

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

**24 CFR Part 891**

[Docket No. FR-4725-I-01]

RIN 2502-AH83

**Mixed-Finance Development for  
Supportive Housing for the Elderly or  
Persons With Disabilities and Other  
Changes to 24 CFR Part 891**

**AGENCY:** Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule implements statutory changes that enable the use of mixed-finance and for-profit participation in the Section 202 supportive housing programs for the elderly and the Section 811 supportive housing program for persons with disabilities, as well as makes other changes to those programs. The rule uses the mixed-finance development model to leverage the capital and expertise of the private developer community to create attractive and affordable supportive housing developments for the elderly or persons with disabilities. In addition, the rule is structured so that tax credits can be used to provide additional units as well as supplement capital advance funds for the Section 202 or 811 project. The rule sets standards for the participation of limited partner investors (who may be for-profit entities) in partnership with a sole-purpose nonprofit general partner; development proposals and supporting documents; eligible fees and expenses; the use of capital advances in the mixed-finance context; and other matters relevant to mixed-finance development of these types of projects.

The public should note that the effective date of the information collection requirements in this rule is delayed, as stated in the "Effective Date" section below, pending approval of the information collections required by this rule under the Paperwork Reduction Act. HUD will publish a notice when paperwork approval for this rule is obtained.

**DATES:** *Comment Due Date:* January 30, 2004.

*Effective Date:* December 31, 2003. The portions of this rule requiring information collection are not effective until OMB approval of the information collection requirements of this rule. The sections requiring information collection are: §§ 891.820(a), 891.820(b), 891.820(c), 891.820(d), 891.820(e), 891.820(g), 891.820(h) 891.820(i),

891.820(j), 891.820(k), 891.820(l), 891.820(m), 891.820(n), and 891.825. HUD will publish a document in the **Federal Register** announcing the effective date of these sections.

**ADDRESSES:** Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-0500. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address. Facsimile (FAX) comments are not acceptable.

**FOR FURTHER INFORMATION CONTACT:** Willie Spearmon, Director, Office of Housing Assistance and Grant Administration, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-8000; telephone (202) 708-3000 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Legislative Background**

The American Homeownership and Economic Opportunity Act of 2000, Pub. L. 106-569 (AHEO Act), amended both the Section 202 supportive housing program for the elderly and the Section 811 supportive housing program for persons with disabilities. These amendments allow the participation of for-profit limited partnerships and the use of mixed-finance development methods. Section 831 of the AHEO Act, 114 Stat. 3021, further amended section 202(k)(4) of the Housing Act of 1959, 12 U.S.C 1701q(k)(4), to add to the existing statutory definition of "private nonprofit organization" a for-profit limited partnership the sole general partner of which is a nonprofit organization meeting the requirements under 12 U.S.C. 1701q(k)(4)(A)-(C), or a nonprofit corporation wholly owned and controlled by a nonprofit organization meeting those requirements. Section 841 of the AHEO Act, 114 Stat. 3022, amended section 811(k)(6) of the National Affordable Housing Act, 42 U.S.C. 8013(k)(6), to add to the definition of "nonprofit organization" a for-profit limited partnership, the sole general partner of which is a nonprofit organization meeting the requirements of 42 U.S.C. 8013(k)(6)(A)-(D), or a nonprofit

corporation wholly owned and controlled by a nonprofit organization meeting those requirements. In both cases, the statutory requirements for the nonprofit organization include a nonprofit organizational structure, a governing board that includes the representation of the views of the community and is responsible for operating the development, and approval as to financial responsibility by HUD. (See 12 U.S.C. 1701q(k)(4) and 42 U.S.C. 8013(k)(6), as amended.) For purposes of subpart F of this rule, both types of organizations are referred to as Nonprofit Organizations.

Sections 832 and 842 of the AHEO Act, 114 Stat. 3021 and 3022, broadened the funding sources that may be used for amenities and design and construction suitable for supportive housing for the elderly or persons with disabilities. Excess amenities may not be funded with the capital advance under either program, and, if other funds are used, the cost of such amenities is not taken into account in determining the amount of Federal assistance or the rent contribution of tenants. Under the statute as amended, an owner may now treat funds from other Federal and non-federal sources as amounts not derived from a Federal grant. Sections 834 and 844 of the AHEO Act, 114 Stat. 3021-22 and 3023, respectively, amended 12 U.S.C. 1701q(j) and 42 U.S.C. 8013(j) to add a new paragraph to each statute relating to the use of project reserve accounts under the existing supportive housing for the elderly and persons with disabilities programs. Under these new sections, project reserves may be used to reduce the number of units by combining and retrofitting units that are obsolete or unmarketable. HUD approval is required to ensure that reduction of units is for appropriate purposes.

Sections 835 and 845 of the AHEO Act amended section 202(h)(1) of the Housing Act of 1959, 12 U.S.C. 1701q(h)(1), and section 811(h)(1) of the National Affordable Housing Act, 42 U.S.C. 8031(h)(1), respectively, to clarify that commercial facilities for the benefit of residents of the project and the community in which the project is located, may be located and operated in a supportive housing project for the elderly or persons with disabilities. Such commercial facilities cannot be subsidized with 202 or 811 funds.

Section 833 of the AHEO Act amended sections 202(b) and 202(h)(2) of the Housing Act of 1959, 12 U.S.C. 1701q(b) and 1701q(h)(2), to remove the limitation in the Section 202 program that existing housing be acquired only from the Resolution Trust Corporation

(RTC). Section 202 owners may now acquire property without the need for rehabilitation for use in supportive housing from other sources. In the case of section 811, the statute does not limit acquisition to RTC properties (*see* 42 U.S.C. 8013(b)(2)).

## II. This Interim Rule

This rulemaking amends 24 CFR part 891, which regulates HUD-assisted supportive housing for the elderly and persons with disabilities. Most importantly, this rule establishes a mixed-finance program under which partnerships with for-profit limited partners could participate as mixed-finance owners in the development and management of supportive housing under part 891, if they partner with a nonprofit general partner meeting the requirements of the statute and this rule. Such general partner must have been created by a sponsor that has received a Section 202 or Section 811 fund reservation. In addition, this rule makes changes to other portions of part 891 to conform to recent changes in law, and to include additional provisions applicable to the existing Section 202 and 811 programs.

This rule revises 24 CFR 891.120 and 891.405, two cross-cutting sections that govern both supportive housing for elderly persons and persons with disabilities. As to 891.120, the rule adds a new paragraph (e) to permit commercial facilities for the benefit of residents in supportive housing developments under part 891, as long as the commercial facilities are not funded with the supportive housing program funds. Such commercial facilities are considered public accommodations under Title III of the Americans with Disabilities Act and must be accessible under the requirements of that Act. Section 891.405 of this interim rule adds a new paragraph (d) permitting project reserves to be used to reduce the number of units for the purpose of retrofitting obsolete or unmarketable units; for example, two efficiencies (0 bedroom) could be combined to form a one-bedroom unit. Retrofitting must be consistent with the applicable accessibility requirements of Section 504 of the Rehabilitation Act of 1973. HUD approval would be required for any such change. The definition of "replacement reserve account" in 891.105 is revised to be consistent with the new paragraph.

This rule adds material regarding the developer's fee in the context of this program in § 891.815. This section establishes the appropriate amount of the developer's fee and the eligible and ineligible uses of the fee. Previously,

this material was found in handbook publications (*see* Notice H 96-102, as extended by Notice H 03-08). Eligible uses of the developer's fee are both to fund eligible costs and to contribute to the general partner's share of the partnership assets. The total fee is capped at the amount stated in § 891.815(a), and the amount that may be taken out of the capital advance to pay the developer's fee is capped in § 891.815(b).

