



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 Program Center Directors
All Operations Officers
All Directors of Project Management
All Housing Project Managers
ALL Housing Project Owners

Notice H 2014-10

Issued: August 20, 2014

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revoked, or superseded

Cross References

Handbooks 4571.2,
4571.3 REV-1, 4571.4 and
4571.5

Notice H2011-18

Notice H96-102

FR Notice 5167-F-02

SUBJECT: Update to Housing Notice 2011-18, Processing Guidance for the Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs

This Notice updates the revised procedures published in Notice 2011-18 pertaining to underwriting and construction administration guidance for Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities Programs. The updates include corrections and clarifications in language to certain sections and corrections based upon regulatory changes to 24 CFR Part 891.

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.

Summary of Changes:

- Organizational Expenses-Conflicting language removed on financial consultants as an eligible use of funds. A financial consultant is an eligible use of capital advance

funds only when used for traditional(non-tax credit)project activities.

- Housing Consultant-Final payment to the housing consultant has been changed to be due at final closing and not one year after final closing.
- The cash requirement of a Contingency Reserve has been omitted and replaced with a construction contingency line item in the Developer's Fee as previously allowed.
- A holdback of excess capital advance proceeds is removed as an allowed assurance of completion for offsite improvements.
- The correct definition of flood insurance coverage for capital advances is added to Form HUD 90164-CA.
- Cost Certification-For projects exempt from submitting cost certification, input the final completion date into DAP as the cost certification date. Exempt projects are allowed to include expenses incurred up to 60 days beyond this date as project costs.
- Owner/Architect Agreement- HUD amendment to AIA form B-108 is available as form HUD-92408-M.
Davis-Bacon wage determinations requested from the DOL are effective for 180 days from date of the determination when there is no published determination applicable.
- Joint Venture-Deleted language requiring a waiver of prohibited relationships between development team members. It no longer applies to mixed finance projects.
- Excess Amenities- The use of floating units are optional when there are unassisted units in the project.
- Health Care Facilities- Mixed-financed Section 202 projects may have certain health care facilities.
- Bedroom Types- Bedroom types are now specified in 24 CFR 891.210(b).
- Use Agreement- Further guidance has been added for mixed finance projects. The Capital Advance Mortgage term should match the Use Agreement term. The Use Agreement is to be recorded before all mortgage instruments even when the Capital Advance is not in first lien position.
- Underwriting Instructions-Deleted language indicating that the contractor and architect cannot have an identity of interest with the owner or other team members
- Tax Credit Issues- Added further guidance for mixed finance projects. When the sponsor loans the capital advance to the project, the loan documents are to assign the collateral to HUD.

- Project Operating Budget- Corrected typo by adding a percentage sign. Projects with 100[%] PRAC units may include a vacancy loss rate.
- First Lien Position- Added further guidance for mixed finance projects. When HUD is not in first lien position, agreements in the superior position cannot contain provisions that conflict with HUD requirements. Recording the Use Agreement first will protect HUD from certain conflicts; however, documents used in the transaction should be reviewed thoroughly for conflicting language and brought to the attention of the project owner's counsel.
- Use Agreements- When the sponsor is loaning capital advance funds to the project, language referencing forgivable loans is deleted as they do not meet the tax credit test for a loan.
- CAUC Duration- Updated information to allow for the fund reservation to be extended beyond 36 months with a waiver from headquarters. Initial closing must occur to complete the term of the reservation.

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PART A - GENERAL ISSUES

I. DEVELOPER'S FEE.

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

A. The developer's fee.

1. For traditional Section 202/811 projects the maximum developer's fee will be the greater of \$40,000 or 10 percent of the estimated total for all improvements, total carrying charges and the total legal, organizational and audit fees. In this case the developer's fee may be paid from the capital advance. To compute the Developer's Fee, use the following formula.

Note: The old maximum nonprofit developer's fee of \$400,000 (plus 2 percent of any replacement cost amount over \$5,000,000) found in Notice H96-102 no longer applies.

Total for All Improvements - Line G50 from the HUD 92264	\$2,550,000
Total Carrying Charges - Line G63 from the HUD 92264	\$7,000
Total Legal, Organizational & Audit Fees - Line G67 from the HUD 92264	\$15,000
Subtotal	\$2,572,000
Multiply the Subtotal by	10%
Result equals Developer's Fee - Record the results on Line G68, Builder and Sponsor Profit and Risk	\$257,200

2. For mixed-finance Section 202/811 projects, discussed in Part B, there is no 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 developer's fee **may be** pledged or deferred to meet the estimated financial requirements to close. For example, the developer's fee can be used to cover the working capital escrow and the minimum capital investment/operating reserve.

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

Up to 50 percent of the annual residual receipts generated by the assisted units may be used to repay the deferred developer's fee residual receipts note.

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.
(24 CFR §891.815(c))

Owners seeking to use residual receipts must request a waiver of the regulations.

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/unpledged developer's fee funds during the construction phase of the project. It may be used for any project related expense. At final closing any unused funds will be released to either the Owner or, if applicable, the developer. The money belongs to the Owner or developer, and is expended at their discretion.

- E. A separate construction contingency for new construction and a housing consultant's fee are **not permitted**, as these activities are part of the developer's duties. However, both a housing consultant's fee and a new construction contingency for necessary change orders are allowable uses of the developer's fee. For mixed-finance transactions see Part B, Section E.3.

II. ORGANIZATIONAL EXPENSES.

- A. The Hub/Program Center will use the organizational line item in Section G, Replacement Cost, of Form HUD-92264 to reflect the Owner's third party technical costs:

- Environmental studies.
NOTE: These are environmental studies discussed in the NOFA.
- The Appraiser.
- Market Analyst.
- The Cost Analyst.
- Needs Assessor.
- Financial Consultant used in non-tax credit transaction.

- B. In a mixed-finance transaction organizational expenses must be pro-rated between the assisted units and, if applicable, unassisted units. 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, the developer's fee, the cost to construct any excess amenities and the cost to maintain and operate the excess amenities.

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

III. HOUSING CONSULTANT.

- A. Use of Housing Consultants.

1. Housing consultants are used to:
 - a. Speed up development of the application and subsequent project;
 - b. Improve quality of the development through the advisement of selecting a an architect, a contractor, and other development team members; and
 - c. Assist the Sponsor and Owner in handling all aspects of project development through to final closing and rent-up during the first year of occupancy.

2. Housing consultant efforts must be directed exclusively towards serving the nonprofit Sponsor and the Owner when formed.
 - a. As a general rule the housing consultant may not have any other role on the development team.
 - b. Exception to the general rule is permitted where the contracts for housing consultant services is between the Owner and Sponsor (or Sponsor's nonprofit affiliate) if no more than two persons salaried by the Sponsor or its nonprofit affiliate serve as non-voting directors on the Owner's board of directors. (24 CFR §891.130(a) (2))

3. A housing consultant ***is not*** required for participation in the Section 202 and/or Section 811 programs. The Sponsor/Owner may perform these services with in-house staff. If a Sponsor is going to contract with a housing consultant, consideration should be given to contracting with a housing consultant who knows the local jurisdiction's processing requirements.

4. More than one housing consultant may be hired by the Sponsor. The Sponsor may choose to hire one housing consultant to manage the application process and another housing consultant to manage the development process. However, the Sponsor is responsible for assuring long term viability or

success of the project.

5. In the traditional Section 202 and 811 programs, the maximum fee for housing consultant services for a project from federal funds is established by OPM as noted in the General Section of the NOFA for the year under which the project was funded.
6. Housing consultants are required to meet all civil rights requirements and to affirmatively further fair housing.

B. Responsibility of a Sponsor.

1. Selection of a housing consultant(s) is the responsibility of the Sponsor. If a housing consultant is used, then within 14 days from the date of the Agreement Letter, the Sponsor must submit an original HUD-2530, Previous Participation Certification, and the housing consultant's résumé to the Program Center. Use of The Active Partner Performance System (APPS) by all participants is strongly recommended. The system provides a method for participants to store and manage all data pertaining to their participation in HUD Multifamily Programs and to submit future APPS Previous Participation Certificates (APPCs) online, in HUD's secure web based environment. Participants may opt to file a paper form HUD-2530 with the Program Center subject to further guidance.
2. No individual or entity having an identity of interest with the Sponsor/Owner may earn a fee in addition to the compensation for services that would otherwise be provided on a fee basis by a housing consultant (for example, an Executive Director or other employee of the Sponsor/Owner)

C. Responsibility of Program Center.

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

1. Evaluate the previous experience of the consultant

based on its resume and Form HUD-2530, Previous Participation Certification;

2. Conduct a credit investigation of the housing consultant;
3. Review Form HUD-2013 SUPP, Supplement to Application for a Multifamily Housing Project. The only portion of the signed and dated Form that must be filled out is near the bottom of the page. Answer the 4 questions dealing with:
 - Delinquent Federal debt.
 - Lawsuits or legal actions
 - Bankruptcy
 - Judgments

Where delinquent Federal debt exists, the Sponsor shall include:

- a. A detailed written explanation from the individual or firm with a prior Federal default or claim or whose credit report contains conflicting or adverse information.
- b. A letter from the affected agency, on agency letterhead and signed by an officer, stating the delinquent Federal debt is current or satisfactory arrangements for prepayment have been made.
- c. A statement from the Sponsor explaining why it wants to use this housing consultant.

