

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****24 CFR Parts 885, 889, 890, and 891**

[Docket No. FR-3941-F-01]

RIN 2502-AG51

**Office of the Assistant Secretary for Housing—Federal Housing Commissioner; Supportive Housing for the Elderly and Persons With Disabilities****AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.**ACTION:** Final rule.

**SUMMARY:** This rule represents the final rulemaking for HUD's Section 202 Program of Supportive Housing for the Elderly and the Section 811 Program of Supportive Housing for Persons with Disabilities, both of which HUD has previously implemented through several interim rules. As part of President Clinton's regulatory reinvention initiative, this final rule also consolidates and streamlines the regulations for these two programs in order to make them easier to use and understand. This rule also eliminates obsolete regulations from 24 CFR part 885 regarding the Loans for Housing for the Elderly or Handicapped Program, and moves the remaining provisions to a subpart within the consolidated supportive housing regulations. Furthermore, information that is also in the statute or that should be more appropriately placed in the program handbook or in Notices of Funding Availability (NOFAs) has been deleted from the regulations.

**EFFECTIVE DATE:** April 22, 1996.**FOR FURTHER INFORMATION CONTACT:**

Linda Cheatham, Director, Office of Multifamily Housing Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6134, Washington, DC 20410, telephone (202) 708-3000. (This number is not toll-free.) Hearing- or speech-impaired persons may access that number by calling toll-free the Federal Information Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:****I. Background****A. Loans for Housing for the Elderly or Handicapped; Part 885**

Under section 202 of the Housing Act of 1959 (12 U.S.C. 1701q) and the regulations at 24 CFR part 885, HUD provided direct Federal loans to assist private, nonprofit corporations and

nonprofit consumer cooperatives in the development of housing projects serving elderly or handicapped families and individuals. Loans made under part 885 were used to finance the construction or substantial rehabilitation of projects for elderly or handicapped families, or to finance the acquisition with or without moderate rehabilitation of existing housing and related facilities for group homes for nonelderly handicapped individuals.

HUD published two interim rules in the Federal Register on June 12, 1991 (56 FR 27070, 27104) establishing the Section 811 Program of Supportive Housing for Persons with Disabilities (24 CFR part 890) and the Section 202 Program of Supportive Housing for the Elderly (24 CFR part 889). The interim rule for the Section 202 Program (56 FR 27104) also amended part 885 and provided that part 885 would continue to apply to projects for which Section 202 loan reservations were made in Fiscal Year (FY) 1990 and prior years. The rule further provided, however, that projects for the elderly selected for funding in FY 1991 and subsequent years would be covered by part 889. Since no new projects are being funded under the regulations in part 885, many of the provisions in that part that do not apply to the continued management of the projects are unnecessary, and HUD can remove them from the Code of Federal Regulations.

Therefore, this final rule removes several definitions from § 885.5. Second, this rule eliminates §§ 885.200 through 885.405 and § 885.415 regarding projects that received reservations under section 202 of the Housing Act of 1959 and housing assistance under section 8 of the United States Housing Act of 1937 (202/8 projects). No new 202/8 projects will be funded, and all of the projects have either closed or been converted to capital advances under either part 889 or part 890. Third, this rule eliminates many sections in subpart C of part 885 regarding projects for nonelderly handicapped families receiving reservations under section 202 and project assistance payments under section 202(h) of the Housing Act of 1959 (202/162 projects). No new 202/162 projects will be funded, and all existing 202/162 projects have closed or have been converted to capital advances under part 890. Fourth, this rule will also remove other definitions and provisions from part 885 that are merely explanatory or duplicative. Lastly, this rule moves the remaining provisions from part 885 to subpart E of the new streamlined regulations for the supportive housing programs.

**B. June 12, 1991 Interim Rules**

On June 12, 1991, HUD published in the Federal Register two interim rules, one for the Section 202 Program of Supportive Housing for the Elderly (56 FR 27104) and one for the Section 811 Program of Supportive Housing for Persons with Disabilities (56 FR 27070). The interim rule for the Section 202 Program (56 FR 27104) provided for the continued applicability of part 885 to projects for which Section 202 loan reservations had been made in fiscal year (FY) 1990 and prior years, and to add part 889 establishing the new Section 202 Program of Supportive Housing for the Elderly and enabling FY 1991 funding for the program. The interim rule for the Section 811 Program (56 FR 27070) added a new part 890 establishing the new program for persons with disabilities. These two interim rules contained very similar provisions. As stated in the preambles to both rules (56 FR 27070, 27104), HUD intended to establish additional requirements for the supportive housing programs in separate rules.

HUD received 19 comments on the interim rule for the Section 202 Program, and 24 comments on the interim rule for the Section 811 Program. HUD responded to some objections raised by commenters by changing the program requirements in the subsequent interim rules discussed below. The following discussion summarizes the other comments and provides HUD's responses to those comments.

**1. Definition of "Acquisition"**

One commenter objected to the definition of "acquisition" in the interim rule for the Section 811 Program (§ 890.105 of the interim rule; § 891.305 of this final rule). This definition provides that property other than from the Resolution Trust Corporation (RTC) is only eligible for acquisition if at least three years have elapsed from the completion of the project or the beginning of occupancy to the date of application. The commenter argued that HUD should eliminate this limitation, since it is beyond the intent of the statute and it denies the opportunity for acquisition of newer properties except through the RTC.

**HUD Response:** HUD agrees and is removing the three year requirement. Furthermore, HUD is removing the prohibition against acquiring property to use as independent living facilities. Previously, acquisition without rehabilitation was limited to group homes and property from the Resolution Trust Corporation.