The rule also revises the definition of "acquisition" in 24 CFR 891.205 and 891.305. Since the RTC is no longer in existence, the rule removes the regulatory requirement that acquisition of properties for the supportive housing program under part 891 be purchased from the RTC. The rule also makes § 891.205 parallel to § 891.305 by restricting capital advances for developments owned and operated by the sponsor, except in connection with rehabilitation. Capital advance funds may not be provided to refinance a federally assisted or insured project.

The rule creates a new subpart F to 24 CFR part 891, to state the rules governing the mixed-finance program for supportive housing for the elderly and persons with disabilities. The new subpart states the basic rules for participation in the program. Except where specifically stated otherwise, this subpart includes by cross-reference the basic regulations of the Section 202 and 811 supportive housing programs and adds additional requirements related to mixed-finance developments.

Sections 891.800, 891.802, and 891.805 state the purpose, applicability of other provisions, and definitions, respectively. The overall purpose of the legislation and rule is to create more supportive housing for elderly persons and persons with disabilities. The means of doing so is to bring in for-profit entities, in partnership with nonprofit general partners, thus leveraging private capital for developing additional units. In turn, limited partnerships can apply for and utilize Federal low-income housing tax credits, assuming that their developments meet all the requirements of IRS rules for tax credits. The Department has determined that all mixed-finance developments must meet the civil rights nondiscrimination statutes and all of the implementing regulations and Section 504 requirements and that these requirements apply to all of the development's units regardless of funding source. The Civil Rights Restoration Act of 1991 amended the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of

1973 to state that their nondiscrimination provisions applied to "all of the operations of an entire corporation, partnership, or other private organization or entire sole proprietorship if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or which is principally engaged in the business of providing housing."

This interim rule, in section 891.805, creates additional definitions pertinent to the mixed-finance supportive housing program only. These include a definition of a "mixed-finance owner," which must include a single-purpose Nonprofit Organization (in the case of supportive housing for the elderly, a private Nonprofit Organization, and, in the case of housing for the disabled, a Nonprofit Organization with a section 501(c)(3) IRS tax exemption), which must be the sole general partner. For-profit limited partners may be included where the Nonprofit Organization is the sole general partner. The "Single-Purpose Nonprofit Organization" (for 811 projects) or "Single-Purpose Private Nonprofit Organization" (for 202 projects) also must meet the requirements of the definition, which includes the statutory requirements that the organization have the appropriate tax-exempt status; that its net earnings do not go to profit any particular individual; that the governing board includes representation of the views of the community and is responsible for the operation of the part 891 supportive housing; and that it is approved as to financial responsibility by HUD. In addition, the Nonprofit Organization meeting these requirements can be the general partner of a partnership with for-profit limited partners, as long as it owns at least one-hundredth of one percent of the partnership assets, or is a nonprofit corporation wholly owned by an organization meeting those requirements. The Nonprofit Organization must be formed by a sponsor receiving a Section 202 or 811 fund reservation.

Sections 891.808 and 891.810 address capital advance funds and project rental assistance in the mixed-finance context. Capital advance funds are provided as in accordance with the regular Section 202 and 811 programs, except that the mechanism for providing the funding is somewhat more complex in a mixed-finance arrangement. HUD will initially provide the fund reservation to the project sponsor (the term is defined in sections 891.205 and 891.305), which will then transfer the fund reservation to the single-purpose Nonprofit Organization. HUD then will provide the capital advance funds to the

Nonprofit Organization, which will deposit the funds in a disbursement escrow account to be loaned to the mixed-finance owner only upon HUD approval of the drawdown. The loan will be non-amortizing and at the interest rate for the 202 or 811 program in effect at the time of the closing of the capital advance, and is not repayable if the project remains available for very low income elderly or disabled persons for 40 years. Finally, paragraphs (b) and (c) of § 891.808 ensure that the proper number of units are built with the capital advance funds, and that the capital advance funds are not used improperly in the mixed-finance context (for example, to support the development of non-202 or -811 units).

Project rental assistance is covered in section 891.810 and is essentially the same as for the 202 and 811 programs generally, and is defined in section 891.105. Project rental assistance can only be paid for 202 and 811 units. Any necessary funds for the non-202 or -811 units must be obtained from another source.

Section 891.813 deals with the eligible uses of assistance under this proposed subpart. Paragraph (a) reiterates the statutory standards. Paragraph (b) deals with excess amenities. Such amenities may not be funded with capital advance funds. The main concern here is that amenities be provided in a manner that makes them available to all residents, assisted and unassisted alike. To that end, the amenities cannot be made mandatory for the assisted residents, although they are permitted to participate in or use the amenities voluntarily. Any fee charged for the amenities must be reasonable, so that assisted residents who want to do so can use the amenities.

Section 891.815 includes material on developer's fees. This section sets limitations on the total developer's fee and the amount of the capital advance that may be paid toward the developer's fee. In addition, the section provides that the developer's fee may be used for the general partner's contribution to the partnership assets, as well as listing other eligible and ineligible uses for the developer's fee.

Section 891.818 states the contents of the firm commitment application for 202 or 811 units in mixed-finance projects. The application requirements in this interim rule closely follow the guidelines on firm commitment applications (see Notice H 96-102, as extended by Notice H 03-08). In the mixed-finance context, the partnership structure involves additional parties in the application process, such as the

general partner and the for-profit limited partners.

Additionally, in the mixed-finance program, there will be a mixed-finance proposal addressing the total mixed-finance project, including non-202 or -811 units and any commercial space, submitted at the time of the application for the firm commitment of capital advance funds under § 891.820. The mixed-finance proposal must include a description of the proposed project; financing documents, including any firm commitments; a statement of sources and uses of funds; site information; construction cost estimates; a systems life cycle analysis; any relocation plan, if the development will cause displacement; the relationship among participating parties; a demonstration of the operating feasibility of the project for the entire 40-year period of the very-low income restriction on the assisted units; a market analysis; a summary of the proposed management and occupancy policies; a statement regarding existing facilities; any additional environmental information HUD deems necessary in completing its environmental review; and required certifications and assurances.

HUD will review the firm commitment application and mixed-finance proposal under the standards provided in § 891.823. This section requires an initial review for technical deficiencies with an opportunity to supply any missing materials by a date certain, followed by firm commitment and proposal technical processing. The purpose of technical processing is to determine that the project is financially feasible, that the supportive housing funds provided are used in an appropriate manner, that the mixed-finance owner has the legal capacity and experience to develop and operate the project, that the proper zoning is in place, that there are restrictive covenants running with the land guaranteeing that the assisted units will remain available to very-low income elderly persons or very-low income persons with disabilities for a 40-year period, and that other legal and regulatory requirements pertaining to the program are in fact met by the project as proposed in the firm commitment application/mixed-finance proposal.

Once the firm commitment application/mixed-finance proposal is approved, but prior to HUD approval of the release of capital advance funds, § 891.825 requires the sponsor to submit for HUD approval evidentiary materials consisting of the actual documents to support the statements and

certifications in the firm commitment application/mixed-finance proposal and other required documents. For example, all the organizational documents of the mixed-finance owner and the general partner, the actual covenants running with the land or deed restriction guaranteeing the availability of the supportive housing units to very-low income eligible persons for 40 years, any zoning documents, any updates to financing documents submitted as part of the proposal, the management contract, evidence of site control, and various required certifications. This section also makes clear that no third-party beneficiary, principal-agent, or other legal relationship (beyond the duty to fulfill the explicit contractual and regulatory requirements) is created with HUD by any of the agreements entered into by the parties to the mixed-finance transaction.