Note: A housing consultant with outstanding delinquent Federal debt and without satisfactory repayment arrangements is automatically disqualified.

4. Consider the Program Center's working experience with the potential consultant;
5. Determine if conflicts or identities of interest exist;
6. Inform the Sponsor/Owner of the strengths and weaknesses of the housing consultant.

7. Confirm that the schedule for release of consultant fees conforms to the following minimum thresholds:
 - a. At initial closing: up to a total of 50 percent.
 - b. During the construction period: up to a total of 65 percent.
 - c. At final closing, provided the project is not having any financial difficulties, 100 percent of the remainder of the fee may be released.

Note: The Program Center may consider a release of up to 65% of the fee at initial closing in the case where a Consultant's contractual obligation is satisfied before or at initial closing.

IV. WORKING CAPITAL DEPOSIT.

- A. As part of the firm commitment processing HUD will:
 1. Compute a working capital deposit equal to 2 percent of line 74, Total Estimated Replacement Cost of Project, on Form HUD 92264.
 2. Show this amount in item 3a Part A of the Total Requirements for Settlement in Form HUD 92264A, Supplement to Project Analysis.
- B. At initial closing:
 1. The Owner:
 - a. Will place these funds with a financial institution acceptable to HUD; or
 - b. As stated above in section I.B., the developer's fee may be pledged to cover this cash requirement. If applicable, the Owner may request that excess capital advance mortgage proceeds be held by HUD for this purpose if funds are available.
 2. The release of said funds will be under HUD's control.

- C. The working capital deposit will:
1. Cover shortfalls in interest, taxes, property insurance premiums, ground rents and assessments during construction after funds available under Form HUD-90167-CA, Capital Advance Agreement, are exhausted.
 2. Defray cost of initial marketing and rent-up. This includes: sales and advertising, model furnishings including furnishings for public areas, and equipment and supplies essential to initial rent-up, etc.
 3. Set up accruals for items due during the first operating year that project income is not expected to cover, including real estate taxes, permanent property insurance premiums, ground rents and assessments.
- D. Final release of the working capital deposit.
1. HUD will release any remaining funds to the Sponsor/Owner or, if applicable, the developer three years after completion unless the project has financial problems (e.g. has not reached sustaining occupancy, has poor liquidity or high payables, is operating at a deficit or is near default) or the project has not reached final closing. The money belongs to the Sponsor/Owner or if applicable, developer, and is expended at their discretion.
 2. HUD will continue to hold any remaining funds until the financial problems are resolved.
 3. HUD will use the remaining balance of the working capital deposit to fund an operating deficit or cure a default before releasing the remaining funds to the Owner.
- E. In a mixed-finance transaction it is possible that other funding sources/lien holders or investors may require a similar type escrow. HUD will accept the other escrow in lieu of the working capital deposit

provided HUD's interests as outlined in items B through D above are protected.

- F. HUD will permit an Owner to combine the working capital deposit and the new construction contingency reserve into one escrow account but the two accounts must remain separate in the Owner's accounting.

V. CONSTRUCTION CONTINGENCY.

A. New Construction.

- 1. As part of the firm commitment processing HUD will:
 - a. Compute a project contingency equal to 2 percent of line G50, Total All Improvements, of Form HUD 92264, to cover the cost of necessary changes orders approved before completion of the project as well as unanticipated carrying and financing costs occasioned by delays in construction.
 - b. Reflect this amount as an eligible use of the developer's fee.
- 2. At the final closing HUD will release any remaining funds to the Sponsor/Owner or, if applicable, the developer.

B. Substantial Rehabilitation Only.

- 1. A contingency reserve is included on Item G71 of Form HUD 92264, Multifamily Summary Appraisal Report.
- 2. This reserve is based on a percentage of the sum of Items G36(c), G41 and G42. The percentage may run from 0 to 15 percent of the sum of these items as determined by the Hub/Program Center Director.
- 3. The contingency reserve may be used to cover the cost of unforeseen items of rehabilitation as well as unanticipated carrying and financing costs occasioned by delays in construction.

4. The Owner may elect to apply any funds remaining in the substantial rehabilitation construction contingency account after completion of the approved rehabilitation to pay for approved cost overruns or further improvements or upgrades to the property.
- C. Processing during Construction. In addition to the Contractor's Requisition Project Mortgages, Form HUD-92448 and the Contractor's Prevailing Wage Certificate, HUD will accept the contractor's estimate of cost for change orders (Form HUD-92437, Request for Construction Changes on Project Mortgages) as approved by the project architect. All necessity change orders will be funded from the contingency line item in the Developer's Fee or from the Owner's other financial sources.

HUD reserves the right to comment on the costs and comments from HUD should be submitted to the Owner within 10 days.

VI. NON-REALTY FURNISHINGS AND EQUIPMENT COSTS FOR GROUP HOMES.

- A. The Owner will escrow \$500 per resident to cover the purchase of dishes and eating utensils and other items with a short-lived life cycle such as office and maintenance supplies.
- B. As part of the firm commitment processing HUD will reflect this amount in item 3c Part A of the Total Requirements for Settlement in Form HUD 92264A, Supplement to Project Analysis.
- C. The Owner:
 1. Will place these funds with a financial institution acceptable to HUD; or
 2. If applicable, may use excess capital advance mortgage proceeds held by HUD.
- D. The release of said funds will be under HUD's control.
- E. At the final closing HUD will release any remaining funds to the Owner/Sponsor or, if applicable, the developer.

VII. MINIMUM CAPITAL INVESTMENT.

- A. The Owner must deposit one-half of one percent (0.5%) of the HUD-approved capital advance amount not to exceed \$10,000 in a special escrow account to assure the Owner's commitment to the housing. At initial closing the minimum capital investment (MCI) will be placed in escrow and will be held by a HUD-approved escrow agent.
- Under the Section 202 program, if the owner has a National Sponsor or National Co-Sponsor, the MCI shall be one half of one percent (0.5%) of the HUD approved capital advance, not to exceed \$25,000.
 - If the project reaches initial closing (or construction starts in a capital advance upon completion project) within the initial 18 months of the fund reservation, HUD will waive one-half of the MCI.
- B. The MCI cannot be used to cover construction shortfalls.
- C. As part of the firm commitment processing HUD will reflect this amount in item 3b Part A of the Total Requirements for Settlement in Form HUD 92264A, Supplement to Project Analysis.
- D. HUD Asset Management will release to the Owner all remaining funds not used to cover operating deficits during the first three years of operation unless the Sponsor/Owner used the Developer's fee for the MCI. The funds will be released at the end of the three year period provided the project is financially sound and finally closed.

VIII. 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 which will be deposited into 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., jacuzzi, it may do so, but the cost associated with the amenity must be funded by the Owner at initial closing.

IX. ASSURANCE OF COMPLETION FOR OFFSITE IMPROVEMENTS.

- A. Require one of the following:
 - 1. An 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 HUD 90170-CA, Escrow Agreement for Offsite Facilities) deposited with an escrow agent acceptable to HUD. The amount must equal or exceed HUD's estimate of cost of offsite facilities.
 3. An unconditional irrevocable letter of credit issued to the construction lender in a mixed-finance transaction.
 4. A surety company bond or bonds equal to HUD's estimate of the cost of the offsite facilities using Form HUD 90177-CA, Capital Advance Offsite Bond.
- 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 HUD 90177-CA, Capital Advance Program Off-Site Bond.

X. 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 to provide 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 HUD 90164-CA, Property Insurance Requirements, with Form HUD-92329, Property Insurance Schedule-Insurable Values for Property Insurance Coverage attached. HUD 90164-CA has been updated to correct statements regarding flood insurance coverage that **do not apply** to capital advances in paragraphs A and B, Sec. 5(g). For capital advances, flood insurance is required for the life of the property, and in an amount that is equal to the development or project cost (less estimated land cost) or the maximum amount of insurance available with respect to the project

under the National Flood Insurance Program, whichever is lesser.

B. Effective Coverage Date.

Require the Property Insurance Requirements, Form HUD 90164-CA, to bear the Capital Advance Mortgage (or Deed of Trust) Note date.

XI. DAVIS-BACON REQUIREMENTS - 202/811 PROJECTS

A. Applicability.

Davis-Bacon wage and reporting requirements are applicable to all Section 202 and Section 811 projects that contain 12 or more assisted units.

Section 202 and Section 811 projects that contain less than 12 assisted 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 copies of the Section 202/811 Fund Reservation Letters.

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 give 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 later change 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. Changes to Davis-Bacon wage decisions are effective for a particular project if the change is published before contract award or start of construction if there is no award.

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

2. At this point (contract award or start of construction), the wage decision "locks-in" **except:**
 - a. In cases where the Sponsor/Owner awards the contract based on competitive bidding, changes published less than 10 days before bid opening are effective *unless* it is determined that there is not a reasonable time to notify bidders of the modification. A record of this determination must be retained with the contract.
 - b. Further, if under competitive bidding the contract is not awarded within 90 days after bid opening, any changes to a general wage decision published before contract award are effective for that project. This 90 day limitation does not apply to "project" wage decisions that are requested by Labor Relations for a specific project when a published wage decision is not available. Project wage decisions are effective for 180 days from the date of the decision. If contract award does not occur within the 180 days, Labor Relations must request a new project wage decision or an extension from the Department of Labor.