## 2. Definition of "Independent Living Facility"

Three commenters objected to the definition of "independent living facility" in § 890.105 of the interim rule for the Section 811 Program. The definition limits projects for persons with chronic mental illness to occupancy by 20 such persons. The commenters argued that the statutory definition allows 24 persons, and makes no distinction between persons with chronic mental illness and other persons with disabilities. Some of the commenters argued that such a distinction by HUD is a violation of the Fair Housing Act and section 504 of the Rehabilitation Act of 1973. One of the commenters also objected to allowing projects up to 40 persons, arguing that this is an "inappropriately large upper limit" that will result in the segregation of persons with disabilities. However, the other commenter argued that the smaller number of persons permitted in facilities for persons with chronic mental illness will increase costs and make it more difficult to develop such facilities in large urban areas.

**HUD Response:** Congress originally set the project size limit for independent living facilities at 20 persons. Although an amendment to the statute increased the project size limit to 24 persons (Pub. L. 102-27; approved April 10, 1991) (42 U.S.C. 8013(k)(4)), HUD chose to retain the 20 person limit for independent living facilities for persons with chronic mental illness. In FYs 1993, 1994, and 1995, however, HUD decided that the project size limit for independent living facilities would be 24 persons regardless of the disabled population being served. HUD intends to retain this limit in future funding cycles. In response to the commenter who objected to allowing projects up to 40 persons, HUD intends to remove the upper limit on exceptions to the project size limits in the next Notice of Funding Availability to allow this determination to be made at the local level.

## 3. Definition of "Person With Disabilities"

One commenter objected to the definition of "person with disabilities" in the interim rule for the Section 811 Program (§ 890.105 of the interim rule; § 891.305 of this final rule), which excludes persons whose sole impairment is alcoholism or drug addiction. This commenter argued that this definition is contrary to the Fair Housing Act, which protects persons disabled by alcoholism or substance abuse (although not those who currently

and illegally use or are addicted to controlled substances).

**HUD Response:** HUD has consistently used a definition of "person with disabilities" for the Section 811 Program and its predecessor, the Section 202 Program, that excludes persons whose sole impairment is alcoholism or drug addiction. In other words, drug or alcohol addiction alone is not a qualifying condition for occupancy in Section 811 housing. Alcohol or drug addiction would not disqualify a person, however, as long as the person meets the required three-pronged test for eligibility as a person with a disability (i.e., physical, mental, or emotional impairment is of long-continued and indefinite duration, the impairment substantially impedes the person's ability to live independently, and the person's ability to live independently could be improved by more suitable housing conditions).

## 4. Definition of "Sponsor"; Prohibited Relationships

One commenter suggested that the regulations for these programs be changed to allow management contracts between the Owner and the Sponsor or its nonprofit affiliate or wholly-owned for-profit subsidiary. This commenter, who sponsors Section 202 and Section 811 projects, asserts that the for-profit nature of its subsidiary has meant that the housing needs of more people are fulfilled, since the net profits of the subsidiary go back into the nonprofit Sponsor.

This commenter also objects to the provisions in the interim rules that no officer or director of the Sponsor is permitted to have any financial interest in any contract with the Owner in connection with the rendition of services. This commenter describes a situation in which the Owner's attorney is also an unpaid board member. This arrangement is desirable because it allows the organizations to take advantage of the attorney's unique expertise. However, under the definition of "Sponsor," the attorney's fees can no longer be paid from project funds.

Another commenter asserted that these regulations make it virtually impossible for Sponsors to pay for project management costs, eliminating the benefits of repeat participation by experienced nonprofit developers. Specifically, this commenter suggests that HUD allow Sponsors to receive consultant fees, so that qualified Sponsors that perform such services can be compensated accordingly.

**HUD Response:** The handbooks for the Section 202 and Section 811 Programs provide exceptions to these

provisions by permitting the Sponsor or its nonprofit affiliate to contract for a fee with the Owner to provide management services and/or supportive services. Furthermore, attorney's fees can be paid from project funds, unless the attorney is an officer or board member of the Sponsor or Owner. The same restriction that applies to other development team members also applies to attorneys. As part of HUD's efforts to simplify the Section 202/811 development process, this rule eliminates the housing consultant's fee in lieu of a developer's fee from which the Owner can pay the Sponsor for consulting services.

## 5. Project Standards for Group Homes

With regard to § 890.210(b) of the interim rule for the Section 811 Program (§ 891.310(a) of this final rule), one commenter remarked that it may be impossible to meet the space per resident requirements within the development cost limits. Another commenter requested clarification on the provision requiring that a project involving acquisition comply with applicable State requirements. In the absence of such requirements, the project must comply with standards as described in the interim rule (§ 890.210(b) of the interim rule; § 891.310(a) of this final rule). This commenter asked whether HUD's standards apply if they are greater than the State's standards, and if so this commenter requested HUD to state this clearly in the regulations. The commenter also requested HUD to state clearly that in no case must a project comply with State standards in violation of the Fair Housing Act.

**HUD Response:** During the past five years of program operation, HUD is not aware of Sponsors having difficulty in meeting the space per resident requirements within the development cost limits. In the near future, HUD will be closely examining the development cost limits to ensure that they are reflective of their respective localities. Previously, if the fund reservation was not adequate to support the development of the project, an amendment to the fund reservation would be made for HUD-approved expenses up to the maximum amount allowable. Although there will still be amendments to the fund reservation, with this final rule, amendments will be available only after initial closing. In response to the commenter asking for clarification regarding whether HUD's standards apply to acquisition projects if they are greater than applicable State requirements, § 891.310 of this final rule requires that the project at least meet applicable State requirements if they

exist, and if they do not, the project must meet the HUD requirements. The purpose of this provision is to permit flexibility in the group home standards when complying with the HUD requirements may prove to be cost prohibitive. In regard to the request from the same commenter for a statement that in no case must a project comply with State standards in violation of the Fair Housing Act, HUD feels that such a statement is unnecessary since participation in the program requires a Sponsor to certify that it will comply with the requirements of the Fair Housing Act and implementing regulations.