Section 891.830 regulates the drawdown of capital advance funds after all HUD approvals are obtained. Capital advance funds may only be drawn down pursuant to a HUD-approved drawdown schedule, and only in the appropriate amount pro-rated according to the development costs of only the supportive housing units. Each drawdown of funds constitutes a certification by the mixed-finance owner and Nonprofit Organization that all representations and warranties they have made are true, valid and in full force and effect, and all conditions precedent to the drawdown have been satisfied. Such funds may only be used for eligible costs.

Section 891.833 requires HUD to monitor and review all phases of construction and operation to ensure continued compliance with the mixed-finance amendment to the capital advance agreement and all other contractual, legal, and regulatory requirements. Notwithstanding HUD's monitoring role, compliance ultimately is the responsibility of the mixed-finance owner and sponsor.

Section 891.835 states the eligible and ineligible uses of the project rental assistance provided once the project is operating. Importantly for the mixed-finance context, eligible operating costs attributable to the project as a whole, such as for common areas, may be paid from project rental assistance on a pro rata basis, based on the ratio of 202 or 811 units to the total units in the project.

Sections 891.840-891.853 of this interim rule make, respectively, site and neighborhood standards, environmental review, Uniform Relocation Act requirements, design and cost standards (except for the paragraph on amenities,

which are governed for the mixed-finance program by proposed § 891.813(b)), Davis-Bacon labor standards, and development cost limits from the regular 202 or 811 programs applicable in the mixed-finance context. Sections 891.855 and 891.860 of this interim rule, respectively, govern replacement reserve accounts and operating reserves.

Section 891.863 of this interim rule requires that the development maintain the same number of supportive housing units as stated in the capital advance agreement for a 40-year period. This requirement will be enforced by deed restrictions or covenants that will continue to apply regardless of any change in ownership of the development. Section 891.865 of this rule, entitled "Sanctions," provides that HUD may impose sanctions or seek legal and equitable relief in the event that the mixed-finance units are not developed and operated in accordance with all applicable requirements.

**III. Findings and Certifications**

*Public Reporting Burden*

To ensure that only feasible proposals for mixed-financing will be developed,

HUD is collecting information to assist the agency in determining whether the owner has the financial and administrative capacity needed to develop and manage a mixed-finance project, all funding commitments are in place, the proposed site and supportive services are suitable for the intended residents, the project design meets the physical needs of the residents, and the estimated income can support the operation and maintenance of the project, when built. The regulations will require the mixed-finance owner to submit a full proposal and evidentiary materials for mixed-finance development.

Section 891.818 covers the submission of the firm commitment application and the mixed-finance proposal. This section requires that the Firm Commitment Application be submitted by both the mixed-finance owner and the Nonprofit Organization. However, the documents required for submission with the Firm Commitment Application (as well as the documents required from initial closing through final closing) have not changed from what is required under the regular Section 202 and Section 811 programs.

The OMB clearance for the Section 202 and Section 811 Firm Commitment through Final Closing documents are covered under OMB Control No. 2502-0470.

Section 891.820 provides the documentation that Section 202 and Section 811 owners must submit if they are proposing mixed-finance projects pursuant to the AHEOA. If this collection of information were not made, HUD would not be able to ensure that owners are eligible and financially capable of developing mixed-finance developments of Section 202 supportive housing for the elderly or Section 811 supportive housing for persons with disabilities, or otherwise meet other HUD and federal requirements for acceptability. The collection of this information is not currently accounted for under any previous OMB clearance and, therefore, a request for their approval is being made herein.

For mixed-finance proposals, the total estimated paperwork burden is 1,350 hours. The burden of information collection in this proposed rule is estimated as follows:

Section reference	Number of parties	Number of responses per respondent	Estimated average time for requirement (in hours)	Estimated annual burden (in hours)
§ 891.820(a), Development Description .....	15	1	.5	7.5
§ 891.820(b), Financing Description .....	15	1	1	15
§ 891.820(c), Sources and Uses of Financing .....	15	1	8	120
§ 891.820(d), Site Information .....	15	1	2	30
§ 891.820(e), Development Construction Cost Estimate .....	15	1	4	60
§ 891.820(g), Relocation Plan .....	15	1	2	30
§ 891.820(h) Statement of Activities and Relationship of Parties .....	15	1	1	15
§ 891.820(i), Documents Showing Operating Feasibility .....	15	1	4	60
§ 891.820(j), Market Analysis .....	15	1	2	30
§ 891.820(k), Summary of Proposed Management and Occupancy Policies .....	15	1	.5	7.5
§ 891.820(l), Statement Addressing Facilities and Services .....	15	1	.5	7.5
§ 891.820(m), Environmental Information .....	15	1	4	60
§ 891.820(n), Certifications and Assurances .....	15	1	.5	7.5
§ 891.825, Evidentiary Materials .....	15	1	60	900

Total Reporting and Recordkeeping Burden (Hours): 1,350.

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received within 30 days from the date of this proposal. Comments must refer to the proposal by name and docket number (FR-4725-I-01) and must be sent to:

Lauren Wittenberg, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503-0009; and

Gloria S. Diggs, Reports Liaison Officer,  
Office of the Assistant Secretary for  
Housing-Federal Housing  
Commissioner, Department of  
Housing and Urban Development, 451  
7th Street SW., Room 9116,  
Washington, DC 20410-8000.

### Justification for Interim Rulemaking

In general, the Department publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking, 24 CFR part 10. However, part 10 does provide for exceptions from that general rule where the agency finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest." (24 CFR 10.1) The Department finds that good cause exists to publish this rule for effect at the same time as it solicits public comment, because waiting for the completion of public comments prior to making the rule effective would be contrary to the public interest. The public has already expressed interest in going forward with mixed-finance proposals for supportive housing for the elderly or persons with disabilities, and there are already proposals pending that are ready to proceed. No purpose would be served by making those who are prepared to proceed wait for the receipt of public comments, the consideration of those comments by agency decision makers, and the subsequent publication of a final rule. In addition, the rule would provide a significant public benefit, in the form of increased housing opportunities for the elderly and disabled, while, through the leveraging of private resources and state and local tax credits, reducing the amount of Federal expenditure. Therefore, it is in the public interest to issue this rule for effect so that these proposals can go forward expeditiously and the public can have the benefit of the increased development of supportive housing that the rule intends to foster. The Department invites public comment on the rule to assure that consideration is given to the full range of views that may be presented in the development of a final rule that will supersede this interim rule.

### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. This rule does not

impose any Federal mandate on any state, local, or tribal government or the private sector within the meaning of the UMRA.

### Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Office of Regulations, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-0500.

### Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this rule and in so doing certifies that this rule would not have a significant economic impact on a substantial number of small entities. The program will provide capital advances to private Nonprofit Organizations and nonprofit consumer cooperatives to expand the supply of supportive housing for the elderly and to Nonprofit Organizations to expand the supply of supportive housing for persons with disabilities. Private for-profit entities may also participate in the mixed-finance aspect of producing such housing. Although small and private entities may participate in the program, the rule does not impose any legal requirement or mandate upon them and accordingly, will not have a significant impact on them.

