English proficiency and formats for persons who are visually or hearing impaired.

VI. Prepayments which do Not Require HUD Approval

This section applies to those Section 202 Direct Loans that do not require HUD consent for prepayment. Section 202 projects with original financing dates of approximately 1977 to 1982 may have a mortgage note that permits the prepayment with only a 30-day notice to HUD. No Use Agreement is required for such prepayments. An Owner may prepay the Direct Loan by submitting a 30 day notice to the Hub/PC, and notifying the project residents as described in Section XI (Tenant Involvement in Prepayment and Refinancing) of this Notice. The Hub Director will process the prepayment proposal and forward the prepayment information to HUD Headquarters' Office of Asset Management. The Office of Asset Management will provide the Hub Director written approval to confirm the prepayment.

Typically, if the Section 202 Direct Loan does not require HUD consent for prepayment, the mortgage note, Form FHA-3432-EH (6/76) contains language similar to the following:

“Privilege is reserved to pay the debt in whole or an amount equal to one or more monthly payments on principal next due, on the first day of any month prior to maturity, upon at least thirty (30) days prior written notice to the Payee.”

If the Owner of such a project prepays the Section 202 Direct Loan and voluntarily agrees to the requirements listed in Section V of this Notice (including the recordation of the Section 202 Use Agreement), the project will be initially exempted from Mark-to-Market restructurings during the term of the financing used to prepay the Section 202 loan. The Owner may renew the HAP contract under Option 4 of the Renewal Guide.³ To qualify for the Mark-to-Market exemption, the Owner must meet all requirements listed in Section V and Section VII of this Notice. Please note: if the Owner does not opt to follow the requirements listed in Section V and VII of this Notice, the project will not be exempt from Mark-to-Mark restructuring upon expiration of the Section 8 HAP contract, unless the Owner refinances the Section 202 Direct Loan conventionally.

VII. Refinancing Resulting in Reduction in Debt Service

This Section applies to Section 202 Direct Loan prepayments where the Owner is refinancing a

³ This exemption was authorized under Section 612(h) of the Departments of Labor, Health and Human Service and Education Appropriations Act ending September 30, 2002.

Section 202 Direct Loan for the purpose of replacing the Direct Loan with a new loan that has a lower interest rate and results in a reduced debt service payment for the project. This Section does not apply to transactions involving the sale of a Section 202 project. Refinances to reduce debt service must meet all of the following requirements:

A. Reduction in debt service.

The Owner must demonstrate that the prepayment and refinance will result in a reduction in debt service payments. The prepayment application must include a detailed Sources and Uses document and a summary financial analysis that demonstrates that the new loan will have a lower debt service payment than the original Section 202 Direct Loan. The reduction in debt service must be quantified (i.e., must be expressed as a specific dollar amount of savings) but there is no minimum amount of savings required. Debt service savings are not required to be escrowed.

B. Approved use of proceeds from the refinance.

Pursuant to AHEO, the Owner must describe how proceeds from the new loan “will be used in a manner advantageous to tenants of the Section 202 Direct Loan project being refinanced, or used in the provision of affordable rental housing and related social services for elderly persons that are tenants of the project or are tenants of other HUD-assisted senior housing [owned] by the private nonprofit organization project owner, private nonprofit organization project sponsor, or private nonprofit organization project developer.”

The Owner must provide a narrative description of the proposed use of loan proceeds, including specific dollar amounts to be used for specific purposes, and the timing of the proposed use of proceeds. The proposal must meet the requirements listed below.