#### 6. Limits on Number of Units

Three commenters objected to the provision of the interim rule for the Section 202 Program limiting to 10 percent of the national allocation the number of units for which national organizations can apply (§ 889.215 of the interim rule; § 891.215 of this final rule). The commenters argued that this limitation is arbitrary, not required by statute, and contrary to the goal of producing the highest quality housing. Applications should be funded on merit and local need. One commenter suggested that if limits are absolutely necessary, this section should be revised so that the limit only applies if there are at least 10,000 units being allocated for the program that year. Furthermore, HUD should base the limits on the number of units awarded, rather than the number of units for which the Sponsor is applying. Finally, HUD should waive this requirement if there are no suitable competing applicants in a particular region.

**HUD Response:** The limit on the number of Section 202 units for which national organizations can apply was established to ensure that organizations that are not national in scope would have a more equitable opportunity to participate in the program. Contrary to the opinion of the commenter, applications are funded based on merit and local need. However, without a limit on the number of units that national organizations can apply for, these organizations have a competitive edge over qualified non-national organizations. This results in a possible tendency to dominate the program. Although HUD intends to continue placing a limit on the number of Section 202 units a national organization can apply for, the requirement will be in the Notice of Funding Availability published in the Federal Register once Congress appropriates Section 202 funds to HUD. Therefore, this final rule deletes the limit from the regulations.

#### 7. Project Eligibility and Size Limits

Seven commenters requested additional guidance with regard to the interim rule for the Section 811 Program, under which eligible projects include dwelling units in multifamily housing developments, condominiums, and cooperatives (§ 890.215(a)(3) of the interim rule). These commenters argued that one of the core goals of the National Affordable Housing Act was to expand available housing options beyond group homes and independent living facilities. Therefore, HUD should provide guidance as to the applicability of the requirements of each section of the interim rule to the newly available options. One commenter specifically asked for guidance with regard to limits on the number of dwelling units within multifamily developments and limits on the number of persons who may reside in such units.

Another commenter suggested that, in order to encourage independent and integrated housing for persons with disabilities, the regulations should not require the Sponsor to notify the municipality in the case of acquisition of individual dwelling units in multifamily developments, condominiums, and cooperatives.

Three commenters suggested that HUD develop strict guidelines for waiving the project size limits of the Section 811 rule (§ 890.215(c) of the interim rule). Several commenters asserted that allowing the development of larger facilities through a waiver of the size limits is contrary to the goal of providing quality services and an integrated living environment. The other commenter suggested that HUD require Sponsors to demonstrate thoroughly the necessity for such an exception to the size limits. For instance, HUD should require the Sponsor to demonstrate that there is no other residential site within a reasonable distance that would make a smaller project feasible. However, one commenter argued that rather than making these waivers harder to obtain, HUD should make them easier to obtain by expediting its review and approval of such waivers.

**HUD Response:** In response to the seven commenters that requested guidance as to the applicability of each section of the interim rule to the newly available options of dwelling units in multifamily housing developments, condominiums, and cooperatives, HUD has determined that detailed information concerning these housing options would be more appropriate in a handbook and intends to issue a revised handbook in the near future.

In response to the commenter that suggested that the Sponsor not be required to notify the municipality when acquiring dwelling units in multifamily developments, condominiums, and cooperatives in order to encourage independent and integrated housing for persons with disabilities, HUD does not find that notifying the municipality will have any negative impact on integrating persons with disabilities. The units will be dispersed within the structure and thus will be difficult to identify as housing for disabled persons.

In response to the comments on exceptions to project size limits, HUD has decided to eliminate from the regulation the section on project size limits and exceptions. This information will appear in the annual Notice of Funding Availability (NOFA). However, since HUD published the last interim rule, HUD has expanded the criteria required for Sponsors to request a waiver of the project size limits by adding that the Sponsor must demonstrate why the site was selected, as well as how the size of the project is consistent with State and/or local policies governing similar facilities for the proposed population. Furthermore, HUD intends to remove the upper limits on the number of units that can be requested so that the size of the project can be determined more appropriately at the local level.

#### 8. Design and Cost Standards

This provision of the interim rules (§ 891.120(c) of this final rule) provided that HUD would not fund certain amenities, such as washers and dryers in individual units. One commenter objected, arguing that easily accessible washers and dryers do not represent excessive costs, but rather are especially important for older and frailer persons. This commenter also noted that the failure to provide individual laundry facilities may increase service costs for those unable to carry their laundry to distant facilities. Several other commenters remarked that features such as washers and dryers are considered standard features in most new housing today, and many of the excluded amenities can materially contribute to the independence of a person with disabilities. These commenters argued that Sponsors should be allowed to provide these amenities if they can do so within the cost limits.

**HUD Response:** Section 202 and Section 811 projects must be modest in design. Therefore, there are certain amenities such as atriums, bowling alleys, and swimming pools, that are considered excessive and are not

eligible to be paid for out of the capital advance (§ 891.120(c)). However, there is no prohibition against the Sponsor including certain excess amenities as long as they pay for them from other sources.