Although HUD has determined that this rule would not have a significant economic impact on a substantial number of small entities, HUD welcomes comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

### Federalism Impact

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct

compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

### Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action," as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Rules Docket Clerk, Room 10276, U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-0500.

### List of Subjects in 24 CFR Part 891

Aged, Civil rights, Grant programs—housing and community development, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Mental health programs, Rent subsidies, Reporting and recordkeeping requirements.

(The catalogue of Federal domestic assistance numbers for the programs in this rule are: 14.157 and 14.181.)

■ For the reasons discussed in this preamble, HUD amends 24 CFR part 891 as follows:

### PART 891—SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

■ 1. The authority citation for part 891 continues to read as follows:

**Authority:** 12 U.S.C. 1701q; 42 U.S.C. 1437f, 3535(d), and 8013.

### Subpart A—General Program Requirements

■ 2. Amend 24 CFR 891.105 by revising the definition of "Replacement reserve account" to read as follows:

#### § 891.105 Definitions.

\* \* \* \* \*

*Replacement reserve account* means a project account into which funds are deposited, which may be used only with the approval of the Secretary for repairs, replacement, capital improvements to the project, and retrofitting to reduce the number of units as provided by 24 CFR 891.405(d).

■ 3. Amend 24 CFR 891.120 by adding a new paragraph 891.120(e) to read as follows:

**§ 891.120 Project design and cost standards.**

\* \* \* \* \*

(e) Projects under this part may have on their sites commercial facilities for the benefit of residents of the project and of the community in which the project is located, so long as the commercial facilities are not subsidized with funding under the supportive housing programs for the elderly or persons with disabilities. Such commercial facilities are considered public accommodations under Title III of the Americans with Disabilities Act and must be accessible under the requirements of that Act.

**Subpart B—202 Supportive Housing for the Elderly**

■ 4. Amend 24 CFR 891.205 by revising the definition of “acquisition” in § 891.205 to read as follows:

**§ 891.205 Definitions.**

\* \* \* \* \*

*Acquisition* means the purchase of (or otherwise obtaining title to) existing housing and related facilities.

**Subpart C—Section 811 Supportive Housing for Persons With Disabilities**

■ 5. Amend 24 CFR 891.305 by revising the definition of “acquisition” in § 891.305 to read as follows:

**§ 891.305 Definitions.**

\* \* \* \* \*

*Acquisition* means the purchase of (or otherwise obtaining title to) existing structures to be used as housing for persons with disabilities.

\* \* \* \* \*

**Subpart D—Project Management**

■ 6. Amend 24 CFR 891.405 by adding a sentence to the end of paragraph 891.405(d) to read as follows:

**§ 891.405 Replacement reserve.**

\* \* \* \* \*

(d) \* \* \* With HUD approval, reserves may be used to reduce the number of dwelling units, provided that the purpose for the reduction is the retrofitting of obsolete or unmarketable units.

■ 7. Add a new subpart F to read as follows:

**Subpart F—For-Profit Limited Partnerships and Mixed-Finance Development for Supportive Housing for the Elderly or Persons With Disabilities**

Sec.

891.800 Purpose.  
891.802 Applicability of other provisions.  
891.805 Definitions.

891.808 Capital advance funds.  
891.809 Limitations on capital advance funds.  
891.810 Project rental assistance.  
891.813 Eligible uses for assistance provided under this subpart.  
891.815 Developer's fee.  
891.818 Firm commitment application.  
891.820 Mixed-finance proposal.  
891.823 HUD review and approval.  
891.825 Evidentiary materials.  
891.828 Loan of capital advance funds to mixed-finance owner.  
891.830 Drawdown.  
891.833 Monitoring and review.  
891.835 Eligible uses of project rental assistance.  
891.840 Site and neighborhood standards.  
891.843 Environmental review and approval.  
891.845 Relocation requirements.  
891.848 Project design and cost standards.  
891.850 Labor standards.  
891.853 Development cost limits.  
891.855 Replacement reserves.  
891.860 Operating reserves.  
891.863 Maintenance as supportive housing units.  
891.865 Sanctions.

**§ 891.800 Purpose.**

The purpose of this subpart is to establish rules allowing for, and regulating the participation of, for-profit limited partnerships, of which the sole general partner is a Nonprofit Organization meeting the requirements of 12 U.S.C. 1701q(k)(4) or 42 U.S.C. 8032(k)(6), in the development of supportive housing for the elderly and persons with disabilities using mixed-finance development methods. These rules are intended to develop more supportive housing for the elderly and persons with disabilities by using Federal assistance, private capital and expertise, and tax credits.

**§ 891.802 Applicability of other provisions.**

The provisions of 24 CFR part 891, subparts A–D, apply to this subpart F unless otherwise stated.

**§ 891.805 Definitions.**

In addition to the definitions at § 891.105, the following definitions apply to this subpart:

*Mixed-finance owner*, for the purpose of the mixed-finance development of supportive housing under this subpart, means a for-profit limited partnership of which a Single-Purpose Private Nonprofit Organization (in the case of supportive housing for the elderly), or a Single-Purpose Nonprofit Organization with a 501(c)(3) tax exemption (in the case of supportive housing for the disabled) is the sole general partner. The purpose of the mixed-finance owner must include the promotion of the welfare of the elderly or persons with disabilities, as appropriate.

*Single-Purpose Private Nonprofit Organization* (in the case of supportive housing for the elderly) or *Single-Purpose Nonprofit Organization* (in the case of supportive housing for persons with disabilities) (for the purposes of this subpart, both types of organization are referred to as “Nonprofit Organization”), for the purpose of this subpart, means any institution or foundation:

(1) In the case of supportive housing for the elderly, that meets the requirements of the definition of “private nonprofit organization” found in § 891.205 of this title; or

(2) In the case of supportive housing for persons with disabilities, that meets the requirements of the definition of “nonprofit organization” in § 891.305 of this title; and that

(3) Is the general partner of a for-profit limited partnership, if the Nonprofit Organization meets the requirements of this definition and owns at least one-hundredth of one percent of the partnership assets, or is a nonprofit corporation wholly owned and controlled by a Nonprofit Organization meeting those requirements. If the project will include units financed with the use of Federal Low-Income Housing Tax Credits and the organization is a limited partnership, the limited partnership must meet the requirements of section 42 of the IRS code, including the requirements of section 42(h)(5).

**§ 891.808 Capital advance funds.**

(a) HUD is authorized to provide capital advance funds to expand the supply of housing for the elderly and persons with disabilities in accordance with the rules and regulations of the Section 202 and 811 supportive housing programs. For mixed-finance projects, HUD provides a capital advance funds reservation to the sponsor, which transfers the fund reservation to the Nonprofit Organization, which is general partner of a for-profit limited partnership meeting the requirements of this subpart. HUD then provides the capital advance funds to the Nonprofit Organization, which makes a non-amortizing loan to the mixed-finance owner to be repaid within 40 years at the 202 or 811 interest rate in effect on the date of the closing of the capital advance. The capital advance funds may be provided as a loan in the case of a mixed-finance project using a nine percent tax credit, and as a pass-through to the limited partnership in the case of mixed-finance projects using tax-exempt bonds with four percent tax credit. The capital advance funds will be disbursed under a disbursement escrow agreement

upon HUD approval of the mixed-finance draw down.