Loan proceeds in excess of those required to pay off the Section 202 Direct Loan or other HUD approved subordinate debt, including Residual Receipts notes paid at closing, must be placed in a segregated account at the closing of the refinance transaction.⁴ All segregated proceeds from the refinance intended for rehabilitation, retrofits, or construction at the Section 202 project or approved HUD-assisted senior housing (as described in paragraph 6, below) must be expended within five (5) years of the closing of the refinance. If the funds are not expended during this time frame, the Owner must submit a written justification of good cause to HUD, and may reprogram the funds for other approved uses. HUD must approve all proposed uses of proceeds in advance. Approval of a prepayment application will constitute approval of the proposed use of proceeds. HUD will monitor the expenditures of the loan proceeds through review of required audited Annual Financial

⁴ Please note: if the Section 202 Direct Loan is being refinanced using FHA mortgage insurance, the proceeds from the new loan will be underwritten in accordance with FHA guidance including the MAP Guide and Notice 04-21; any escrowed funds, for example as a repair escrow or completion assurance, will be escrowed and released in accordance with the MAP Guide. Any excess proceeds beyond such FHA required escrows and costs paid at closing will be placed in a segregated account in accordance with this Notice.

Statements detailing the amount and use of funds in the segregated account, as described below. Any material change in proposed use of proceeds after the loan closing will require HUD approval, as described in the required Section 202 Use Agreement. Funds must be used in accordance with AHEO and the guidance below.

Allowable uses of loan proceeds include:

1. Provision of social services. Proceeds from the refinance may be used for not more than 15 percent of the cost of increasing the availability or provision of supportive services to elderly tenants of the project being refinanced, which may include the financing of service coordinators and congregate services.

Pursuant to the 2010 Act, HUD may waive the 15 percent limitation as necessary to better enable seniors to age in place. The Hub/PC Director should carefully review the Owner's proposal for provision of supportive services and determine if a waiver is warranted. If a waiver is sought, the waiver request should accompany the prepayment package submitted by the Hub/PC to HUD Headquarters. The waiver request must detail the funds requested for supportive services and justify the need for these funds to aid existing tenants of the project to age in place.

2. Rehabilitation, modernization or retrofitting of structures, common areas, or individual dwelling units, including reducing the number of units by reconfiguring units that are functionally obsolete, unmarketable, or not economically viable. Allowable reductions in units are those defined in Housing Notice 11-03.
 - a. Where debt service savings are anticipated, the repair work does not need to meet the threshold of substantial rehabilitation as defined in the HUD MAP Guide. A third-party Project Capital Needs Assessment (PCNA) is not required. However, the prepayment application must provide a narrative and spreadsheet providing detail on specific repair plans and costs. (Where debt service savings are not anticipated from the refinance, the repair work must involve substantial rehabilitation, as discussed in Section VIII, below.)
 - b. As authorized by AHEO, Owners may reconfigure units to reduce vacancies. Such unit conversions must meet the criteria described in Housing Notice 11-03.
3. Construction of an addition or other facility in or adjacent to the project, including assisted living facilities. With HUD approval, the Owner may use proceeds to construct facilities for the elderly located in the community where the project sponsor refinances a project, or where the sponsor pools shared resources from more than one such project. Such projects must be located in the same geographical region as the Section 202 project (i.e. Metropolitan

Statistical Area), and must be owned by the private nonprofit organization project owner, private nonprofit organization project sponsor, or private nonprofit organization project developer that owns the Section 202 project. Approval of such construction or additions is subject to the terms of the proposed financing for the Section 202 project being refinanced.