One commenter also objected to § 890.220(b) in the interim rule for the Section 811 Program, which provides that HUD will establish limits on unit sizes and number of bathrooms for independent living facilities. This commenter remarked that such specifications have caused costly delays in construction, and that HUD should be more flexible and result-oriented. HUD should focus on enforcing the development cost limits and the incentives for savings, as well as the minimum construction and space standards, rather than on design and cost standards.

**HUD Response:** If the project is to be newly constructed and designed from the beginning according to the maximum unit sizes and number of bathrooms, HUD disagrees with the commenter that this requirement could cause costly delays in construction. If the project is to be rehabilitated, there is flexibility in meeting this requirement when complying with the limitations would be too costly. Also, if the Sponsor can develop the project with larger sized units and more bathrooms within the appropriate development cost limit the Sponsor is permitted to do so. The Sponsor can also pay for the extra space and the associated operating cost with funds from other sources. The reference to unit size and number of bathrooms for independent living facilities will be in the handbook and not in the regulation.

#### 9. Site and Neighborhood Standards

Two commenters objected to the provision of the interim rule for the Section 811 Program (§ 890.230(g) of the interim rule; § 891.320(b) of this final rule) that prohibits developing projects adjacent to certain types of facilities, such as schools or other housing primarily for persons with disabilities. One of these commenters argued that persons with disabilities might need to be close to such supportive services, and developing a project on a site near such services would decrease the cost of service delivery. This commenter noted that HUD considers the proximity or accessibility of such services as a selection criterion for funding (§ 890.300(c)(6)(i)(A) of the interim rule). The other commenter warned that this requirement contradicts the Fair Housing Amendments Act of 1988, and that it fuels potential community opposition by allowing opponents to

protest that their area is "concentrated" with other facilities for persons with disabilities.

**HUD Response:** HUD has determined that the location of the project should be decided at the local level, and therefore has relaxed the requirement in § 891.320(b) of this final rule by indicating that projects "should" rather than "must" be located in neighborhoods where other family housing is located, and "should not" rather than "may not" be located adjacent to certain facilities. However, the statute still prohibits more than one group home from being located on one site, as well as a group home from being located on a site contiguous to another site containing such a home.

#### 10. Development Cost Limits

HUD received many comments on this provision of both interim rules. One commenter remarked that the development cost limits are "woefully inadequate." Three commenters objected to the calculation of the development cost limits under the interim rules. These commenters asserted that HUD offices are instructed not to add an additional 10 percent for Costs Not Attributable, and this will result in lower maximum cost limits. They reminded HUD to ensure that the High Cost Factors are truly reflective of costs in the area, as is required by the conference report on the National Affordable Housing Act.

Three commenters objected to the development cost limits for the acquisition without rehabilitation of properties from the Resolution Trust Corporation (RTC). The interim rules provided that in the case of RTC properties that require no rehabilitation, the cost limits are reduced to 85 percent of the limits listed in the rule. These commenters asserted that there is no statutory basis for this reduction and that the reduction will effectively eliminate these properties as viable options.

Five commenters remarked that the interim rule for the Section 811 Program provides no guidance on development cost limits for dwelling units in multifamily housing, condominiums, or cooperatives.

**HUD Response:** HUD will review the development cost limits, which have been deleted from this final rule, to ensure that they adequately reflect the cost of developing similar housing in the locality. HUD will establish the development cost limits and all future changes to them through a notice in the Federal Register.

Although there is no statutory basis for the lower development cost limit for

properties acquired from the RTC that will not need any rehabilitation, the 85 percent limit is justified since properties can be obtained less expensively from the RTC than they can from the private market.

The reason that the interim rule for the Section 811 Program did not provide guidance on development cost limits for dwelling units in multifamily housing, condominiums, or cooperatives is that these housing types are considered independent living units, and therefore would use the appropriate development cost limit based upon the number and size of the units and whether or not the structure has an elevator.

In this section (§ 891.140 of this final rule), HUD has provided incentives for savings by providing that Owners whose actual development costs are less than the initial fund reservation for the capital advance will retain 50 percent of this savings in their Replacement Reserve Account. The Owner will retain 75 percent of this savings by adding energy efficiency features. One commenter asked for further details concerning which energy efficiency features will satisfy this incentive.

Six commenters remarked on the retention of the savings in the Replacement Reserve Account, the funds in which may only be used for repairs or replacements in or capital improvements of the project. These commenters requested that HUD provide greater flexibility in the use of these savings. The commenters suggested HUD change the regulations in one of the following ways: relax the requirements for the use of at least a portion of the funds in the Replacement Reserve Account; retain the funds in the Residual Receipts Account; or split the funds between the two accounts, so that the funds can be used for resident services after all repair needs have been met. One commenter further recommended that HUD's share of the savings should be placed in a special account to provide needed repairs and modernization for those Section 202 projects with no reserves on which to draw.

**HUD Response:** HUD will give further details concerning which energy efficiency features will satisfy the incentive to retain 75 percent of the savings in the program handbook.

In response to the request that HUD allow more flexibility in the use of the savings, HUD believes that the appropriate account for any savings received is the Replacement Reserve Account since there are no other funds provided for needed repairs and maintenance. The Residual Receipts Account is used for other purposes. The

statute specifically states that if there are savings, HUD retains 50 percent; it does not permit HUD's share to be folded back into the project.

#### 11. Term of Commitment

Two commenters expressed concern that although HUD requires that housing assisted under both programs remain available to very low-income elderly persons and persons with disabilities for 40 years (480 months), the initial contract for project rental assistance shall be for 240 months, with an extension of not less than 60 months. This commenter suggests that the regulations provide for contract extensions for not less than 240 months, since rental assistance will be required in order to ensure the housing is available.