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

Program Center and Labor Relations staff must make certain that the correct Davis-Bacon wage decision and the Supplementary Conditions of the Contract for Construction (Form HUD-92554M) are contained in the contract specifications. Program Center staff must secure Labor Relations' clearance before initial closing. (See also Paragraph G, *Initial/Final Closing - Release of Capital Advance Upon Completion.*)

1. Program Center staff must notify Labor Relations in advance of each initial closing or preconstruction conference (whichever is earlier) to secure Labor Relations' clearance. Typically, 3 to 5 business days is sufficient lead-time for Labor Relations' review. If the field Labor Relations staff is not available, clearance may be secured from the Regional Labor Relations Officer.
2. Labor Relations will inspect the contract specifications to determine whether the correct and current Davis-Bacon wage decision and HUD-92554M are incorporated.

Where the servicing Labor Relations staff are located in another HUD office, the Labor Relations staff shall consult remotely (e.g., by telephone or e-mail) with Program Center staff to make such determination. The Program Staff will provide to the Labor Relations staff via email a copy of the construction contract, including the labor standards clauses and wage determinations as a pdf file. The Labor Relations staff shall provide written or e-mail clearance to Program Center staff.

Note: The Labor Relations staff may always request a copy of the relevant portion(s) of the contract document as needed for labor standards purposes.

3. The Hub/Program Center Director shall make sure that Labor Relations' clearance has been received

and that any clearance conditions have been fully satisfied before closing.

E. The Preconstruction Conference.

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

1. Following the Preconstruction Conference, any further inquiries concerning Davis-Bacon requirements should be directed to the assigned Labor Relations staff.
2. The Supplementary Conditions of the Contract for Construction (Form HUD-92554M) contain the labor standards provisions applicable to the construction of the project. The labor standards provisions include the payment of not less than the wage rates contained in the applicable wage decision, the proper compensation for overtime hours, and the timely submission to HUD, through the general contractor, of weekly certified payroll reports and any other documents required by HUD to establish labor standards compliance.
3. The general contractor is responsible for the full compliance with these provisions on its own behalf and on behalf of all subcontractors at all tiers. The Sponsor/Owner is responsible for making sure that the general contractor meets all of its obligations required under the contract.
4. The general contractor is responsible for displaying a copy of the applicable wage decision and the Department of Labor (DOL) Davis-Bacon poster (Form WH-1321) at the job site in a place that is easily accessible to all of the construction workers employed at the project and where the wage decision and poster won't be destroyed by wind or rain, etc. The general contractor may also post a properly prepared Project Wage Rate Sheet (Form HUD-4720).

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

5. The general contractor is responsible for making sure that all subcontracts at all tiers contain the applicable wage decision and the Supplementary Conditions of the Contract for Construction (Form HUD-92554M).
6. The general contractor must make sure that all laborers and mechanics employed in the construction of the project are available at the job site for interview by authorized representatives of HUD or DOL.
7. If there are violations of the labor standards provisions, disbursements from capital advance funds may be withheld or reduced to ensure the full correction of any wage or reporting discrepancies. Additionally, willful or aggravated violations may be grounds for debarment.
8. The general contractor and all subcontractors are encouraged to obtain a copy of HUD's "A Contractor's Guide to Prevailing Wage Requirements for Federally-Assisted Construction Projects." The Guide is available at:
<http://www.hud.gov/offices/olr/library.cfm>.

F. During Construction.

1. HUD inspectors have three key responsibilities with regard to Davis-Bacon enforcement on HUD construction projects.
 - a. To make sure that the applicable Davis-Bacon wage decision and poster form WH-1321, "Davis Bacon Poster" are displayed on the job site at a location accessible to the laborers and mechanics employed in the construction of the project. The first inspection report should contain a notation to this effect.

- b. Perform interviews with the construction laborers and mechanics and report the results of the interview on Form HUD-11, Record of Employee Interview.
 - 1) Attach the completed employee interview records to the HUD Representative Trip Report, Form HUD 95379, and provide to the construction coordinators so that they can monitor inspector performance and better coordinate with field Labor Relations staff.
 - 2) The construction coordinators will forward the original copy HUD-11s to Labor Relations. In addition the construction coordinator will keep a copy of each completed Form HUD-11 in the Construction Record Binder.
- c. Report to the Labor Relations staff any activities or other indications of labor standards violations, which may come to their attention.

2. Labor Relation staff coordination during construction:

- a. Withholding Draws/Advances: (Usually only required in extreme circumstances.)

Upon written request from the DOL in accordance with 29 CFR §5.5; or, where the contractor failed to comply with labor standards provisions after a written request by Labor Relations to the contractor to comply, the Regional Labor Relations Officer (RLRO) notifies the MH Program Center Director of the need for withholding or suspension of draws in accordance with 29 CFR §5.5/5.9.

- The RLRO notice to the MH Program Center Director includes a copy of the notice to the contractor and the withholding amount recommended;

- MH Program Center Director provides Labor Relations with written confirmation of the withholding; and
- Labor Relations provides MH Program Center Director written clearance of the withholding upon resolution of the LR violation.

b. Labor Relations Status Checks:

Upon request from the construction coordinator at the time of draws and advances, Labor Relations provides timely labor standards project status updates to the construction coordinator.

G. Final Closing.

The Labor Relations staff must make sure that all labor standards issues are resolved or that provisions are made to ensure the payment of wage restitution that may be found due and the payment of liquidated damages that may be imposed for overtime violations.

1. Program Center staff must notify Labor Relations of the target final closing date when one is set for the project and update Labor Relations staff to any changes in the closing date. If the field Labor Relations staff is not available, clearance may be secured from the Regional Labor Relations Officer.
2. Labor Relations shall conduct such reviews needed to determine whether any and all labor standards issues are resolved. The Labor Relations staff shall provide written or e-mail clearance to Program Center staff and will advise whether there are any conditions that must be met before final closing. If the clearance is conditioned, Labor Relations will explain what documents and/or actions are needed to satisfy the conditions. Normally the Labor Relations staff provides final closing clearance to projects within 30 days of notification/knowledge that the project has reached 100 percent completion. Delays may occur if contractors fail to respond to Labor Relations staff project review reports

that require contractor actions to address violations that may result in underpaid workers. Serious violations involving falsification of certified payrolls may trigger intensive investigations that may necessitate deposits at final closing.

3. If issues remain that cannot be resolved in advance of final closing, Labor Relations shall require a deposit to the U.S. Treasury of an amount equal to the amount of any wage restitution and any other standards liabilities that have been or may be found due. The Labor Relations staff shall prepare and provide to Program Center staff a deposit agreement, a schedule for the deposit and wire transfer instructions for the depositor's financial institution.
4. The Hub/Program Center Director shall make sure that Labor Relations' clearance has been received and that any clearance conditions have been fully satisfied before the final closing. If HUD allowed projects to close without regard of the status of Labor Relations review, HUD would be in violation of US Department of Labor regulation 29 CFR §5.6 that requires Federal agencies to investigate all contracts to ensure compliance and 29 CFR §5.9 that requires suspension of funds until there are sufficient funds withheld to cover underpayment to workers.

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

In some cases, the Sponsor/Owner will undertake the construction work with its own financing sources rather than capital advance funding. The Sponsor/Owner proceeds with a commitment from HUD that the capital advance will be approved and paid over to the Sponsor/Owner if all HUD requirements, including Davis-Bacon requirements, are met to HUD's satisfaction. Labor Relations staff will perform the same support, compliance monitoring and enforcement functions for such projects as for those where capital advance funds are released during construction.

1. Before construction start, Program Center staff must secure Labor Relations' concurrence that the contract specifications contain the correct Davis-Bacon wage decision and the Supplementary Conditions of the Contract for Construction (Form HUD-92554M) are contained in the contract specifications. (See Labor Relations initial closing clearance procedures, above)
2. After construction completion, Program Center staff and Labor Relations staff will follow the final closing procedures (above) for the initial/final closing.

XII. SUBSIDY LAYERING REVIEW.

- A. All Section 202 and Section 811 projects must undergo a subsidy layering review in accordance with Notice HUD 95-4, Subject: Subsidy Layering Reviews (SLR's - Implementing Instructions); or
- B. HUD will accept subsidy layering reviews performed by Housing Finance Agencies (HFAs) and Housing Credit Agencies (HCAs).

XIII. COST CERTIFICATION.

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

- A. A simplified (unaudited) cost certification is permitted for Section 202 projects with 40 assisted units or less and for all Section 811 projects.

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

- B. The Owner will be required to cost certify the actual costs of the project unless the property contains Low Income Housing Tax Credit (LIHTC) equities and has a capital advance to cost ratio of less than 80 percent.
 1. If LIHTC are included in the project development costs and the Secretary determines at the time of Firm Commitment issuance that the ratio of capital advance proceeds to the estimated cost of the

projects is less than 80 percent, the Owner will not be required to certify actual costs to HUD. For example, when the Capital advance is less than 80 percent of the Total Estimated Replacement Cost of Project derived under section G. of Form HUD-92264, the Owner will not be required to cost certify to HUD.