4. Payment to the project owner, sponsor or third party developer of a Developer's Fee in an amount not to exceed or duplicate:
 - a. In the case of a project refinanced through the Low Income Housing Tax Credit (LIHTC) program, the fee permitted by the LIHTC program as a percentage of acceptable development cost. The Owner's prepayment application should include evidence of the fee permitted by the program in that State.
 - b. In the case of a project refinanced through any other source of refinancing, up to 15 percent of the acceptable development cost. Acceptable development cost includes the cost of acquisition, rehabilitation, loan prepayment, initial reserve deposits, and transaction costs, as defined below. Transaction costs may include costs of third party reports such as market studies or physical inspection reports not otherwise captured in the development costs, and loan fees and closing costs.
5. Proceeds may be used to cover the payment of transaction costs related to LIHTCs or other secondary financing, provided that these funding sources are contributing to the provision of housing or social services for elderly residents of the project or other HUD-assisted elderly projects. Transaction costs may include costs of third party reports such as market studies or physical inspection reports of the project, repayment of predevelopment loans specific to the project, and payment of loan fees and closing costs.
6. Use of proceeds in other HUD-assisted senior housing properties. AHEO, as amended, enables the Owner to utilize loan proceeds from the refinance for the provision of affordable rental housing and related social services for elderly persons that are tenants of the Section 202 project being refinanced, *or for tenants of other HUD-assisted senior housing*. If the Owner is proposing to use proceeds for the benefit of tenants of other HUD-assisted senior housing, the prepayment application must clearly outline the proposed use of funds. Projects eligible to receive proceeds include those described in paragraph f, below. The following requirements apply:
 - a. The Owner's prepayment application must specify the project(s) that will receive the proceeds from the refinance.
 - b. The project(s) must be designated as senior housing and serve only residents where the head of household is aged 62 and above. The

designation as senior housing, and occupancy by residents aged 62 and above, must have been in place prior to the Section 202 Direct Loan prepayment.

- c. The project(s) must have an active program in place to provide social services for elderly residents. The program must have been operational prior to the Section 202 Direct Loan prepayment.
- d. At the time of the application for the Section 202 Direct Loan prepayment, the level of affordability of the project(s) receiving proceeds from the refinance must be at least as affordable as the Section 202 Direct Loan project being refinanced. For example, if the Section 202 Direct Loan project is restricted to households at or below 80% of AMI, the project to receive the proceeds must be restricted to households at or below 80% of AMI, or any income band below 80% of AMI. In no event may the affordability restriction be above the low or moderate income level currently served by the Section 202 Direct Loan being refinanced.
- e. All Section 202 Direct Loan and Section 202 Capital Advance properties are eligible to receive proceeds from the refinance. Section 202 Capital Advance projects under development are eligible if a HUD Fund Reservation for the project has been issued prior to submission of the prepayment application.
- f. Eligible properties may also include affordable senior projects that receive other HUD assistance in the form of project-based rental assistance, HUD Direct Loan, FHA mortgage insurance or a HUD Capital Advance.
- g. All project(s) to receive proceeds from the refinance must have or put in place a Use or Regulatory Agreement requiring operation of the project as affordable senior housing for a term at least 10 years beyond the date of closing of the Section 202 refinance, or the date of termination of the existing Use or Regulatory Agreement, whichever is later. A period of at least 10 years will be added to the receiving project's Use Agreement at the time of the Section 202 Direct Loan prepayment. For all projects except new 202 Capital Advance projects under development, a copy of the Use or Regulatory agreement for the project receiving the proceeds must be submitted with the prepayment request. An Owner may meet this requirement by extending an existing Use or Regulatory agreement for a further term, or executing a new Use or Regulatory Agreement at or before closing of the refinance.
- h. The other HUD-assisted senior housing project receiving the proceeds from the refinance must be owned by the Section 202 Direct Loan project owner, or must be an affiliate or instrumentality of the Section 202 Direct Loan project Owner or otherwise be under financial or legal control of the

Section 202 Direct Loan project. This may include a project for which the Owner is the General Partner of a for-profit Limited Partnership for LIHTC purposes.

7. Rent reduction of unassisted tenants residing in the Section 202 Direct Loan project being refinanced. Unassisted residents may not face an increase in rents as a result of the prepayment and refinance. The proceeds from the new loan may be used to maintain affordable rents to households residing in units that are not supported by a project-based rental assistance contract. The prepayment application must detail how the loan proceeds will be used to maintain affordable rents for unassisted residents for the duration of the required Use Agreement. Please note that in certain Section 202 projects financed prior to 1975 with a Direct Loan interest rate of six (6) percent or below, HUD may provide rental assistance to prevent displacement of unassisted elderly residents. Please refer to Section VIII of this Notice for more information on these projects.