**HUD Response:** HUD recognizes that project rental assistance funds will be necessary to keep the Section 202 and Section 811 projects viable for 40 years. However, in these times of uncertainty and extreme budget constraints, HUD is unable to extend contracts for project rental assistance for an additional 240 months. In fact, in the FY 1995 funding cycle, HUD was permitted to reserve project rental assistance contract (PRAC) funds for only 60 months as opposed to the usual 240 months. HUD will do all it can to assure that residents of Section 202 and Section 811 housing will continue to receive rental assistance as long as they remain eligible.

#### 12. Other Financing Sources

Two commenters remarked on HUD's statement in the preamble to the interim rule for the Section 202 Program (56 FR 27105) that HUD would generally not accept borrowed funds from other sources. These commenters suggested that HUD remove this limitation and allow Owners to use such funds, since Congress intended to encourage mixed financing (17 U.S.C. 1701q(h)(6)). One commenter suggested that local HUD offices have the ability to approve such loans, especially "soft loans" or secured grants to ensure program compliance, and that the regulations should set general parameters on the loan terms.

**HUD Response:** Owners are permitted to use borrowed funds from other sources in the case of secondary financing. Field offices must review requests for approval of secondary financing, and provided the documents meet HUD requirements, they will be approved.

#### 13. Owner Deposit (Minimum Capital Investment)

HUD received many comments on this provision of both interim rules

(§ 891.145 of this final rule). These commenters remarked that this deposit requirement is a serious financial burden. The commenters further expressed concern that this provision penalizes Sponsors for delays that are often beyond the Sponsors' control or even HUD-related. Other delays are caused by having to obtain municipal approval, conduct archeological investigations, examine subsurface conditions for toxic leaks, conduct public hearings, and obtain a building permit.

The commenters offered several suggestions. One commenter suggested that HUD adopt an approval process that is more decentralized, more flexible, and result-oriented. Another commenter suggested that HUD should return the deposit once the project has closed and project viability is assured; such a provision would allow Sponsors to use the experience gained in previous projects in the development of subsequent projects. Another commenter suggested that HUD should treat the 18-month and 6-month time periods as targets, giving local offices the permission to extend the time periods based on determinations of individual circumstances. Two commenters suggested that any processing time by HUD offices in excess of the recommended times should be credited to the Sponsor as an extension. Another commenter suggested that if HUD is responsible for delaying the final closing beyond the 6-month time period (plus a 2-month extension), then HUD should return the full balance remaining in the Minimum Capital Investment. Finally, one commenter suggested that the funds that are returned should be placed in either the Replacement Reserve or Residual Receipts Accounts, at the Sponsor's option.

**HUD Response:** Although HUD appreciates the recommendations, HUD established the policies regarding the Minimum Capital Investment to provide an incentive for Owners to reach final closing early, and so far the policies are working. Therefore, HUD will not make any changes to these policies at this time.

#### 14. Provision of Services

HUD received one comment requesting clarification on the provision in § 889.260(b)(3) of the interim rule for the Section 202 Program (§ 891.225 of this final rule) regarding the \$15 per unit per month service cost allowance. This commenter inquired whether the funding for the service coordinator is different from or included in this \$15 per unit per month service allowance.

Three commenters expressed concern that \$15 may be an insufficient service allowance for frail elderly persons. One of these commenters suggested that more money be allocated for service subsidies. The other commenter suggested that HUD revise the dollar amount if it should prove to be insufficient, and at least annually to reflect the changing cost of services. The third commenter recommended that a copayment by the tenant receiving the service should only be voluntary; since these tenants will have low incomes, they may not have sufficient funds for all their needs.

Two commenters encouraged HUD to allow a \$15 per unit operating cost under the Section 811 Program as well as under the Section 202 Program, since operating costs for housing for persons with disabilities may often be equal to or greater than those for elderly persons.

**HUD Response:** The funding sources for service coordinators and the \$15 per unit per month service allowance are separate. The amount of \$15 per unit per month was determined based upon HUD's experience with the Congregate Housing Services Program. At this time HUD has not had sufficient experience with the service allowance in the Section 202 Program to determine whether the amount of \$15 per unit per month is sufficient. The Section 811 statute does not provide for any HUD funding for supportive services.

#### 15. Service Coordinator Funds in Housing for Frail Elderly Persons

Several commenters objected to HUD's decision that the only developments that can receive service coordinator funding under the Section 202 Program are those in which more than 50 percent of the residents are "frail." First, as one commenter asserted, the service coordinator is instrumental in assessing clients to determine frailty. Further, another commenter cited surveys indicating that approximately 25 percent of the residents in subsidized senior housing will require services. Requiring twice that number of frail elderly tenants will overwhelm management, even with a service coordinator. It will also lead to an undesirable balance of "well to frail" residents. The commenters argued that service coordinators are essential to every development, and therefore HUD should provide service coordinator funds for all developments regardless of the number of "frail" elderly tenants.

One commenter expressed concern regarding the assessment of the occupants' abilities (with regard to the "activities of daily living") at the time the Sponsor is developing its supportive

services plan and the rest of its application. According to the nondiscrimination requirements, such as section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, this commenter asserts that it will be legally impossible to make such determinations in advance. The commenter suggested that HUD require a statement from the Sponsor certifying its intent to assess the physical characteristics and abilities of the tenants following initial rent-up. At that time the Sponsor would have a clear idea of the number of tenants needing services and how to deliver those services.