2. For projects that are exempt from providing a cost certification, when the project reaches final completion, as deemed by the HUD Inspector, the Owner will be notified of the final completion date. This date will be used as the effective date of the cost certification for data purposes in the Development Application Processing (DAP) system. Eligible expenses incurred up to 60 days beyond this date may be included as project costs as indicated in handbook 4470.1, paragraph 11-4.
3. The Owner must account for all operating income during construction and ending three months before final closing.
 - a. The income and expense statement must cover the period from first occupancy (if occupancy occurred during construction) or from the date of final completion (as deemed by the HUD Inspector) up through the period ending three months before final closing.
 - b. The statement must be submitted to HUD, at least 30 days before the date scheduled for final closing.
 - c. If the income and expense statement evidences receipt of income (Excess Funds) during this period, the Owner will be required to deposit the Excess Funds into the reserve fund for replacements established under the Regulatory Agreement, unless the housing finance agency (HFA) has notified HUD that the funds must be used in another manner to be in compliance with IRC Section 42, low-income housing tax credit requirements.

- C. For additional cost certification instructions concerning mixed finance transactions discussed in Parts B and C read Section XXI found in Part C.

XIV. OWNER/ARCHITECT AGREEMENT.

AIA Document B181 has been replaced by AIA Document B108-2009 *Standard Form of Agreement Between Owner and Architect for a Federally Funded or Federally Insured Project*. Additionally, HUD revised the Amendment to the Owner/Architect Agreement found in Appendix 12B.2 of the MAP Guide and Handbook 4460.1 REV-2, Appendix 2 to be used for Section 202 and Section 811 projects as form HUD 92408-M.

Paragraphs 11 and 12 of form HUD 92408-M apply to traditional projects only. Strikethrough the following sentences in Paragraph 11 that applies to FHA projects only: "The Architect designing the Project may have an identity of interest with Owner, Contractor, and/or any Project subcontractor, except however, any Architect administering the Construction Contract shall not have any identity of interest with Owner, Contractor, and/or any Project."

XV. PREPARING A BUDGET FOR DETERMINING PROJECT RENTAL ASSISTANCE CONTRACT.

In preparing the budget consult HUD Handbook 4350.1, *Multifamily Asset Management and Project Servicing*, Chapter 7 as modified below.

- A. Paragraph 7-30.P. of HUD Handbook 4350.1. will not apply since the budget will no longer include a 2 percent contingency reserve for Section 202 and Section 811 projects. In its place the Owner may include a typical vacancy factor not to exceed three percent.
- B. For a mixed-finance project with low income housing tax credits, the budget for the assisted units may include the pro rata portion of commercial reasonable cost of the annual compliance reports (a.k.a. state allocating agency's compliance and asset monitoring fees) that must be submitted to the tax credit allocation entity.

I. **INTRODUCTION.**

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

- A. Developments built with mixed-finance funds may combine Section 202 or Section 811 units with unassisted units.
 - 1. The number of Section 202/811 assisted units in the project cannot be more or less than the number specified in the capital advance agreement letter.
 - 2. The unassisted units:
 - a. May benefit from other forms of federal assistance.
 - b. Cannot cause a Section 811 mixed-finance project to exceed the applicable Section 811 project size limit if they will also set aside units for persons with disabilities.
 - c. HUD does not restrict who may live in the unassisted units except as noted in 2.b. above. For example a Section 202 project may have young families under the age of 62 years living in the unassisted units.
 - d. May be financed with construction and permanent loan financing. For example, the unassisted units may be financed with HUD mortgage insurance or with a Section 542(C) risk sharing loan.
- B. The mixed-finance program permits the use of other sources of funding, including tax credits to raise additional funds for a project. Some types of funding, such as tax credits, add a new layer of complexity but should not frighten away the less experienced nonprofits that might be considering sponsoring a Section 202 or Section 811 mixed-finance project.

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

- C. Because of the complexity of these projects, HUD staff is encouraged to participate with all the parties involved including the multiple lenders to get the projects built and occupied.

II. HISTORY AND GOALS OF THE MIXED-FINANCE PROGRAM UNDER SECTION 202 AND SECTION 811.

- A. The American Homeownership and Economic Opportunity Act of 2000 created the Mixed-Finance Program.
- B. The intent of the Mixed-Finance Program is to:
 - 1. Leverage the capital and expertise of the private developer community by allowing for-profit participation in the Section 202 Supportive Housing Program for the Elderly and the Section 811 Supportive Housing Program for Persons with Disabilities;
 - 2. Leverage private and public capital;
 - 3. Expedite the production of this scarce housing; and
 - 4. Expand the supply of supportive housing for the elderly or persons with disabilities.

III. WHAT IS A MIXED-FINANCE PROJECT?

- A. The mixed-finance project **must** be owned by a for-profit limited partnership with a nonprofit organization as the sole general partner.
 - 1. The general partner in a Section 202 project may be:
 - A private nonprofit organization or an institution or foundation that includes a

nonprofit corporation; or

- A for-profit corporation wholly owned and controlled by one or more nonprofit organizations meeting the requirements of 24 CFR §891.205; or
 - A limited liability company wholly owned and controlled by one or more nonprofit organizations meeting the requirements of 24 CFR §891.205.
2. The general partner in a Section 811 project may be:
- An organization that meets the requirements of the definition of private nonprofit organization which includes a nonprofit corporation as defined in 24 CFR §891.305; or
 - A for-profit corporation wholly owned and controlled by a nonprofit organization meeting the requirements of 24 CFR §891.305
- B. The mixed-finance project **may have** (but is not required to have) a combination of assisted units and unassisted units.
- C. The mixed-finance project may also have a mixed-use, for example: commercial spaces, retail spaces, spaces for use of the wider community. However, the mixed-use portion must be self-sustaining. No capital advance, PRAC and tenant contribution to the rent can be used to construct the space or to support the operation of the space.

IV. SWITCHING DESIGNATIONS BETWEEN A MIXED-FINANCE PROJECT AND A TRADITIONAL SECTION 202/811 PROJECT.

- A. Under certain circumstances a Section 202/811 project may switch designations.
1. For approved applications involving the development of additional units, the Program Center must refer to the appropriate Notice of Funding Availability (NOFA) to determine whether

the applicants received any points for their mixed-finance proposal.

- a. If a proposal received points under the NOFA selection process, the Sponsor **cannot** switch back to a traditional Section 202/811 project designation.
 - b. If a proposal did not receive points under the NOFA selection process, the Sponsor **can** switch back to a traditional Section 202/811 project designation.
2. A traditional Section 202/811 project **may** switch its designation to that of a mixed-finance project at any time up to the submission for firm commitment application.
- B. Program Centers are reminded to update the Section 202/811 tracking module of DAP whenever a project's designation changes.

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

- A. The HUD Program Center must refer to the State tax credit-allocating agency's qualified allocation plan (QAP) to identify the maximum developer fee the agency permits and determine if any costs associated with the transaction are required to be paid from the developer's fee.
- B. This review:
1. Confirms the standards for the developer's fee in mixed-finance projects developed in that particular State even if there is no tax credits associated with a project.
 2. Gives HUD a comfort level that certain transaction costs are not counted twice.
- C. The developer's fee in the mixed-finance transaction is paid from project funds other than the capital advance, the PRAC or the tenant contribution associated with the assisted units. (24 CFR §891.815(c))

- D. The developer's fee may be split between the nonprofit general partner and the joint venture developer. (See Section VI below.)
1. The general partner will have ongoing tax credit monitoring and compliance requirements after the project is operational. Therefore, the general partner should make sure they are adequately compensated for these duties from the developer's fee. In addition, these are eligible project expenses under the PRAC and must be prorated between the assisted units and unassisted units that benefited from the tax credits. See Section XXIII.B.
 2. HUD does not regulate the division of funds.
- E. Release of funds for the developer's fee.
1. There will be a Developer's Agreement, which contains a schedule of performance measures that must be met before any portion of the developer's fee may be released.
 2. Release of the developer's fee is subject only to the requirements of the state tax credit allocating agency or the investor and is not controlled by HUD.
 3. A separate housing consultant's fee is **not an eligible use of capital advance funds**, as the activities of the consultant are part of the developer's duties of which the fee is paid from other funding sources.

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

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

- A. The joint venture developer:
- Should be experienced in real estate development and tax credit projects if using Low Income Housing Tax Credits (LIHTC);

- Should have expertise in managing multifamily and tax credit projects if using LIHTC;
- Should have good relations with lenders, syndicators and/or investors;
- Should be an acceptable financial and credit risk;
- May receive a portion of the developer's fee; and
- May provide pre-development money that may be repaid as the proposal is finalized.

B. If a joint venture developer is used:

1. No more than 30 days after acceptance of the funding award, the nonprofit Sponsor/general partner should identify the joint venture developer and submit the following documentation on the entity to the Hub/Program Center.
 - a. An electronic or paper Form HUD 2530, Previous Participation.
 - b. Form HUD 2013 SUPP, Supplement to Application for a Multifamily Housing Project. The only portion of the signed and dated Form that must be filled out is the 4 questions near the bottom of the page dealing with:
 - Delinquent Federal debt
 - Lawsuits or legal actions
 - Bankruptcy
 - Judgments
 - c. The joint venture developer's financial statements if they are funding some pre-development costs.
 - 1) For an individual, Form HUD-92417, Personal Financial Statement; or
 - 2) For a business entity, three years of audited financial statements. If the firm lacks audited financial statements

it may submit unaudited statements that contain the criminal certification found on Form HUD-92417.