C. Monitoring of proceeds from the refinance.

1. HUD must approve use of the proceeds from the refinance. The prepayment approval will constitute approval of the proposed use of proceeds.
2. Any proceeds to be used for construction, rehabilitation, retrofits, additions or unit conversions must be expended within five years of the prepayment of the Section 202 Direct Loan. If these funds are not expended within five years for these proposed activities, the Owner must submit to the Hub/PC Director, 30 calendar days prior to the end of the five year period, good cause justification for the delay and a specific timeline for utilization of the funds. Failure to expend those funds designated for construction, rehabilitation, retrofits or unit conversion within five years with good cause will result in administrative action against the project owner by HUD.
3. As required in the Section 202 Use Agreement, proceeds from the refinance that exceed costs to be paid at closing, including paying off the Section 202 Direct loan and other HUD-approved subordinate debt such as Residual Receipts notes, must be deposited into a segregated account and included in the Annual Financial Statements for the project.
4. The required Section 202 Use Agreement will include requirements with respect to utilization and reporting on proceeds from the refinance. Until the proceeds from the refinance are fully expended, they will be documented in the project's audited Annual Financial Statements for HUD review and approval.
5. If the Owner is not in compliance with AHEO, HUD reserves the right to take necessary steps to ensure compliance with the law, which may include referral

to the Departmental Enforcement Center or other actions.

- D. Section 8 rent increase. Section 202 projects anticipating a reduction in debt service costs may receive a Section 8 rent increase to fund operational needs other than increased debt service if the rent increase can be justified under a budget-based rent increase calculation following the process described in the Section 8 Renewal Guide.

VIII. Refinancing to Address the Physical Needs of the Project

This Section applies to the prepayment of Section 202 projects originally financed between 1959 and 1974 with Direct Loans carrying interest rates of six (6) percent or less. Many of these properties are in need of significant capital repairs and Owners may request a prepayment in order to obtain new financing to address the physical needs of the project. Even in a time of historically low interest rates, it is unlikely that the refinancing would result in a lower interest rate or a reduction in debt service for these projects. Therefore, an increase in debt service is an expected result from the refinance.

HUD may approve a prepayment and refinancing of a Section 202 project that results in increased debt service. However, HUD will only approve a transaction with increased debt service if the Section 202 Direct Loan carries an interest rate of (6) six percent or lower. The refinance must address the physical needs of the project and must meet these requirements:

- A. Rents. The proposed transaction may not result in higher rents for the unassisted residents. If the transaction is not feasible without rent increases, HUD may provide rental assistance, subject to the availability of appropriations, to those impacted tenants that would otherwise be at risk of rent increase or displacement. HUD will issue guidance on the provision of Senior Preservation Rental Assistance as such assistance is made available to protect elderly residents from displacement in such transactions. In certain cases, as described in Housing Notice 2012-03, *Guidance on Eligibility for Tenant Protection Vouchers Following Certain Housing Conversion Actions*, and in conjunction with an approved Section 202 Direct Loan prepayment, unassisted elderly residents in these Section 202 projects may be eligible to receive Tenant Protection Vouchers.
- B. Section 8 rent increases. The refinance to complete repairs may involve an increase in Section 8 rents if such increase is necessary to support the refinance transaction. The overall cost of providing Section 8 rental assistance for the project may not increase, except that HUD may approve mark-up-to-market or mark-up-to budget rent increases. Owners requesting rent increases should follow the process detailed in the Capital Repair program in Chapter 15 of the Renewal Guide.
- C. Physical needs of the project. When no debt service savings are anticipated, the amount of capital repairs must include substantial rehabilitation as defined by the MAP Guide. Otherwise, the transaction could have the effect of merely trading lower interest debt to higher interest debt. This may include conversion of efficiency units to reduce vacancies

under the guidelines in Housing Notice 11-03. The Owner must demonstrate the substantial rehabilitation threshold is met through one of the criteria below:

1. The Owner submits a Project Capital Needs Assessment (PCNA)⁵ to assess the repair and rehabilitation needs of the property, and a repair plan that demonstrates the needs identified in the PCNA will be met;

or

2. The Owner may submit architectural plans and specifications for the proposed substantial rehabilitation transaction (plans and specifications may have been prepared for another use, such as a loan or LIHTC application).