**HUD Response:** In response to the objection that only projects with at least 50 percent frail elderly persons are eligible for service coordinator funding, the actual requirement is that projects principally serving the frail elderly are eligible for service coordinator funding. Limited funds should be provided where there is the most need. In other projects that do not qualify for service coordinator funding, management assumes many of the same functions as a service coordinator.

The requirement to assess occupants' abilities with regard to the activities of daily living at the time the Sponsor is developing its supportive services plan and application does not violate section 504 or the Americans with Disabilities Act because the requirement is to assess in general the abilities of potential occupants from the general population.

#### 16. Housing Only Independent Persons

With regard to the elderly program, one commenter objected that HUD has created a loophole by allowing Sponsors to provide no supportive services by housing all fully independent persons. This commenter cited a draft of HUD's training materials providing that "if the applicant is not going to provide services, it only needs to justify market demand for fully independent elderly." The commenter argued that this may violate section 504 of the Rehabilitation Act of 1973, and it is contrary to the purpose of the Section 202 Program. The commenter suggested that HUD require all Sponsors to anticipate housing some elderly persons requiring services and to plan for the delivery of such services.

**HUD Response:** At the outset, a Sponsor may serve all fully independent elderly people. However, eventually many occupants will require services as they get older. Sponsors proposing to serve all fully independent elderly people initially must describe in their applications how they will address the

service needs of their residents as they "age in place."

#### 17. Provision of Services to Nonresidents

With regard to the Section 202 Program, the statute provides that HUD may permit the provision of services to elderly persons who are not residents, as described in the preamble to that interim rule (56 FR 27106). However, one commenter urged HUD not to allow the provision of services to nonresidents unless these recipients are very low-income, there is available funding to assist these persons, and the needs of current residents are fully met.

**HUD Response:** The Section 202 statute allows the Secretary to permit the provision of services to elderly persons and persons with disabilities who are nonresidents only if doing so will not adversely affect the cost-effectiveness or operation of the program or add significantly to the need for assistance.

#### 18. Application Contents

HUD received several comments on the application requirements in the interim rules. Several commenters on the elderly program suggested that since many Area Agencies on Aging will serve as the primary services liaisons with any new Section 202 housing development, the regulations should strongly encourage their coordinated efforts during the application process under the elderly program.

Another commenter objected to the requirement in the interim rule for the Section 811 Program that Sponsors submit a certification from the appropriate State or local agency that it has reviewed the supportive services plan (§ 890.265(c)(19) of the interim rule). One commenter asserted that some State and local agencies have a "bias" against nonprofit organizations operating housing for the populations they also serve. Therefore, this commenter suggested that HUD allow the waiver of this requirement upon sufficient documentation that the supportive services plan is adequate.

Several commenters remarked on the requirement that sponsors describe their "ties to the community" (§ 890.265(c) of the interim rule). While this requirement could include evidence that the sponsor is a viable part of the community and evidence of the sponsor's ability to carry out the project, its past experience, and its financial and programmatic capability, these commenters argued that HUD cannot require statements of support or approval of the application by members of the community. The commenters

argued that this may be an unnecessary and illegal requirement in violation of the Fair Housing Amendments Act of 1988.

**HUD Response:** This final rule removes the application contents from the regulations. Instead, HUD will include them in the annual NOFAs published in the Federal Register for the programs, as well as in a self-contained application. The requirement that Sponsors submit a certification from the appropriate State or local agency with a determination as to whether the supportive services plan is well designed to meet the needs of persons with disabilities is statutory and cannot be waived.

In response to the commenters who argued that HUD cannot require statements of support or approval of the application by members of the community, HUD revised this requirement in the interim rule published in the Federal Register on May 5, 1993. Since the effective date of that rule, applicants have been required to include in their applications statements of support for the proposed project from nongovernmental organizations that are familiar with the needs of the population the project would serve. For example, an applicant proposing to develop housing for people with chronic mental illness could include in their application a letter of support for the project from a local service provider that offers mental health services. Such letters of support help HUD determine the Sponsor's ties to the community and the amount of local support for the project, both of which are indicators of the project's potential success.

#### 19. Review of Applications for Fund Reservation

Four commenters objected to the ranking and selection process described in the interim rule for the Section 811 Program (§ 890.300 (d) and (e) of the interim rule). Using this selection process, HUD would fund all approvable applications that contain evidence of control of an approvable site before it would fund any applications in which the Sponsor had identified the site but did not yet have control of the site. The commenters argued that this process makes all other selection criteria subordinate to control of the site at the time of application. This unduly restricts Sponsors from developing innovative housing opportunities, and HUD should instead balance site control with the other criteria.

**HUD Response:** In this final rule, HUD has removed the provisions on the ranking and selection process from the

regulation. These provisions will appear in the annual NOFAs for the programs. The statute requires HUD to use, as a selection criterion for the Section 811 program, the extent to which the applicant has site control. In order to implement this requirement, HUD created two categories of applications; Category A for those applicants with satisfactory evidence of an approvable site, and Category B for applicants that had identified a site. Priority in selection was given to Category A applicants. For the FY 1995 program, HUD changed the procedures by eliminating the categories in favor of awarding bonus points to applicants with satisfactory evidence of an approvable site. HUD believes this procedure satisfies the statutory requirement without making all other selection criteria subordinate. It does not unduly restrict Sponsors from developing innovative housing opportunities, but rather provides an incentive for Sponsors to lock-in suitable sites that will result in much needed housing being available for persons with disabilities sooner.

#### 20. Cancellation of Fund Reservation

Two commenters suggested that if a project is cancelled, HUD should reallocate the funds to another application in the same region in which HUD had originally allocated them. This will fulfill the goal of balancing housing opportunities across the country. Another commenter remarked that HUD should at least inform the public of how HUD will reallocate the funds by including this information in the regulations.