- d. The joint venture developer's resume including a detailed list of projects where the entity was the developer.
2. The Hub/Program Center will immediately order a credit report and review the joint venture developer for previous participation, credit and financial acceptability.
- C. The Hub/Program Center should issue a recommendation of acceptability or a rejection of the joint venture developer within 30 days of receiving the documentation.

The Sponsor/Owner is free to accept or disregard HUD's recommendation except in the case of 2530 and delinquent federal debt issues.

VII. RENT.

The rent on the unassisted units is not subject to any Section 202 and 811 requirements.

VIII. EXCESS AMENITIES.

- A. The assisted units should be modest in design and still meet the requirements of other funding sources.
 1. Excess amenities defined in 24 CFR §891.120(c) are not eligible for HUD funding.
 2. The use of durable materials to control or reduce maintenance, repair and replacement costs **is not** an excess amenity
 3. Excess amenities must be designed with appropriate safeguards for the residents' health and safety.
 4. The tenants in assisted units cannot be required, but may voluntarily choose, to use, participate in, or pay a fee for the use or maintenance of the excess amenities.

5. Any fee charged for the use, maintenance, or access to excess amenities by residents must be reasonable and affordable for all residents of the development.

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 assisted units.
- C. The assisted units must look like the unassisted units in the project that are of similar bedroom size. If the project contains both assisted and unassisted units, the assisted units may be floating units. See 24 CFR 891.863(b).

IX. HEALTH CARE FACILITIES AND CHARGES.

- A. Mixed-financed Section 202 projects may have facilities for infirmaries, nursing stations or spaces for overnight care (24 CFR §891.813(c) and §891.848).

The costs of developing and operating the 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.

X. 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.

XI. COMMERCIAL SPACE.

- 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 contribution associated with the assisted units.
- B. Commercial space must meet all accessibility requirements under Titles II and III of the Americans with Disabilities Act, as applicable.

XII. BEDROOM TYPE.

- A. For the assisted units, the NOFA requirements and 24 CFR 891.210(b) dictate the bedroom types permitted.
- B. For the unassisted units, HUD does not impose any limits on the bedroom types that can be incorporated into the mixed-finance project.
- C. While the overall size of a Section 811 mixed-finance project may exceed the limitation in the NOFA, the limitation still applies for the units set aside for persons with disabilities.
- D. The mixed-finance program does not impose any income restrictions on the unassisted units. However, other funding sources such as LIHTCs may impose restrictions.

XIII. OPERATING RESERVE IN A MIXED-FINANCE TRANSACTION.

- A. The operating reserve functions as an operating deficit escrow for the unassisted units in a mixed-finance transaction. If there are no unassisted units in the project then HUD does not require an operating reserve.
- B. Before initial closing the Owner will establish the operating reserve account.
 - 1. The Owner determines the initial adequacy of the

escrow; however it must be sufficient to cover the operating expenses of the unassisted units **for at least** a three-month period.

2. If the project is operationally sound, the operating reserve is released at the later of:
 - a. The release of the minimum capital investment and HUD will release to the Owner all remaining funds; or
 - b. A date determined by the other lien holders or limited partners.
- C. The Owner must supply funds as a firm commitment condition to meet project expenses during the Owner's estimated period required to establish and maintain a sustaining level of operation.
 1. Use Form HUD 92476-A-CA, Additional Contribution by Sponsors/Mortgagors, to set the reserve.
 2. The reserve must be funded with cash.
- D. No monies derived from the assisted units (i.e. capital advance funds, project rental assistance (PRAC) and the tenant portion of the rent) can be used to fund or replenish this account.
- E. The limited partner or, if applicable, other secured lien holders may impose more stringent requirements relative to the operating reserve.

XIV. REGULATORY AGREEMENT.

- A. The Owner executes a HUD Regulatory Agreement governing the operation of the assisted units in the project.
- B. HUD does not dictate the operation of the unassisted units.
- C. The Regulatory Agreement for Capital Advance Mixed Finance Program, Form HUD 92466.1CA, must be recorded ahead of the release of capital advance funds and any other security interests in the project.

XV. USE AGREEMENT.

The Owner executes a Capital Advance Mixed-Finance Program Use Agreement, Form HUD 90163.1CA, to protect the current and future residents living in the assisted units.

A. The Use Agreement.

1. **General Rule.** The Use Agreement has a 40-year term.
2. **Exception to the General Rule.** If the Sponsor lends the Capital Advance funds to the project and the debt is still outstanding at the end of normal 40 year period, then the Use Agreement will be extended for an additional 15 years. When the Use Agreement is extended for an additional 15 years, the Capital Advance Mortgage, form 90165-CA term is to be extended as well.

B. The Use Agreement must be recorded before the release of any capital advance funds.

C. The Capital Advance Use Agreement is subordinate to any tax credit Use Agreement.

D. When the capital advance mortgage is not in first lien position, the Use Agreement should be recorded before all mortgage instruments.

XVI. SINGLE ASSET ENTITY.

The project must be the only asset of the Owner. This requirement will not be waived.

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

XVII. INTEREST RATE AND TERM ON OTHER FUNDING SOURCE LOANS.

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

XVIII. AMORTIZATION PLAN.

A. HUD does not dictate the terms and conditions of any

other financing.

- B. PRAC and the tenant contribution to the rent in the assisted units cannot be used to pay off other financing.

XIX. FAIR HOUSING AND EQUAL OPPORTUNITY.

- A. The Owner and all contractors, and subcontractors must comply with all applicable fair housing and civil rights requirements in 24 CFR §5.105(a), including, but not limited to, the Fair Housing Act and implementing regulations at 24 CFR Part 100, Title VI of the Civil Rights Act of 1964 and implementing regulations at 24 CFR Part 1, Section 504 of the Rehabilitation Act of 1973 and implementing regulations at 24 CFR Part 8, Section 3 of the Housing and Urban Development Act of 1968 and implementing regulations at 24 CFR Part 135, and Title II of the Americans with Disabilities Act to the extent applicable. See 24 CFR §5.105(a) and 24 CFR §891.820.
- B. The Owner and all contractors and subcontractors must comply with all applicable federal accessibility requirements under titles II or III of the Americans with Disabilities Act. For covered multifamily dwellings designed and constructed for first occupancy after March 13, 1991, the design and construction requirements of the Fair Housing Act and HUD's implementing regulations at 24 CFR Part 100 apply. In addition, HUD's Section 504 regulations at 24 CFR Part 8 require affirmative physical accessibility requirements for new construction and alteration projects. In many cases, properties constructed with HUD funds must meet both Section 504 and the Fair Housing Act design and construction requirements.
- C. The Owner/Sponsor(s) and all contractors and subcontractors are required to affirmatively further fair housing and comply with "Affirmative Fair Housing Marketing" (24 CFR Part 200.600, 24 CFR §891.155 and Handbook 8025.1 Revision 2).

Owner/sponsors are responsible for data collection based on race, color, religion, sex, national origin, age,

disability, and family characteristic of persons and households, as stated in 24 CFR 121 and program requirements.

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

XX. FIRM COMMITMENT APPLICATION.

Under traditional processing, HUD requires commitment letters or letters of intent as proof that other sources of funds are available before accepting a firm commitment application for processing.

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

- A. The Sponsor provides a simple statement that it intends to apply for tax credits and/or any additional funding.
- B. The Program Center:
 - 1. Accepts the Sponsor's statement;
 - 2. Processes the firm commitment; and
 - 3. Issues the firm commitment conditioned on the Sponsor/Owner providing evidence of the ability to cover the estimated financial requirements to close the project.

XXI. UNDERWRITING INSTRUCTIONS.

- A. HUD's main concerns in a mixed-finance transaction are:
 - 1. The capital advance funds are equal to or less than the funds needed to construct the assisted units;

2. The Owner has raised enough additional funds when combined with the capital advance funds to build and operate the entire project; and
 3. Establishing the cost of items that will be recognized for cost certification purposes as payable from capital advance funds.
- B. Reserve for replacement account(s).
1. For assisted units the annual deposits to the reserve for replacement for the assisted units shall be calculated by the following formulas:
 - a. New construction: $0.006 \times \text{Total Structure Cost}$
 - b. Substantial rehabilitation: $0.004 \times \text{Total All Improvements}$.
 - c. Purchase of an existing project with or without repairs the Owner will hire a Needs Assessor to conduct a PCNA for long-term capital needs. Based on HUD's review there may be initial and annual deposits to the reserve for replacement account. This is modeled on the Section 223(f) mortgage insurance program. See Appendix 5.5M of the MAP Guide for guidance in establishing the PCNA.
 2. For the unassisted units the Owner should have a replacement reserve equal to either half of the HUD requirement for the assisted units or the state housing finance agency requirement whichever is less.
 3. If the Owner uses HUD's methodology in item C.1. above, the replacement reserve funds for the assisted and unassisted units can be commingled in one account under HUD's control.
- C. 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 developer's fee.
- Inspection fees charged by the construction lender.
- Cost of the monthly reserve for replacement deposits for the unassisted units, if any.