The submission must include a time schedule for proposed repairs, and a description of the sources of funding to meet the physical needs of the project over the term of the new Use Agreement, HAP Contract or SPRAC, whichever is longer. Any significant repair needs (accessibility repairs, major building systems or life safety items) must be addressed through a capital repair effort to be initiated upon closing of the transaction.

If the project receives federal financial assistance, including, but not limited to, project-based Section 8 housing assistance (for a definition see 24 CFR 8.3), then the Owner must include in the PCNA its plan for any alterations to dwelling units or common areas necessary for compliance with HUD's Section 504 regulation at 24 CFR Part 8. The Owner is advised that an independent accessibility assessment may be required; the repairs identified in such an assessment must be integrated into the overall capital repair plan.

- D. Use of proceeds. For prepayment and refinancing requests (not including sales transactions) where no debt service savings are anticipated, any proceeds from the refinance in excess of the cost to pay off the existing 202 Direct Loan must be approved for uses in accordance with Section VII (Refinancing Resulting in Reduction in Debt Service) of this Notice. However, where no debt service savings are anticipated as a result of the refinance, proceeds from the refinance must be used first to make the necessary repairs to the project, and then to maintain affordable rents for unassisted residents, before funds may be approved for any other uses described in Section VII. Any remaining proceeds may be placed in escrow at closing for other approved uses as described in Section VII.

For the purposes of FHA mortgage insurance, reasonable and necessary relocation costs may be included in the calculation of mortgageable costs.

IX. Re-Refinancing of Section 202 Properties

Many properties that have prepaid the original Section 202 Direct Loan may now have new debt

⁵ Refer to the MAP Guide for detailed discussion of PCNA report content.

on the property, in the form of either a conventional or an FHA-insured loan. An Owner may wish to “re-refinance” these former 202 projects (obtain a new loan) to take advantage of lower interest rates and/or to complete repairs. Such prepayments do not require HUD approval from the Office of Asset Management under the same process required for projects that require HUD approval for prepayment, but the prepayment may require approval from the lender on the project. Following the re-refinance, the former 202 project must continue to operate under the terms and conditions of the recorded Section 202 Use Agreement.

If the Owner is re-financing with conventional (non-FHA) financing, the project retains eligibility to renew under Option 4 of the Renewal Guide (“Renewal of Project Exempted from OAHF”) at the next expiration date of the HAP contract. This eligibility for Option 4 is regardless of whether the project originally refinanced the 202 Direct Loan using FHA insured financing, or conventional financing. However, if the Owner re-refinances with an FHA insured loan rather than a conventional loan, the project will no longer be exempt from Mark-to-Market restructuring and will lose the ability to renew under Option 4 when the HAP contract expires. Some prepaid/refinanced properties have already re-refinanced using FHA insured loans. At the time of the HAP contract expiration, these projects are ineligible for Option 4 HAP renewals; if the Section 8 rents are above market, the Owner will be referred to Mark-to-Market restructuring unless the Owner refinances again with a conventional loan prior to contract expiration.