*HUD Response:* The appropriations act in effect for the year in which a project is cancelled governs HUD's ability to recapture and reuse Section 202 and Section 811 contract authority.

#### 21. OMB Circular A-110

In the preamble to the interim rules (56 FR 27073, 27107), HUD specifically requested comments regarding the use of OMB Circular A-110 entitled "Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations—Uniform Administrative Requirements." Three commenters responded that the use of this circular should not be required. These commenters explained that the development team concept is more appropriate for this program than the competitive procurement process. Two of the commenters explained that bidding would make it difficult for Sponsors to use professionals who are experienced in the program and who are willing to defer fees because of their

relationship with Sponsors. The other commenter asserted that competitive procurement is more costly and time-consuming.

*HUD Response:* The Office of Management and Budget (OMB) has determined that OMB Circular A-110 does not apply to the section 202 and section 811 Programs.

#### C. August 12, 1992 Interim Rules

On August 12, 1993, HUD published in the Federal Register two more interim rules, one for the section 202 Program of Supportive Housing for the Elderly (57 FR 36338), and one for the section 811 Program of Supportive Housing for Persons with Disabilities (57 FR 36330). The August 12, 1992 interim rules provided guidance on the development of supportive housing, elements of which include requests for capital advance financing, approval of such requests, and repayment of a capital advance. These interim rules also provided guidance regarding project rental assistance contracts.

HUD received one request for information and one comment in response to the August 12, 1992 interim rules. The commenter requested that HUD allow for-profit corporations, as well as nonprofit organizations, to participate in the programs.

*HUD Response:* The section 202 and 811 statutes prohibit participation in the programs by for-profit corporations.

#### D. May 5, 1993 Interim Rules

On May 5, 1993, HUD again published in the Federal Register two interim rules, one for the section 202 Program of Supportive Housing for the Elderly (58 FR 26836) and one for the section 811 Program of Supportive Housing for Persons with Disabilities (58 FR 26816). As HUD described in the preambles to these interim rules, the rules incorporated amendments to the programs made by the Housing and Community Development Act of 1992. The interim rules also clarified and simplified many of the requirements in the regulations, including substantial improvements to the selection process.

HUD received eight comments in response to the May 5, 1993 interim rules. Several of the comments consisted of inquiries about specific aspects of the regulations. Many of the other commenters commended HUD on its efforts to clarify and simplify the application and selection process. However, two commenters objected to the change in the processes for Notices of Funding Availability (NOFAs). In the May 5, 1993 interim rules, HUD changed the NOFA process so that field offices would no longer publish

Invitations for Applications in newspapers; the field offices must only notify media for minority persons, as well as media for elderly persons and persons with disabilities, as applicable. The commenters argued that this limits the availability of information about relatively new programs that will provide urgently needed housing opportunities.

*HUD Response:* HUD decided to eliminate the requirement that HUD field offices publish Invitations for Applications in newspapers because HUD could not afford to continue paying the advertising costs. However, each field office keeps a mailing list of organizations that are current customers, as well as those that have expressed an interest in the programs but that have not yet participated, and mails to each of them a copy of the NOFA as soon as it is published in the Federal Register.

#### E. March 2, 1995 Interim Rules

On March 2, 1995, HUD published in the Federal Register two more interim rules, one for each program (60 FR 11828, 11836). These rules provided guidance on managing supportive housing for the elderly or persons with disabilities. Specifically, these rules contained provisions regarding Owner responsibilities, tenant responsibilities, leases, security deposits, utility allowances, vacancy payments, and HUD reviews.

HUD received two comments on this set of interim rules. One commenter requested that HUD provide funds under other programs for elderly housing.

*HUD Response:* HUD does provide funds under other programs such as the Public Housing Program, the section 8 Rental Certificate and Housing Voucher Program and the section 232 Program for elderly housing.

The other commenter expressed two main concerns regarding civil rights issues. First, this commenter emphasized that the required receipt of supportive services may violate an individual's civil rights. Therefore, this commenter urged HUD to include language throughout the rule stressing that the available services are voluntary and are not a condition of admission or continued occupancy. Second, this commenter objected to the provision of "diagnosis-specific" housing, or housing for persons with similar disabilities or who require a similar set of supportive services, under the section 811 Program. The commenter argued that this type of housing is contrary to the goal of integration and general occupancy housing, and it fails to



affirmatively further fair housing goals. The commenter urged HUD to limit the circumstances under which it will approve such housing.

**HUD Response:** HUD has been working with consumer advocacy organizations on revisions to the Section 811 program. One of the major issues of concern to consumers and organizations advocating on their behalf is the delinking of housing and supportive services. Although the acceptance of supportive services has never been required as a condition of occupancy in a Section 811 project, HUD has discovered that, in reality, just the opposite occurs. Therefore, in the NOFA for the FY 1995 Section 811 program, HUD stated that the acceptance of supportive services shall not be a condition of occupancy. This statement shall continue to appear in the NOFA for the Section 811 program and it will also be added to the handbook.

In regard to the commenter objecting to the provision of "diagnosis-specific" housing or housing for persons with similar disabilities or who require a similar set of supportive services, HUD's policy is that a Sponsor may design a supportive services package that is targeted to persons with similar disabilities such as persons with physical disabilities, developmental disabilities or chronic mental illness. With the Secretary's approval a Sponsor may design a supportive services package targeted at any subset within these three main categories (e.g., persons with mental retardation). This provision is in the Section 811 statute. In any Section 811 project, however, the Sponsor must permit occupancy by any qualified person with a disability who could benefit from the housing and/or services provided regardless of the person's disability.