Note: A financial consultant in a tax credit transaction who has no other interest in the project other than an arms-length fee arrangement for professional services is not required to submit Form HUD 2530, Previous Participation Certificate

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.

- Do not recognize any housing consultant fees, as these costs are included in the developer's fee.
- Recognize in the proposed operating cost the monthly reserve for replacement deposits for the assisted units.

Note: The only construction contract permitted will be a lump sum construction contract, Form HUD 92442-CA. Form HUD 92443-CA, Construction Contract Incentive Payment, is the only incentive payment permitted with the lump sum contract.

- D. Mortgage Credit will analyze the general contractor's financial statements and the Owner's detailed sources and uses statement and perform the required credit investigations.

XXII. TAX CREDIT ISSUES.

- A. If the Sponsor lends the capital advance to the project it may result in related party issues with the Internal Revenue Service. To avoid this issue, the Sponsor and another 501(c)(3) nonprofit organization may wholly own and control the sole general partner of the limited partnership.
- B. When loaning the capital advance to the project, the HUD mortgage form-93432 and mortgage note form-90165 are signed by the sponsor. The loan between the sponsor and owner should include language assigning the collateral to HUD.
- C. In many tax credit transactions the investor(s) retains the right to remove the existing general partner and replace it with another. Often they have a subsidiary available to step in if necessary. However, in a Section 202 or Section 811 mixed-finance transaction, HUD must first review and approve the replacement general partner entity. HUD's approval rights are limited to confirming conformance between the new entity and the statutory and regulatory requirements of the

Section 202 or 811 programs.

XXIII. PROJECT OPERATING BUDGET.

The Owner prepares an operating budget-based request in connection with the initial and subsequent PRAC contract renewals and annual rent adjustments.

- A. The Owner consults HUD Handbook 4350.1, Multifamily Asset Management and Project Servicing, Chapter 7, as modified below.
 - 1. Paragraph 7-30.P. of HUD Handbook 4350.1 does not apply. The budget will no longer include a 2 percent contingency reserve for PRAC projects owned by nonprofits.
 - 2. Projects with 100% PRAC units may include a vacancy loss rate not to exceed 3 percent in the budget.
- B. PRAC projects with low income housing tax credits may include in their budgets a commercial reasonable cost for the annual compliance reports (a.k.a. state allocating agency's compliance and asset monitoring fees) that must be submitted to the tax credit allocation entity.
- C. Reasonable fees for preparing any Federal, State or local tax returns required of the project.

For example: The cost of preparing both Form 1065, U. S. Partnership Return of Income and related K Schedules may be considered.

- 1. Schedule K, Partners' Share of Income Credits, Deductions, etc., lists the partnership's distributive share of income, deductions, credits and tax preference items.
- 2. Schedule K-1, Partner's share of Income Credits, Deductions etc. (Individual, identifies each partner's share of those accounts.
- 3. The cost of preparing a partner's return is not acceptable.

XXIV. EARLY START OF CONSTRUCTION.

- A. The Owner, general contractor and if applicable, other lien holders must execute Form HUD 92415, Request for Permission to Commence Construction Prior to Initial Endorsement for Mortgage Insurance, without change.

Note: In the case of a Capital Advance Upon Completion transaction the Owner, general contractor, the construction lender and if applicable, other lien holders must execute Form FHA 92415, without change.

- B. In a mixed-finance transaction only, the Hub or Program Center Director may permit an early start of construction once HUD has approved a project's plans and specifications, and has completed environmental review, and there is good cause to approve the request. Good cause means being a responsible partner and recognizing the needs of other funding sources that are providing a significant amount of funding to the project. The most common example of good cause is the need to meet the 10 percent expenditure requirement under the low income housing tax credit guidelines. However, notwithstanding any of the above, the Director must consider the potential risk to the Department when considering the Owner's early start request
- C. If an early start is permitted, a preconstruction conference must be held before the start of any construction.

XXV. FIRST LIEN POSITION.

In a mixed-finance transaction, HUD does not require the capital advance mortgage to be in first lien position. The Program Center must consider the needs of the other lien holders who are providing significant additional funding for the project.

When HUD is not in first lien position, agreements in the superior position cannot contain provisions that conflict with HUD requirements. Recording the Use Agreement first will protect HUD from certain conflicts however; documents used in the transaction should be reviewed thoroughly for conflicting language and brought to the attention of the project owner's counsel.

XXVI. CONSTRUCTION MONITORING AND REPORTING.

It assures that the completed project provides an acceptable risk upon closing of the capital advance mortgage.

A. Assignments.

1. The Hub construction coordinator assigns a staff or contract HUD representative to the project once the firm commitment is issued or there is a request for an early start of construction; or
2. The Multifamily Hub/Program Center may accept inspection reports prepared by either a State or local housing finance agency provided the reports meet HUD's requirements.

B. HUD Representative's Duties. The assigned HUD representative or the inspector from the State or local housing finance agency visits the site twice a month or more frequently where warranted by problems. The HUD representative conducts monitoring following provisions of the Guide to Multifamily Accelerated Processing (MAP), paragraph 13.3D, and reports project findings on the HUD Representative's Trip Report, Form HUD-95379. Reporting is required on the following:

1. Contractor's organization, operations and supervision.
2. Architect's supervision and services.
3. Special circumstances, occupancy, delays, claims, disputes, etc. The HUD representative must specifically identify when the slow start or progress of offsite work may delay occupancy of completed units.
4. Noncompliance in the work.
5. Labor and Equal Employment Opportunity (EEO) provisions, including the number of Davis-Bacon wage interviews conducted and reported on Form HUD-11.
6. Percentage of project completion and scheduled completion. Percentage of completion for each

additive change order and percentage of completion for offsite work.

7. Start of initial and permanent construction.
8. Serious construction problems. See paragraph C.3. below.

C. Construction coordinator's duties are discussed in the Guide to Multifamily Accelerated Processing (MAP), paragraph 13.3C., and include: assignment of inspectors, review inspectors' reports, review change orders, field supervise inspectors' performance by making at least two field review inspections for each project.

1. The construction coordinator or a designated member of the construction analysis staff in the local Program Center is authorized to perform certain functions, as warranted.
 - a. However, the construction coordinator is responsible for keeping the Program Center Director informed on the general progress of all project work, problems, and the general quality of inspections and inspector performance.
 - b. The deputy may perform the review inspection duties.
2. The construction coordinator may secure required engineering assistance for the inspection function, e.g., through use of Hub/Program Center engineers not under the construction coordinator's control, Regional engineers, contract engineers, etc.
3. The construction coordinator reports to the Program Center Director serious construction problems as they occur and prepares a referral memorandum to the Office of Multifamily Housing Assistance and Grant Administration in Headquarters, and provides status reports as appropriate.

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

- Work stoppages for 20 calendar days;
- Slow or non-payments to the general contractor and/or subcontractors;
- Contractor abandons the job;
- Contractor, owner or Architect changes during construction;
- Imbalance between construction funds and construction progress;
- Correction of any construction deficiency is not started within 30 days of the first notification to the contractor; and Contractor can't or won't correct any construction defect or latent defect.

4. The construction coordinator advises the Owner and the construction lender of critical deficiencies in a supervisory architect's performance, and provides a file supporting the findings.

The file should include copies of applicable HUD Representative's Trip Reports, Form HUD-95379, and Supervisory Review Reports, Form HUD-95379, correspondence and minutes or summaries of meetings.

XXVII. PERMISSION TO OCCUPY.

HUD executed Form HUD-92485, Permission To Occupy, is required before the Owner permits occupancy of any assisted dwelling unit. The physical completion and required documentation are outlined on the form and in paragraphs A. and B. below.

- A. Physical Completion. The work or portion thereof for which a Permission To Occupy is approved must be sufficiently completed in accordance with the contract

documents so the Owner can occupy or utilize the identified portion of work for its intended use.

1. Support facilities (utilities, disability access, vehicular access and parking, fire life-safety equipment, etc.) must be in place.
2. Acceptability of each unit for which a permission to occupy is requested must be established:
 - a. Property must be inspected and Form HUD-92485 signed by the Owner, supervisory Architect, contractor, and HUD Representative.
 - b. Minor items that do not preclude occupancy are permitted but must be listed as an attachment to Form HUD-92485.
 - c. The contractor is fully responsible for any incomplete or improperly performed contract work whether or not listed.

B. Signatures, Approval, and Permission:

1. The Owner, supervisory Architect, contractor, construction lender and HUD representative are to sign Form HUD-92485.
2. Approval: The Construction Coordinator or a designated staff person in the Program Center signs as Chief, Architecture and Engineering Section. The HUD Team Leader signs as Chief Underwriter. **The construction lender does not have to sign Form HUD-92485, agreeing with the request and stating that insurance risks have been covered for the project.**
3. Permission to Occupy: The Hub Director or his/her designee will sign the form as the FHA Authorized Agent.