X. Structure of the Transaction and Additional Considerations

There is no requirement that a refinancing plan for a Section 202 Direct Loan include FHA mortgage insurance. Direct Loans may be refinanced using any third party source, including financing by State or local housing finance agencies, use of tax-exempt bonds, LIHTCs, multifamily mortgage insurance under the National Housing Act, reinsurance, or other credit enhancements, including risk-sharing as provided under Section 542 of the Housing and Community Development Act of 1992. No matter what structure, additional considerations or waivers may be required. Owners may need to request the following waivers:

- A. Waiver of payment of flexible subsidy debt. The Owner may request a waiver of payment of Flexible Subsidy debt as part of the transaction. AHEO, as amended, requires HUD to waive the requirement that debt for a project pursuant to the flexible subsidy program be prepaid in conjunction with a prepayment, refinancing or transfer if the financial transaction or refinancing cannot be completed without the waiver. Requests for waivers of payment of Flexible Subsidy debt should follow the policies and procedures detailed in Housing Notice 12-04, “Guidelines for Deferral of Flexible Subsidy Debt.”
- B. Subordination and/or assumption of Section 202 debt. HUD may approve the subordination of Section 202 Direct Loan debt to facilitate a transaction to preserve the affordability of a Section 202 project. In lieu of prepayment of a Section 202 Direct Loan, HUD may approve, in conjunction with the new financing for the project, the subordination of the loan for the project under Section 202 of the Housing Act of 1959, as amended, and the continued subordination of any other existing subordinate debt previously approved by the Secretary to facilitate preservation of the project as affordable housing; or the assumption of

the loan under such Section 202 in connection with the transfer of the project with such loan to a private Nonprofit organization.

Requests for subordination or assumption of Section 202 loans should follow the policies and procedures detailed in Housing Notice 10-26, "Subordination of Section 202 Debt." The existing Section 202 loan may also be assumed by a new owner in connection with the transfer of a project to a new Owner, as defined pursuant to the Housing Act of 1959, as amended. Notice 10-26 will also govern the assumption process.

- C. FHA mortgage insurance. Many projects may be refinanced using FHA financing. Those underwriting considerations not specifically addressed in this Notice are detailed in Housing Notice 04-21, in the Multifamily Accelerated Processing (MAP) Guide and in other guidance provided by the Office of Multifamily Housing in the form of recent Mortgagee Letters.
- D. Rent Supplement contract. If a Section 202 project has a Rent Supplement Contract, the contract would normally terminate upon prepayment of the Direct Loan. If a Section 202 project prepays and refinances under the terms of this Notice, then the Rent Supplement Contract may continue to the original maturity date of the Section 202 Direct Loan or the expiration date of the Rent Supplement Contract, whichever is earlier. To continue the Rent Supplement Contract after the repayment of the Section 202 Direct Loan, the Owner must request a waiver of 24 CFR 215.35. Only HUD Headquarters may grant this waiver.
- E. Subsidy layering review. If the prepayment proposal contemplates the use of more than one government subsidy as a source of funds (i.e., Section 8 assistance, Rent Supplement, LIHTCs, HOME or CDBG funds, and/or other state or local government funds), the proposal must include a Subsidy Layering review.
 - 1. In all prepayment cases where the Section 202 project receives HUD Housing assistance, such as a HAP contract, and receives or is expected to receive other federal governmental assistance, such as HOME or CDBG, a Subsidy Layering Review, including either a Section 102(d) certification by HUD staff or a Section 911 certification by a Housing Credit Agency, is required.
 - 2. Where the other housing assistance includes LIHTCs, the tax credit allocating agency performs the Subsidy Layering Review.
 - 3. If the prepayment proposal does not contemplate financing through FHA mortgage insurance or HFA or GSE risk-sharing, the Subsidy Layering Review must be completed by the appropriate reviewing body prior to approval of the prepayment.
 - 4. If the prepayment proposal contemplates risk-sharing, the subsidy layering review must be performed in conjunction with the processing/approval of the risk-sharing package.

XI. Tenant Involvement in Prepayment and Refinancing

HUD will not accept a prepayment request for any project under Section 202 of the Housing Act of 1959 unless the Secretary has determined that the Owner of the project has notified the tenants of the Owner's request for approval of a prepayment; and has determined that the Owner of the project has provided the tenants with an opportunity to comment on the Owner's request for approval of a prepayment, including the description of any anticipated rehabilitation or other use of proceeds from the transaction, and its impacts on project rents, tenant contributions, or the affordability restrictions for the project and that the owner has responded to such comments in writing.