(b) Developments built with mixed-finance funds may combine assisted supportive housing units with market rate units. However, the number of Section 202 or 811 units in the development funded with the capital advance must be not less than the number of units that could have been developed with the capital advance without the use of mixed funding sources. In the case of a Section 811 mixed-finance project, the additional units cannot cause the project to exceed the applicable Section 811 project size limit if they will also house persons with disabilities.

**§ 891.809 Limitations on capital advance funds.**

Capital advances are not available in connection with:

(a) Acquisition of facilities currently owned and operated by the sponsor as housing for the elderly, except with rehabilitation as defined in 24 CFR 891.105;

(b) The financing or refinancing of federally assisted or insured projects;

(c) Facilities currently owned and operated by the sponsor as housing for persons with disabilities, except with rehabilitation as defined in 24 CFR 891.105; or

(d) Units in Section 202 direct loan projects previously refinanced under the provisions of Section 811 of the American Homeownership and Economic Opportunity Act of 2000, 12 U.S.C. 1701q *note*.

**§ 891.810 Project rental assistance.**

Project Rental Assistance is defined in § 891.105. Project Rental Assistance is provided for operating costs, not covered by tenant contributions, attributable to the number of units funded by capital advances under the Section 202 and 811 supportive housing programs, subject to the provisions of 24 CFR 891.445. The sponsor of a mixed-finance development must obtain the necessary funds from a source other than project rental assistance funds for operating costs related to non-202 or -811 units.

**§ 891.813 Eligible uses for assistance provided under this subpart.**

(a) Assistance under this subpart may be used to finance the construction, reconstruction, or rehabilitation of a structure or a portion of a structure; or the acquisition of a structure to be used as supportive housing for the elderly; or the acquisition of housing to be used as supportive housing for persons with disabilities. Such assistance may also

cover the cost of real property acquisition, site improvement, conversion, demolition, relocation, and other expenses that the Secretary determines are necessary to expand the supply of supportive housing for the elderly and persons with disabilities.

(b) Assistance under this subpart may not be used for excess amenities, as stated in 24 CFR 891.120(c). Such amenities may be included in a mixed-finance development only if:

(1) The amenities are not financed with funds provided under the section 202 or 811 program;

(2) The amenities are not maintained and operated with section 202 or 811 funds;

(3) The amenities are designed with appropriate safeguards for the residents' health and safety; and

(4) The assisted residents are not required to use, participate in, or pay a fee for the use or maintenance of the amenities, although they are permitted to do so voluntarily. Any fee charged for the use, maintenance, or access to amenities by residents must be reasonable and affordable for all residents of the development.

(c) Notwithstanding any other provision of this section, §§ 891.220 and 891.315 on "prohibited facilities" apply to mixed-finance projects containing units assisted under section 202 or 811.

**§ 891.815 Developer's fee.**

(a) *Developer's fee cap.* No developer's fee shall be paid in excess of nine percent of the total project replacement costs.

(b) *Use of capital advance towards developer's fee.* A maximum of eight percent of the capital advance may be used towards payment of the developer's fee.

(c) *Eligible and ineligible uses of developer's fee.* (1) a developer's fee may be used to pay costs associated with developing the mixed-finance project, including, but not limited to:

(A) Reasonable profit and overhead of up to six percent of the total construction cost;

(B) The costs of necessary change orders approved by HUD prior to final project completion;

(C) Housing consultant services;

(D) Organizational expenses;

(E) The owner's cash requirement prior to initial closing, except as stated in paragraph (c)(2) of this section;

(F) Increased taxes and insurance caused by unavoidable delays in construction;

(G) Increases in otherwise eligible non-construction line items;

(H) Environmental studies;

(I) Appraisal costs;

(J) Capital expenditures, such as major moveable furnishings and equipment, including, but not limited to, office and maintenance equipment and furnishings for the public areas;

(K) Costs directly related to the rent-up of the project, such as advertisement;

(L) Accruals for taxes and insurance after completion of construction if current income from the project is insufficient to meet such accruals;

(M) Project contingency items for which two percent of the developer's fee is withheld at HUD approval of the capital advance; and

(N) Cost of obtaining a project cost estimate.

(2) A developer's fee may not be used for the following:

(A) Excess amenities;

(B) Fees to the architect and attorney above those contractually agreed to;

(C) Non-major equipment and furnishings;

(D) Items with short life cycles, such as office and maintenance supplies;

(E) Furnishings within the residential units; and

(F) Motor vehicles.

(d) *Unused developer's fee.* Amounts set aside from the 202 or 811 capital advance funds for the developer's fee that remain unused after the completion of construction are deposited in the project's replacement reserve account at project completion.

**§ 891.818 Firm commitment application.**

(a) *New construction.* The mixed-finance owner and the Nonprofit Organization shall submit an application for a firm commitment for capital advance funding. The application shall consist of the required application form HUD 92013 and additional materials, including:

(1) Form HUD 92013-Supp, and any other supplementary forms or attachments to the application form that HUD requires;

(2) Organizational documents of the mixed-finance owner, including the partnership documents and organizational documents of the Nonprofit Organization that will receive the capital advance, together with an incumbency certificate listing all duly qualified and sitting officers and directors by title and the beginning and ending dates of each person's term;

(3) The name and address of the mixed-finance owner and the Nonprofit Organization, and the name, title, address, and telephone number of the respective officers to whom communications should be addressed;

(4) A balance sheet showing that the mixed-finance owner is adequately capitalized;

(5) Evidence that the sponsor, mixed-finance owner, or the Nonprofit Organization has control of the site of the proposed mixed-finance development, along with a legal description of the proposed site and a title report covering the site;

(6) The mixed-finance owner's submission showing proposed amounts and uses of the developer's fee, demonstrating compliance with 24 CFR 891.823;

(7) Evidence that the zoning for the site of the proposed mixed-finance project complies with existing zoning, or that any necessary zoning approvals or variances have been obtained;

(8) Number of units (with bedroom count) for which funds have been reserved under section 202 or 811, and, in the case of section 811 units, the population to be served in those units; the number of units (with bedroom count) funded or financed from sources other than section 202 or 811, if any (if 811, the population to be served in the non-811 units including the number of persons with disabilities, if applicable); the types and amounts of non-dwelling space to be provided; whether the assisted units will be floating or designated fixed units (Uniform Federal Accessibility Standards (UFAS) accessible units must always be designated fixed units); evidence demonstrating that the development will comply with all fair housing and accessibility requirements, including the design and construction requirements of the Fair Housing Act; evidence demonstrating that units serving persons with disabilities will be dispersed throughout the development in the most integrated environment possible and other requirements of section 504 of the Rehabilitation Act of 1973; evidence demonstrating that the project will comply with accessibility requirements, project standards, and site and neighborhood standards under 24 CFR 891.120, 891.125, 891.210, 891.310, and 891.320, as applicable; and evidence demonstrating that the project will comply with 24 CFR 8.4(b)(5), which prohibits the selection of a site or location which has the purpose or effect of excluding persons with disabilities from federally-assisted programs or activities;

(9) The proposed development schedule for completion of the mixed-finance development, including the estimated time to complete each major development stage. If a mixed-finance development proposal will be implemented in phases, the mixed-finance owner must include in its proposal a general description of each

planned phase of development, including:

(A) The overall number of phases;  
(B) The intended scope of each phase (including number of units);

(C) The anticipated sources and uses of financing for each phase; and

(D) A schedule (to be approved by HUD) for submission of a supplementary proposal for each phase;