C. Submission Documents. The Owner must include the following documents with the completed Form HUD-92485:

1. A Certificate of Occupancy, Temporary Certificate of Occupancy, or equivalent permit from the governing municipal authority for all units and facilities listed on the Permission to Occupy; and any other required permits or authorizations;
2. A certificate of property insurance from the Owner's insurance company.
3. Rent Schedule and Information on Rental Project, Form HUD-92458, for the non-capital advance-assisted units.
4. Evidence of compliance with Affirmative Fair Housing Marketing Plan (AFHMP), Form HUD-935.2a,
5. Certificate of Management Agent, Form HUD-9839-C, for the Capital Advance-assisted units if not previously submitted with the application for firm commitment, and
6. Management Agent Profile, Form HUD-9832, or certification that one is already on file with the particular Field Office.

Note: Items 3 through 6 above must be submitted no later than with the first submission of Form HUD 92485.

D. Partial Occupancy Approval.

1. Favorably consider partial occupancy of units as they become available, where:
 - a. Vandalism could be minimized, or
 - b. Needed project income is provided, or
 - c. An earlier rent-up date could be achieved, or
 - d. The capital advance mortgage security would otherwise be enhanced, and
 - e. Utility and heating/cooling costs for the occupied units can be metered separately from the contractor's usage during

continuation of construction, or an acceptable predetermined arrangement for occupied unit utility and heating/cooling costs is established.

2. Approve a series of Permissions to Occupy as units or facilities become available, e.g. individual buildings on multi-building projects, or individual floors or wings on larger buildings.
3. Approve a single Permission to Occupy for all units where dictated by management considerations, e.g. very small projects.

E. Preparation of the PRAC, Part II of the Project Rental Assistance Contract, Form HUD-90173-A-CA:

1. Immediately after review and acceptance of the project as set forth in C.4. above, the Multifamily Housing Representative ("MHR") will prepare the document for the Program Center Director's signature, requesting that the PRAC be prepared.
2. The multifamily housing representative (MHR) prepares one original and two copies of the PRAC based on the Contract previously prepared as an exhibit to the PRAC Agreement.
3. Any change to the PRAC at this stage may be made only if authorized by the regulations or the Agreement, and must be explained and justified to the Owner in the transmittal letter.
4. The effective date of the PRAC will be the date the permission for occupancy is granted on Form HUD 92485. The initial term of the contract shall be for either 60 or 36 months, depending on the Fiscal Year the NOFA was awarded.
5. The transmittal letter will require the Owner to submit with the executed Contract, a list of leased and unleased units along with justification for any unleased units for which vacancy payments will be requested.

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

F. Execution of the PRAC.

1. The Owner executes all copies of the PRAC and returns them to HUD together with the information regarding leased and unleased units.
2. The MHR routes the PRAC to the Legal Division for final review and the information regarding leased and unleased units to Asset Management.
3. Asset Management will advise Production whether any unleased units qualify for vacancy payments.
4. When approved by the Legal Division, the Hub/Program Center Director will sign the original and two copies of the PRAC for HUD.
5. The MHR, in the letter transmitting the PRAC, will advise the Owner of any unleased units qualifying for vacancy payments.
6. The executed PRAC will be distributed as follows:
 - a. Original will be sent to the Ft. Worth Accounting Center.
 - b. One executed copy to the Owner
 - c. One executed copy to Asset Management

- G. The 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 Owner in writing, HUD will require a monthly deposit 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. The deposits will constitute a "Reserve Fund for Replacements" which will be subject to HUD's control and from which fund withdrawals may be made only upon the receipt of HUD's written permission. These funds will be

deposited with the construction lender or an escrow agent satisfactory to HUD, by the 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 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.

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

- A. Final HUD Representative's Trip Report requires 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.
 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 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. Are work items beyond the contractor's control to complete, e.g.:
 - a. Inability to install landscaping during freezing conditions.
 - b. Unavailability of items due to strike or other temporary outage.
- 2. May not preclude the Owner from occupying or utilizing the project and its facilities for the intended use.
- 3. May not exceed two percent of the contract amount.

4. If such work is not completed by final closing, HUD will retain 150 percent of the amount estimated by the HUD representative for completion of items of delayed completion as an escrow for completion of the work.
5. Must be completed within 12 months of the date of the final HUD Representative's Trip Report.

XXIX. GUARANTEE PERIOD.

Require that a HUD representative make a 9- and 12-month inspection in accordance with the Guide to Multifamily Accelerated Processing (MAP), paragraph 13.6C, Completion Inspection, to identify and report on latent defects, failures, items of delayed completion and any casualty damage.

- A. Inform the Owner, the contractor and if applicable, the secured lien holder(s) in writing of identified deficiencies before the contractor's 1 year warranty expires.
 1. Require correction from the contractor for construction deficiencies, including remedy through equipment and materials warranties, and
 2. Notification of the insurance underwriter for extended hazard or casualty damage as appropriate.
- B. Seek remedy through surety or use of retainage, or cash escrow where available, if the contractor does not correct construction deficiencies in a timely fashion.
- C. Invite the Project Management Director (PMD) to participate at all levels of guarantee period activities, and forward a copy of all HUD representative reports, and correspondence to the PMD, the Owner, contractor, surety and if applicable, the secured lien holder(s) relating to guarantee period construction deficiencies.

XXX. PROPERTY INSURANCE SCHEDULE AND REQUIREMENTS.

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

- A. Correctly shows the insurable value of the completed structures.
- B. Reflects any changes in cost occurring after issuance of firm commitment.

XXXI. BUILDER'S WARRANTY.

- A. If the general contractor used a performance bond the Program Center Director must make sure that the bond contains a guarantee against any defects due to faulty materials or workmanship which appear within a period of one year following completion. The date of completion is defined as the date on which the HUD inspector signs the final HUD Representative's Trip Report, Form HUD-95379, provided that the Construction Manager subsequently endorses the trip report. Construction must be complete, except for acceptable items of delayed completion.
- B. If item A above does not apply then at closing the general contractor must provide one of the following to assure correction of any latent defects.
 - 1. Cash Escrow Deposit of 2 1/2 percent of the total amount of the construction contract, to be retained in escrow under HUD's control for a period of 15 months (if applicable, other secured lender(s) may require escrow amount and/or term to be increased), or
 - 2. An unconditional irrevocable letter of credit equal to 2 1/2 percent of the total amount of the construction contract, to be issued to a secured lien holder; or
 - 3. 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.

XXXII. CAPITAL ADVANCE USE AGREEMENT FOR MIXED-FINANCE TRANSACTIONS.

The Capital Advance Mixed-Finance Program Use Agreement (Agreement), Form HUD-90163.1-CA, states the owner "has agreed to continue to operate the assisted units only as rental housing for very-low income elderly or disabled persons for not less than 55 years from _____, unless otherwise approved by HUD."

The Agreement term of not less than 55 years "unless otherwise approved by HUD" was a result of HUD's interpretation of 24 CFR § 891.808. This regulation states, among other things, "[t]he sponsor may transfer the fund reservation directly to the owner or to the general partner of the owner . . ." A question arose as to the meaning of "transfer" under § 891.808. As mixed-finance transactions increase in complexity, HUD has received requests to allow the sponsor to loan the capital advance amounts to a sponsor-created lender entity, which then loans the funds to the owner, or alternatively, requests to allow the sponsor to loan the capital advance amounts to the owner entity. While HUD has approved these requests, HUD was concerned that after the 40 year use period expires and the capital advance is forgiven by HUD, the owner entity would still be required to repay the capital advance amount to the sponsor or/ sponsor-created lender entity. HUD believes such a repayment obligation from the owner entity to the sponsor/sponsor-created lender entity would unjustly enrich the sponsor/sponsor-created lender entity. To mitigate such potential unjust enrichment by the sponsor/sponsor-created lender entity in these situations, the Agreement incorporated the 55 year term, with flexibility to abide by a 40 year term where there is no unjust enrichment.

This guidance is to clarify that in instances where the sponsor is **not loaning the capital advance amount** to the owner entity or to a sponsor-created lender entity, then field counsel may incorporate an addendum to the Agreement to **reduce** the Use Agreement period to 40 years.

PART C - MIXED FINANCE CAPITAL ADVANCE UPON COMPLETION (CAUC)
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I. DURATION AND EXTENSION OF SECTION 202/811 FUND RESERVATION.

A. The term of the fund reservation is 24 months from the date the Notification of Selection Letter is issued to

the date of initial closing. Regulation 24 CFR 891.165(b) states that the duration of the fund reservation for CAUC projects is from the date of issuance of the award letter to the start of construction. Although the Department considers the start of construction for CAUC projects to be comparable to an initial closing, initial closing must still occur to satisfy the regulation. Since a CAUC project does not reach initial closing until construction completion, the initial and final closing occurs simultaneously.

- B. Extension by Program Center. A Program Center may extend a fund reservation up to 36 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 beyond 36 months to permit additional extensions up to the estimated initial/final closing date of the project.

II. INITIAL CLOSING GOAL.

Currently, each Program Center has a goal based on a count of the number of initial closings 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.

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

- A. Assurance of Completion.
- B. Blanket Fidelity Bond covering all the Owner's officers and employees, including non-compensated officers, during the construction period.
- C. A working capital deposit.
- D. An escrow to fund approved change orders.

- E. Assurance of completion for Offsite improvements.
- F. Approval of the surety when approved change orders increase cost by 10 percent or more.