- A. Pursuant to 24 CFR Part 245, at least 30 days before submitting a prepayment request to HUD, the Owner must notify the tenants in writing of its intention to prepay. The notice should include the address and phone of the local HUD office, including the specific division and/or name and phone number of a contact at the local HUD office. If HUD's permission to prepay is required, the notice must also address how the prepayment is advantageous to the tenants. Further, the notification to tenants should be provided in appropriate formats as necessary to meet the needs of all including persons with limited English proficiency and formats for persons who are visually or hearing impaired.
- B. The notice must be delivered directly to each unit in the project or mailed to each tenant and posted in at least 3 places/common areas throughout the project, including the project office.

Note: In a project greater than 4 stories, the notice may be served either by delivery to each unit or by posting. If the posting method is used, the notice must be posted in at least three conspicuous places within each building in which the affected dwelling units are located.

- 1. The tenants (including any legal or other representatives acting for the tenants individually or as a group) have the right to inspect and copy the materials that the Owner is required to submit to HUD for a period of 30 days from the date on which the notice is served to the tenants. Any tenant comments must be available in the project office during normal business hours for public reading and copying.
 - 2. The tenants have the right, during this period, to submit written comments on the proposed prepayment to the Owner and the local HUD office. Tenant representatives may assist tenants in preparing these comments.
- B. Upon completion of the tenant comment period, the Owner must review the comments submitted by the tenants and their representatives and prepare a written evaluation of the comments. Any negative comments must be addressed in the request for prepayment. The Owner must then submit the following materials to the local HUD office:

1. A copy of the Owner's Notification to the tenants;
2. Copies of all the tenant comments;
3. The Owner's evaluation of the tenant comments; and
3. A certification by the Owner that it has complied with all of the requirements of 24 CFR 245.410, 245.415, 245.416 through 245.419, as applicable, and 245.420.

XII. Process to Request Prepayment Approval

- A. Consultation with HUD staff. An Owner considering prepayment should consult with its Housing Project Manager in the appropriate Hub/PC before submitting the prepayment request. This meeting should address the following topics:
1. Whether or not the Section 202 Direct Loan can be prepaid without HUD approval.
 2. Tenant notification requirements.
 3. The terms and conditions of the Use Agreement, if applicable.
 4. Section 8 Contract issues resulting from prepayment, including contract renewal requirements and rent increase requests.
 5. Whether the unassisted tenants of the project may be eligible to receive Tenant Protection Vouchers or Senior Preservation Rental Assistance following the prepayment (pre-1975 projects only).
 6. Benefits to the tenants of the prepayment.
 7. Requests for waiver of prepayment of Flexible Subsidy debt, if applicable.
 8. Requests for waiver of termination of Rent Supplement contract, or provision of vouchers to Rent Supplement contract units, if applicable.
 9. Disposition of Replacement Reserves and Residual Receipts, if applicable.
 10. Proposed use of proceeds from the transaction, including any proposal to use the proceeds for the provision of housing and supportive services in another HUD-assisted project.
 11. The type of refinancing and other subsidies in the transaction, including Low Income Housing Tax Credits and other sources.