(10) A previous participation certificate for all officers and directors of the sponsor, mixed-finance owner, Nonprofit Organization, developer, housing consultant, general contractor, and management agent;

(11) Identification of the housing consultant, if one is employed;

(12) A mixed-finance owner-Architect Agreement;

(13) Final Working drawings and specifications with the architect's certificate that the project design has been reviewed and approved by the local Building Department;

(14) Topographic survey, surveyor's report, and soil test borings;

(15) Life Cycle cost analysis of utility combinations;

(16) Affirmative Fair Housing Marketing Plan;

(17) Current resumes of general contractor's development experience and general contractor's financial statements for the last three years;

(18) Contractor's cost breakdown and cost analysis;

(19) Resume of resident manager or management agent, which includes qualifications and experience;

(20) Schedule of capital expenditures such as furniture, supplies, equipment, and other items necessary to the basic operation of the project that will not be covered by proceeds from the capital advance, and a description of how the development will meet these costs;

(21) Certification/disclosure of lobbying activities by the mixed-finance owner and the Single-Purpose Nonprofit Organization;

(22) Consolidated owner certifications for the mixed-finance owner, including the certification required by OMB circular A-129; Equal Employment Opportunity certification; certification of drug-free workplace; certification of compliance with design and cost standards; the Uniform Federal Accessibility Standards, section 504 of the Rehabilitation Act of 1973; and, 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 the Americans with Disabilities Act where applicable, and HUD's implementing regulations;

(23) Certification of Compliance with Davis-Bacon prevailing wage

requirements and related labor standards;

(24) Flood Disaster Protection Act of 1973 Certification;

(25) Certification of compliance with the National Environmental Policy Act and related environmental laws and authorities; and

(26) Certification that the information in the firm commitment application is true and accurate.

(b) *Acquisition with rehabilitation.* In the case of acquisition with rehabilitation, the mixed-finance owner must submit the documentation required in paragraph (a) of this section, as well as:

(1) An authorization to inspect the project;

(2) A description of the proposed rehabilitation and a description of any steps to be taken to make the development accessible to persons with disabilities;

(3) Final drawings and specifications of the units as proposed to be rehabilitated, including any structural changes, changes in floor plans, locations of the fixed UFAS accessible units and other units serving persons with disabilities dispersed within the project, or other significant alterations;

(4) A survey or site plan drawing of the development as built; and

(5) Drawings and specifications of the existing facilities, if such drawings can be obtained.

(c) *Acquisition without rehabilitation.* In the case of acquisition without rehabilitation, the mixed-finance owner must submit the documentation required in paragraph (a) of this section (except for paragraphs (a)(13) and (23)), as well as:

(1) An authorization to inspect the project;

(2) A narrative description of any repair work proposed, and the manner in which the project will be made accessible to persons with disabilities;

(3) A survey or site plan drawing of the development as built;

(4) Drawings and specifications of the existing facilities, if such drawings can be obtained.

(d) *Lead-based paint certification.* In the case of acquired developments constructed before 1978 in which any child under six years of age resides or is expected to reside, the mixed-finance owner must also submit a certification of compliance with the Lead-Based Paint Poisoning Prevention Act and the Residential Lead-Based Paint Hazard Reduction Act of 1992.

#### § 891.820 Mixed-finance proposal.

The mixed-finance owner must submit a mixed-finance proposal along

with the firm commitment application. Each mixed-finance development proposal shall be in the form prescribed by HUD and must contain the following information:

(a) *Development description.* A description of the proposed project including: the number and types of units with bedroom count; the number of 202 or 811 units and the number of units to be financed from funds other than 202 or 811 funds; the types and amounts of non-dwelling space to be provided; schematic drawings and designs; the proposed building and unit plans including the location of the fixed UFAS accessible units and other units serving persons with disabilities dispersed within the project; and final plans and specifications.

(b) *Financing.* A detailed description of all financing necessary for the implementation of the proposal, specifying the sources, together with a 5-year operating performance projection, known as a "pro forma" (pro forma), for the development, including all underlying assumptions. In addition, the mixed-finance owner is required to submit to HUD for approval all documents relating to the financing of the proposal, including, but not limited to, any loan agreements, financing commitments, notes, mortgages, or deeds of trust, use restrictions, operating pro formas relating to the viability of the development, and other agreements or documents pertaining to the financing of the proposal. If tax credits are being used, the mixed-finance owner must submit official confirmation of the award of tax credits from the State allocating agency. Any financing commitments must be firm and irrevocable in order to be approved by HUD.

(c) *Sources and uses.* A statement of the sources and uses of financing; if a project is to be developed in phases, the sources and uses of financing for each phase;

(d) *Site information.* An identification and description of the proposed site, site plan, and neighborhood.

(e) *Development construction cost estimate.* A development construction cost estimate based on the schematic drawings and specifications and current construction costs prevailing in the area. In addition, a copy of the development schedule, including the architect or contractor estimate of the time required to complete each major development stage.

(f) *Life cycle analysis.* For mixed-finance projects with new construction or rehabilitation, the criteria to be used in equipping the proposed development with heating and cooling systems,

which shall include a life-cycle cost analysis of the installation, maintenance, and operating costs of such systems.

(g) *Relocation plan.* Information concerning any displacement of current site occupants, including identification of each displacee, the distribution plan for notices, the anticipated cost and source for funding of relocation benefits, and compliance with 24 CFR 891.155(e).

(h) *Activities and relationship of participating parties.* Identification of:

(1) The participating parties, together with full information as to any conflict-of-interest or identity-of-interest between any of the parties, including the general partner, limited partners, mixed-finance owner, Nonprofit Organization, 202 or 811 sponsors, and development team members;

(2) The activities to be undertaken by each of the participating parties; the legal and business relationships among the participating parties; and

(3) The rights and liabilities (financial and otherwise) and respective commitments of the parties with respect to the development;

(i) *Operating feasibility.* A demonstration of the operating feasibility of the development, which must be accomplished by:

(1) Showing that the estimated operating expenses of the development will not exceed its estimated operating income; and

(2) Submitting a 5-year operating pro forma for the development, and including all underlying assumptions and, if the project is a tax-credit project, a pro forma showing how the project will continue to operate for the required period after the end of the tax-credit period;

(j) *Market analysis.* An analysis of the projected market for the proposed mixed-finance development;

(k) *Management and occupancy policies.* A summary of the proposed management and occupancy policies to be implemented for the assisted units at the development, consistent with § 891.410, and a description of application and tenant selection procedures for the units without HUD funding;

(l) *Facilities.* A statement addressing the adequacy of existing facilities and services for the prospective occupants of the development and a description of public improvements needed to ensure the viability of the proposed development with a description of the sources of funds available to carry out such improvements;

(m) *Environmental review.* Any additional environmental information

HUD deems necessary in completing its environmental review;

(n) *Certifications and assurances.* (1) Certificates and assurances that the mixed-finance owner has authority under State and local law to develop housing for elderly persons or persons with disabilities and to enter into all agreements and provide all assurances required under this subpart. In addition, the Nonprofit Organization must certify that it has the legal authority to enter into the partnership agreement under which it acts as the sole general partner with for-profit limited partners and to fulfill all its obligations as partner. The Nonprofit Organization must also certify that it has obtained all necessary approvals for this purpose. The mixed-finance owner will be responsible to HUD for ensuring that the 202 or 811 units are developed and operated in accordance with all applicable HUD requirements. The mixed-finance owner must also warrant that it will provide for a mechanism to assure, to HUD's satisfaction, that the 202 or 811 units will remain available for use by very low-income families for 40 years;

(2) A certification of the mixed-finance owner's previous participation as stated in 24 CFR part 200, subpart H, and shall ensure that all participating parties submit a similar certification to HUD.