IV. CONSTRUCTION STAGE FOR CAPITAL ADVANCE UPON COMPLETION PROJECTS.

A. Basic requirements for CAUC projects during the construction stage are generally the same as for projects with advances. However, because HUD does not disburse any portion of the capital advance during construction, HUD does not monitor the construction lender's disbursements. Additionally, because HUD has no risk exposure until closing, HUD does not become involved in the workout of problems during construction. For example:

- 1. Construction Problems due to:
 - a. Work stoppage,
 - b. Contractor abandons job,
 - c. A change in the contractor or architect during construction,
 - d. Construction defects untreated for 30 days, and
 - e. Extended periods of bad weather, strikes, etc.
- 2. Financing Problems due to:
 - a. Contractor's inability to complete because of under financing.
 - b. Overruns in carrying charges due to circumstances beyond the contractor's and Owner's control.
 - 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

V. **COMMITMENT TO RELEASE CAPITAL ADVANCE UPON PROJECT COMPLETION.**

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

- A. 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, initial and final closing occurs simultaneously after construction completion.
- 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 commitment shall terminate unless HUD extends the time for commencement of construction/rehabilitation in writing

- b. If the project does not reach initial/final closing by the firm commitment expiration date, all rights and obligations of the respective parties shall cease unless HUD extends the expiration date in writing.
2. If an extension is necessary, the Program Center Director may grant an extension if the current fund reservation as amended would not exceed 36 months to reach construction completions and the Capital Advance loan closing. Otherwise s/he will have to request a regulatory waiver of 24 CFR §891.165, from Headquarters.
- a. In all cases, the basis for the extension must be set forth in the project docket and the Program Center Director must make sure that costs and expenses are current.
 - b. It is the responsibility of each Office to assure that prolonged extensions or commitments do not affect the soundness of the underwriting decisions upon which the original issuance of a commitment was based. For this reason, any time extension beyond the Program Center's discretionary periods set forth above must be accompanied, at a minimum, by the following documentation:
 - 1) The date of the original commitment;
 - 2) The construction start date, if applicable;
 - 3) The current date of expiration of the commitment;
 - 4) The extenuating circumstances which justify additional extension(s) of the commitment;
 - 5) An estimate of the time needed to bring the project to a closing; and
 - 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-affecting factors.

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

VI. REQUIRED DOCUMENTS.

Note: Any item with an * 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-92554M; and
 - 3. Davis-Bacon Wage Rates (supplied by HUD Labor Relations).
- *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 unsecured liens approved by HUD, and acceptable reservations of title.

2. Proof that no unpaid obligations exist except as previously approved by HUD.
 3. Title policy continued to date of credit instrument endorsement.
- F. As-built Survey and Surveyor's Certificate, Form HUD-92457.
- G. Contractor's Requisition Project Mortgages, Form HUD-92448. The Contractor's Prevailing Wage Certificate must be submitted to HUD at the time the Capital Advance mortgage is presented for closing pursuant to a CAUC commitment.
- H. Warranty Against Latent Defects, see Section XVI below.

VII. THE PRECONSTRUCTION CONFERENCE.

The conference is required before the initial start of construction, including early start of construction projects.

- A. Required Attendees:
1. Representative(s) of the Owner and construction lender,
 2. The Owner's supervisory architect,
 3. Contractor,
 4. Major subcontractor(s),
 5. HUD construction representative (staff, in all cases, plus contract personnel, where applicable),
 6. HUD mortgage credit analyst,
 7. HUD labor standards specialist, and
 8. A representative from Fair Housing and Equal Opportunity (FHEO).

NOTE: Maintain the attendance list for the Washington Docket.

NOTE: In some HUD Offices a general overview of Labor Relations and FHEO requirements are covered at the preconstruction conference, and Labor and FHEO contact information is provided for separate meetings as necessary. For additional information see Section XI found in Part A.

- B. Supplementary Conditions of the Contract for Construction, Form HUD-92554M. Address Davis-Bacon Wage Rates, Federal labor standards and equal employment provisions, including:
1. Contractual obligations of the contractor and subcontractors, including contractor's certification of compliance with Davis-Bacon wage rates.
 2. Davis-Bacon Wages rates apply to the entire project.
 3. Contract award or start of construction will lock in the Davis Bacon wage decision.
 4. Statement of sanctions imposed for not complying with the supplemental conditions.
 5. Requirement that Form HUD-92554M must be made part of the subcontracts for all tiers.
 6. Give extra copies of Form HUD-92554M and applicable Davis-Bacon wage determinations to the contractor for any subcontractors not attending the meeting.
 7. Emphasize the importance of Federal wage payments, prompt payroll submissions and record keeping. Instruct that Form WH-1321, Davis-Bacon poster, must be conspicuously posted on the job site.
 8. Indicate who in HUD will review for labor standards compliance.

9. Give copies of the Equal Opportunity poster to the contractor and each subcontractor to post conspicuously at the construction site.

C. Contract Administration. Explain the procedures for:

- Change orders and architect's supplemental instructions;
- Handling latent site or rehabilitation building conditions;
- Requesting construction document clarifications and handling job problems;
- Shop drawings and sample approvals;
- Noncompliant work and its correction;
- Substantial completion of the work or portion thereof;
- Permissions to occupy including management plans and rent rolls;
- Job meetings
- Maintenance of test logs;
- The architect's log; and
- The HUD representative's on-site facilities.

- D. HUD will inspect the project during construction as if capital advance funds were being released. The Program Center will give the mixed-finance Owner and the construction lender copies of the HUD inspector's trip reports, Form HUD 95379, as they become available.

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

E. Cost Certification.

Explain that the mixed-finance Owner must cost certify following the instructions found in Section XIII of Part B of this Notice.

VIII. CONSTRUCTION MONITORING AND REPORTING.

See Section XXVI of Part B of this Notice.

IX. CONTRACTOR'S MONTHLY REQUISITIONS.

Monthly requisitions are not applicable to CAUC projects.

X. OFFSITE CONSTRUCTION.

Advance of Funds monitoring by HUD is not applicable for CAUC projects.

XI. CONSTRUCTION CONTRACT CHANGES.

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

A. HUD approval of a change order is not required, however, staff may comment on:

1. Technical acceptability of the requested changes.
2. Affects arising because of error, omission or negligence on the part of the architect, contractor or owner.
3. Affects to the marketability, value, income, or maintenance and/or operating cost of the project.
4. Changes in the applicable codes, ordinances or other workings of the law after firm commitment for CAUC projects.

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

B. Additive Change Orders.

1. No escrow is required for additive change orders, because HUD has no risk exposure until final closing. The mixed-finance Owner must be able to provide the additional funds required and must not have any outstanding obligation in connection with construction other than the capital advance mortgage and prior approved secured and non-secured liens at the time the mortgage is presented for closing.
2. Additive change orders are not a basis for an increase in the capital advance mortgage.

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.

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

XIII. PERMISSION TO OCCUPY.

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

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

XIV. FINAL HUD REPRESENTATIVE'S TRIP REPORT AND ITEMS OF DELAYED COMPLETION.

See Section XXVIII of Part B of this Notice.

XV. GUARANTEE PERIOD.

See Section XXIX of Part B of this Notice.

XVI. REQUISITION FOR DISBURSEMENT OF CAPITAL ADVANCE FUNDS.

- A. HUD is not involved in the release of construction funds.
- B. Form HUD 92403CA, Requisition for Disbursement of Capital Advance Funds, is submitted as part of the closing documents. The amount disbursed will be based on HUD's review and approval of the Owner's cost certification.

XVII. WORKING CAPITAL DEPOSIT.

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

XVIII. Contingency Reserve - New Construction Only.

A 2 percent new construction contingency reserve is not required in CAUC projects.

XIX. MINIMUM CAPITAL INVESTMENT AND OPERATING RESERVES.

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

- A. Minimum capital investment for the assisted units; and
- B. Operating reserve escrow for the unassisted units.

XX. PROPERTY INSURANCE SCHEDULE AND REQUIREMENTS.

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

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

XXI. COST CERTIFICATION.

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

HUD's review is to close out the capital advance. Mortgage Credit only recognizes those costs associated with the assisted units as reflected in the third 92264, discussed in Part B above, as adjusted by the prorated portion of approved change orders. All other costs will be disallowed, for example, financing fees and construction loan interest.

For projects with LIHTCs the Owner must submit to the Program Center a copy of the tax credit cost certification that was submitted to the tax credit agency. Program Center staff will review the documentation to complete their understanding of the transaction especially costs associated with the unassisted unit.

XXII. CLOSING.

Closing must occur within the period provided in the commitment unless HUD extends the commitment in writing. (See Part C Sections I.B. and C. above.)

The goal is to close the project within 120 days of final completion.

XXIII. BUILDER'S WARRANTY.

See Section XXXI in Part B of this Notice.

Questions regarding this Notice may be directed to Shalonda Lincoln at (202)402-2617.

Carol J. Galante
Assistant Secretary for Housing-
Federal Housing Commissioner

"The information collection requirements contained in this Notice were approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The HUD Forms referenced in the Notice are approved as indicated on the Forms, particularly by approval control numbers 2502-0029, 2502-0587, 2502-0204 and 2502-0182. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number."