B. Owner submission requirements:

1. A written request to the appropriate Hub/PC
<http://portal.hud.gov/huddoc/9808.doc>;
2. A copy of:
 - a. The mortgage and mortgage note;
 - b. Original Housing Assistance Payment Contract/Rent Supplement Contract;
 - c. Regulatory Agreement;
 - d. Owner's Notification to the tenants;
 - e. All tenant comments and the Owner's written evaluation of the comments;
 - f. Any other use agreements/restrictions, subordinate loans that may be in place.
3. Details of the proposed repairs/rehabilitation of the project (including a PCNA or plans and specifications, for pre-1975 projects only).
4. List of households currently residing in Section 8 or Rent Supplement assisted units, if any.
5. List of any commercial renters/leases, vendors that may be in place.
6. If applicable, statement regarding application for FHA mortgage insurance or Risk Sharing Program.
7. Additional documents.
 - a. A detailed narrative explaining why the proposal is advantageous to the tenants.
 - b. A detailed narrative justifying the future use of the rental assistance being provided to the project.
 - c. A description of the proposed use of the proceeds from the refinance, including a Sources and Uses statement.
 - d. Draft copy of the Use Agreement to be recorded at the time of prepayment.

- e. Required waiver requests, i.e. Flexible Subsidy loan payment waiver.

XIII. HUD Processing

- A. Prepayment request processing. Multifamily Hubs must assess a Section 202 prepayment request within 30 days of receipt of the complete package (or within appropriate timeframes if the transaction involves FHA mortgage insurance) using the following steps:
 1. Review the prepayment submission using this Notice as a guide.
 2. Coordinate application processing with the appropriate Multifamily field office Development staff, if the project is applying to refinance with FHA mortgage insurance.
 3. Verify that all tenant notification procedures have been followed.
 4. Review any comments received from the tenants and determine if the Owner has made acceptable response.
 5. Review the proposed repairs. For those pre-1975 projects not anticipating debt service savings, verify that the repair work rises to the level of substantial rehabilitation.
 6. Determine if the Owner is adequately planning to protect unassisted tenants from rent increases as a result of the transaction.
 7. Check HUD records to see if there is an outstanding Flexible Subsidy loan or HELP Loan, and/or Use Agreement(s), or other financing. If the Owner is requesting a waiver of payment of the Flexible Subsidy loan, review the request to determine if it meets the requirements of Housing Notice 11-05.
 8. If the Hub/PC believes the prepayment merits approval, it should prepare a memorandum for the HUD Headquarters Office of Asset Management providing an analysis of the prepayment application and presenting a recommendation it be approved. This submission should include all items listed in Section X (Structure of the Transaction, Additional Considerations) of this Notice.
- B. The Headquarters Office of Asset Management will review the Hub/PC office submission and approve or reject the prepayment request based on the requirements of this Notice. The following steps are required after approval is granted:
 1. The field office must submit a copy of the recorded Use Agreement to the Headquarters Office of Asset Management.

2. The field office must update iREMS to record the date of the prepayment approval, the status of the Section 202 Direct Loan, and the term and expiration date of the Use Agreement.

C. Final Processing. The Hub/PC contacts the Ft. Worth Accounting Center to determine the correct payoff amounts for the Direct Loan and (if applicable) the Flexible Subsidy/Help Loan(s). The Hub/PC notifies the Owner of:

3. The Department's approval of the prepayment request. The approval letter shall reference the final prepayment proposal that was agreed to by HUD and the project Owner.
4. The payoff date and amount for the Section 202 Direct Loan and, if applicable, the Flexible Subsidy or HELP Loan(s).
5. Request evidence for the recordation of the Use Agreement.

XIV. Additional Information

No provision of this Notice may be waived by any Hub/PC Director. The Office of Multifamily Housing Programs in HUD Headquarters may grant waivers of this Notice, for good cause. Be advised that individual project level actions are subject to the various environmental regulatory requirements of 24 CFR 50, 51, and 55. Additionally, proposal submitted must meet the environmental requirements detailed in the MAP Guide, Chapter 9.

For further information or questions, HUD Hub/PC staff should call their Headquarters Desk Officer in the Office of Asset Management. Owners should contact the Housing Project Manager in the Hub/PC responsible for their project.

Carol J. Galante
Acting Assistant Secretary for Housing –
Federal Housing Commissioner

Attachments

- 1 - [User Agreement](#)
- 2 - [Preservation Exhibit](#)

The information collection requirements contained in this document are pending approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB control number 2502-0554. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.