(o) *Other.* The mixed-finance owner must provide any other materials or information that HUD may from time to time require.

#### § 891.823 HUD review and approval.

HUD will review the firm commitment application and mixed-finance proposal as follows.

(a) *Initial screening.* HUD will perform an initial screening of the firm commitment application/mixed-finance proposal to determine that all required documentation and evidentiary materials have been submitted. HUD will advise the mixed-finance owner and Nonprofit Organization of any technical deficiencies in the application and proposal and indicate a date certain by which the remaining information must be submitted.

(b) *Firm commitment and proposal technical processing and approval.* Upon determining that the firm commitment and proposal are complete, HUD will process the firm commitment application and mixed-finance proposal for approval. The firm commitment application will be reviewed in accordance with applicable firm commitment and technical review guidelines. Upon determining that a proposal is acceptable for technical

processing, HUD will evaluate the proposal to determine:

(1) Whether the mixed-finance owner has the legal capacity to enter into all necessary contracts and agreements to complete the development;

(2) Whether the proposed sources and uses of funds are eligible and reasonable, and show an appropriate proration of supportive housing funds and funds from other sources, and whether the project, including the market-rate units, is financially feasible and is projected to remain feasible for the 40-year term of the very low-income use restrictions, given the available financing structure, firm financing commitments, and market for the project;

(3) Whether the mixed-finance owner has the resources and capacity to develop and operate the project for the required time period;

(4) Whether the HUD-assisted units are comparable in size, location, appearance, and design to any units without HUD assistance;

(5) Whether the mixed-finance owner will develop and operate the Section 202 or 811 assisted units in accordance with all HUD program requirements, including program regulations governing those units;

(6) Whether the documents include the required covenants and use restrictions, which must be recorded prior to release of HUD funds;

(7) Whether the mixed-finance owner has obtained all necessary State, local, and Federal approvals, zoning changes, or variances;

(8) Whether the design of the development meets applicable accessibility requirements;

(9) Whether the supportive services to be provided for the Section 202 or 811 units are at least equal to the services the sponsor proposed to provide in its 202 or 811 application for funding;

(10) Whether the assistance to be provided under this part, taking into account all assistance to be received by the project, is no more than necessary to provide affordable housing, as required by section 102(d) of the Department of Housing and Urban Development Reform Act of 1989, 42 U.S.C. 3545(d);

(11) Whether any other processing criteria that HUD may prescribe from time to time are satisfied;

(12) Whether the mixed-finance owner has certified to compliance:

(i) With all applicable Federal, State, or local civil rights laws and regulations;

(ii) With all environmental regulations;

(iii) With applicable wage rates determined in accordance with the

Davis-Bacon Act and with related labor standards.

#### **§ 891.825 Evidentiary materials.**

Any updates or amendments to materials submitted at the firm commitment/mixed-finance proposal stage must be submitted as part of the evidentiary materials, even if not specifically requested.

(a) *General.* Except as otherwise expressly provided, a mixed-finance owner is required to submit for HUD review and approval prior to HUD's approval of the release or drawdown of capital advance funds all evidentiary materials required by HUD. Upon HUD approval of evidentiary materials, the evidentiary materials will be executed and recorded in the order required by HUD, along with other required documents. All the executed documents for the mixed-finance project will be made available for HUD's final review before drawdown of funds. The evidentiary materials must include:

(1) *Organizational documents.* Updated organizational documents of the mixed-finance owner, nonprofit organization, and all participating parties in the partnership showing that:

(i) One of the purposes of the mixed-finance owner is the promotion of the welfare of elderly persons or persons with disabilities;

(ii) There is no prohibited conflict of interest or prohibited identity of interest involving the sponsor, the nonprofit organization, or the mixed-finance owner, and the mixed-finance owner is not controlled by or under the direction of persons or firms seeking to derive profit or gain from the mixed-finance owner. Individual conflict of interest and identity of interest and disclosure certifications must be submitted by all directors, officers, shareholders, trustees, and agents of the mixed-finance owner and the nonprofit organization and all development team members; and

(iii) A partnership agreement has been entered into between the mixed-finance owner, its general partner, and any other participating entities that establishes the relationship of the partners with respect to implementation of the proposal.

(2) *Amendment to capital advance.* A mixed-finance amendment to the capital advance agreement.

(3) *Deed; declaration of covenants or deed restriction.* A deed or ground lease to the mixed-finance owner with a declaration of covenants or deed restriction, and a pro forma title policy. The first recorded document must be a covenant running with the land, deed restriction, Use Agreement, or other document of public record in the form

prescribed by HUD that will assure to HUD's satisfaction that the HUD-assisted units will be available for use by eligible very low-income elderly or disabled families in accordance with all applicable requirements for no less than 40 years, and that any party that subsequently acquires the mixed-finance development will be fully bound under these covenants and deed restrictions;

(4) *Zoning.* Evidence that the zoning of the site permits construction of the mixed-finance development;

(5) *Site control.* Evidence that the sponsor, nonprofit organization, or mixed-finance owner has control of the site for such period of time as may be required by HUD, and a title policy or report evidencing that the site is free of any encumbrances, restrictions, or reverters that could adversely affect use of the site for the proposed project;

(6) *Development agreement.* Any development agreement or agreements, or other document showing the proposed development schedule; the respective responsibilities of each party for each development phase; the expected costs and financing for those costs; the allocation of risk of loss as between or among the parties; and guarantees of completion, insurance, and bonding requirements as applicable to regular 202 and 811 projects;

(7) *Regulatory agreement.* A regulatory or operating agreement that provides binding assurance that operation of the 202 or 811 units will be in accordance with the applicable Section 202 or 811 requirements;

(8) *Management agreement.* Any agreement relating to management of the Section 202 or 811 development by an entity other than the mixed-finance owner or the nonprofit organization, requiring that the management of the project will be in accordance with Section 202 or 811 requirements;

(9) *Financing documents.* Any updates to the financing and firm commitment documents required under the mixed-Finance Proposal;

(10) *Federal subsidies.* A description of the amount and source of any housing assistance that the project will receive from a state, unit of local government, or the Federal government, as required by section 102(d) of the HUD Reform Act of 1989, 42 U.S.C. 3545(d);

(11) *Certification of compliance with approved proposal.* The mixed-finance owner's certification that it will develop and operate the number of 202 or 811 units approved by HUD, in the configuration and with the bedroom sizes approved by HUD, within the approved cost limits; and comply with

all applicable statutory, regulatory, and Executive Order requirements for the 40-year period required by law and in accordance with the HUD-approved proposal;

(12) *Legal opinion.* A legal opinion supporting the legal capacity of the mixed-finance owner and its affiliates to enter into all necessary agreements to develop and operate the mixed-finance project, as well as the validity and priority of the covenants and restrictions of the mixed-finance documents. The legal opinion must attest that the counsel has examined the availability of the participating parties' financing, the amounts and sources of financing committed to the mixed-finance project by the participating parties, and that such financing has been irrevocably committed for use in carrying out the project;

(13) *No assignment.* A statement by the mixed-finance owner and the nonprofit organization, which must be included in all agreements and contracts with participating parties, that a transfer of 202 or 811 capital advance funds or rental assistance to the mixed-finance owner shall not be deemed an assignment of the funds, and the transferee shall not succeed to any rights or benefits of the nonprofit organization under the capital advance agreement;

(14) *No third-party beneficiary relationship.* A statement to be included in the capital advance agreement and the mixed-finance amendment to the capital advance agreement that nothing in the capital advance agreement or mixed-finance amendment to the capital advance agreement shall be deemed to create a relationship of third party beneficiary, principal-agent, or any relationship involving HUD.

(15) *Additional certifications.* The owner's certification to:

(i) Compliance with all applicable Federal, State, or local civil rights requirements;

(ii) Compliance with all deed conditions and covenants running with the land, including the requirement not to dispose of the development without the prior written approval of HUD for the entire period that the use restrictions for the assisted housing remain in effect;

(b) *Other.* The mixed-finance owner must submit such other evidentiary materials as HUD may require.

**§ 891.828 Loan of capital advance funds to mixed-finance owner.**

Upon issuance of the firm commitment for capital advance financing, the nonprofit organization to which has been transferred the fund

reservation by the sponsor, shall execute a capital advance agreement and an agreement to enter into a Project Rental Assistance Contract with HUD. Upon approval of the mixed-finance proposal and the evidentiary materials, the mixed-finance owner shall provide a Note evidencing a non-amortizing loan of the capital advance funds for a period of not less than 40 years at the program interest rate in effect on the date of the Note. The mixed-finance owner shall execute and record a use agreement, which shall include a complete legal description of the project site and which shall be accompanied by a title insurance policy or commitment insuring the validity and priority of the use agreement. Capital advance funds can be drawn down under a disbursement and escrow agreement in accordance with § 891.830.

**§ 891.830 Drawdown.**

(a) Upon its approval of the executed evidentiary materials and other documents submitted and upon determining that such documents are satisfactory, HUD may approve the drawdown of capital advance funds in accordance with the HUD-approved drawdown schedule.

(b) The capital advance funds may only be drawn down in an approved ratio to other funds, in accordance with a drawdown schedule approved by HUD. The nonprofit organization and the mixed-finance owner shall certify, in a form prescribed by HUD, prior to the initial drawdown of capital advance funds, that they will not draw down more capital advance funds than necessary to meet the pro rata share of the development costs for the 202 or 811 units. The nonprofit organization and the mixed-finance owner shall draw down capital advance funds only when payment is due and after inspection and acceptance of work covered by the draw.

(c) Each drawdown of funds constitutes a certification by the mixed-finance owner and the nonprofit organization that:

(1) All the representations and warranties submitted in accordance with this subpart continue to be valid, true, and in full force and effect;

(2) All parties are in compliance with their obligations pursuant to this subpart which, by their terms, are applicable at the time of the drawdown of funds;

(3) All conditions precedent to the drawdown of the funds by the nonprofit organization and the mixed-finance owner have been satisfied;

(4) The capital advance funds drawn down will be used only for eligible costs

actually incurred in accordance with the provisions of this subpart and the approved proposal; and

(5) The amount of the drawdown is consistent with the ratio of 202 or 811 units to other units.

**§ 891.833 Monitoring and review.**

HUD shall monitor and review the development during the construction and operational phases in accordance with the requirements that HUD prescribes in the mixed-finance amendment to the capital advance agreement. In order for units assisted under the 202 and 811 programs to continue to receive project rental assistance, they must be operated in accordance with the mixed-finance amendment to the capital advance agreement and all other HUD regulations and requirements. It is the responsibility of the mixed-finance owner and nonprofit organization to ensure compliance with the preceding sentence.

**§ 891.835 Eligible uses of project rental assistance.**

(a) Section 202 or 811 project rental assistance may be used to pay the necessary and reasonable operating costs, as defined in 24 CFR 891.105 and approved by HUD, not met from project income and attributed to Section 202 or 811 units. Operating cost standards under 24 CFR 891.150 apply to developments under this part.

(b) Section 202 or 811 project rental assistance may not be used to pay for:

(1) Debt service on construction or permanent financing, or any refinancing thereof, for any units in the development, including the 202 or 811 units;

(2) Cash flow distributions to owners; or

(3) Creation of reserves for non-202 or -811 units.

(c) HUD-approved operating costs attributable to common areas or to the development as a whole, such as groundskeeping costs and general administrative costs, may be paid from project rental assistance on a pro-rata basis according to the percentage of 202 or 811 assisted units as compared to the total number of units.

**§ 891.840 Site and neighborhood standards.**

For Section 202 or 811 mixed-finance developments, the site and neighborhood standards described at § 891.125 and § 891.320 apply to the entire mixed-finance development.

**§ 891.848 Project design and cost standards.**

The project design and cost standards at § 891.120, with the exception of subsection (c), apply to mixed-finance developments under this subpart. Sections 891.220 and 891.315 on prohibited facilities shall apply to mixed-finance developments under this subpart.

**§ 891.853 Development cost limits.**

The Development cost limits for development activities, as established at § 891.140, apply to Section 202 or 811 units in mixed-finance developments under this subpart.

**§ 891.855 Replacement reserves.**

(a) The mixed-finance owner shall establish and maintain a replacement reserve account for section 202 or 811 units. This account must meet all the requirements of 24 CFR 891.405.

(b) The mixed-finance owner may obtain a disbursement from the reserve only if the funds will be used to pay for capital replacement costs for the Section 202 or 811 units in the mixed-finance development and in accordance with the terms of the regulatory and operating agreement. In the event of a disposition of the mixed-finance development, or the dissolution of the owner, any Section 202 or 811 funds remaining in the replacement reserve account must remain dedicated to the Section 202 or 811 units to ensure their

long-term viability, or as otherwise agreed by HUD.

(c) Subject to HUD's approval, reserves may be used to reduce the number of dwelling units in the development for the purpose of retrofitting units that are obsolete or unmarketable.

**§ 891.860 Operating reserves.**

(a) The mixed-finance owner shall maintain an operating reserve account in an amount sufficient to cover the operating expenses of the development for a three-month period.

(b) Project income and tax credit equity may be used to fund the operating reserve account.

**§ 891.863 Maintenance as supportive housing units for elderly persons and persons with disabilities.**

(a) The mixed-finance owner must develop and continue to operate the same number of supportive housing units for elderly persons or persons with disabilities, as stated in the mixed-finance amendment to the capital advance agreement, for a 40-year period.

(b) If a mixed-finance development proposal provides that the Section 202 or 811 supportive housing units will be floating units, the mixed-finance owner must operate the HUD-approved percentage of Section 202 or 811 supportive housing units, and maintain the percentage distribution of bedroom sizes of Section 202 or 811 supportive

housing units, for the entire term of the very low-income use restrictions on the development. Any foreclosure, sale, or other transfer of the development must be subject to a covenant running with the land requiring the continued adherence to the very low-income use restrictions for the Section 202 or 811 supportive housing units.

(c) The Owner must ensure that Section 202 or 811 units in the development are and continue to be comparable to unassisted units in terms of location, size, appearance, and amenities.

**§ 891.865 Sanctions.**

In the event that Section 202 or 811 units are not developed and operated in accordance with all applicable Federal requirements, HUD may impose sanctions on the participating parties and seek legal or equitable relief in enforcing all requirements under section 202, the Housing Act of 1959, or section 811 of the National Affordable Housing Act, all implementing regulations and requirements and contractual obligations under the mixed-finance documents.

Dated: November 3, 2003.

**John C. Weicher,**

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