#### *F. The Fiscal Year 1995 Rescissions Act*

The Fiscal Year 1995 Rescission Act (Pub. L. 104-19; approved July 27, 1995) provides in relevant part that in allocating the rescission of \$1.115 billion of FY 1995 funds, the Secretary may reduce the appropriations needs of HUD by waiving any provision of section 202 of the Housing Act of 1959 and section 811 of the National Affordable Housing Act that the Secretary determines is not necessary to achieve the objectives of these programs. On January 30, 1996 (61 FR 3047), HUD published a notice in the Federal Register advising the public of the impact of the rescissions on the Section 202 and Section 811 Programs. As described in the notice, for projects funded in FY 1995, the Secretary reserved PRAC funds at 75 percent of

the estimated project's total operating expenses to take into consideration estimated tenant contributions. The Secretary also extended eligibility to low-income households (in addition to very low-income households), waived the Federal preferences for admission, and reduced the term of the PRAC to 5 years. The PRAC funds reserved for projects funded in FYs 1993 and 1994 that had not gone to initial closing or had an Addendum to the Agreement to Enter into the Project Rental Assistance Contract (Forms HUD-90172-A-CA and HUD-90172-B-CA) alerting the Owner of HUD's right to reduce the PRAC reserved for the project at a later time were also reduced by 25 percent. However, the authority in the FY 1995 Rescissions Act to waive statutory provisions is limited to achieving the \$1.115 billion rescission. Therefore, since the effects of the Rescissions Act are temporary, this final rule does not change the regulations to reflect the changes described in the January 30, 1996 notice.

#### *II. Regulatory Reinvention*

In response to Executive Order 12866 and President Clinton's memorandum of March 4, 1995 to all Federal departments and agencies on the subject of regulatory reinvention, HUD has reviewed all its regulations to determine whether certain regulations can be eliminated, streamlined, or consolidated with other regulations. As part of this review, HUD determined that since the substance of the regulations in 24 CFR parts 885, 889, and 890 was very duplicative, these parts could be consolidated and streamlined into one set of regulations. Therefore, this final rule creates a new part 891 in title 24 of the Code of Federal Regulations that will contain all the provisions for HUD's Supportive Housing Programs. Subpart A of part 891 will contain all the requirements that are similar in the programs. Subparts B and C of part 891 will contain requirements that are unique to the Section 202 and Section 811 programs, respectively. Subpart D will contain the project management provisions for the Section 202 and Section 811 programs. Finally, subpart E will contain the regulations necessary for the continued management of projects under the Loans for Housing for the Elderly or Handicapped Program.

In addition to consolidating similar provisions, this rule also removes provisions that are redundant of statutes or would more appropriately appear in program handbooks or annual Notices of Funding Availability (NOFAs). For example, many of the definitions in the regulations come directly from section

202 of the Housing Act of 1959 and section 811 of the National Affordable Housing Act. The provisions for the Elder Cottage Housing Demonstration Program are also redundant of the statute (section 806 of the Cranston-Gonzalez National Affordable Housing Act (Pub. L. 101-625; approved November 28, 1990). This final rule removes the redundant provisions and replaces them, as appropriate, with references to the statute. This final rule also removes the sections on application requirements, review and approval of applications, and the ranking and selection process. This information will instead appear in the NOFAs published in the Federal Register for these programs. As a result of this rule's consolidation and streamlining, HUD will eliminate approximately 92 pages of unnecessary regulations.

#### *III. Lead-Based Paint*

HUD is taking the opportunity, in this final rule, to update technical aspects of its lead-based paint requirements to conform with new recommendations of the Centers for Disease Control. For example, in §§ 891.155(g) and 891.325, HUD is changing the childhood age of concern from under 7 years of age to under 6 years. In § 891.325(b)(2), HUD is changing the definition of "elevated blood-lead level (EBL)," with respect to blood lead levels that require environmental intervention, from 25 ug/dl (micrograms per deciliter) to 20 ug/dl for a single test or 15-19 ug/dl for two consecutive tests several months apart. (See U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, Preventing Lead Poisoning in Young Children, A Statement by the Centers for Disease Control, October 1991.)

Analysis of the need for additional changes to the lead-based paint requirements is being deferred until the publication of a separate proposed rule that would implement sections 1012 and 1013 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 and revise the lead-based paint requirements for all HUD programs. This proposed rule is in its final stages of development.

#### *IV. Other Matters*

##### *Environmental Impact*

At the time of publication of the interim rules for these programs, Findings of No Significant Impact with respect to the environment were made in accordance with HUD regulations at 24 CFR part 50 implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). Those interim rules are being adopted



by this final rule without significant change in terms of environmental impact. Accordingly, the initial Findings of No Significant Impact remain applicable, and are available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the Office of the Rules Docket Clerk, 451 Seventh Street S.W., Room 10276, Washington, DC 20410-0500.

#### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the undersigned hereby certifies that this final rule does 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. Although small entities will participate in the program, the rule will not have a significant impact on them.

#### *Executive Order 12606, The Family*

The General Counsel, as the Designated Official for Executive Order 12606, *The Family*, has determined that the provisions of this final rule will not have a significant impact on family formation, maintenance, or general well-being, and thus is not subject to review under the Order. No significant change in existing HUD policies or programs will result from promulgation of this rule, as those policies or programs relate to family concerns.

#### *Executive Order 12612, Federalism*

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12611, *Federalism*, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order.

#### List of Subjects

#### *24 CFR Part 885*

Aged, Individuals with disabilities, Loan programs—housing and community development, Low and moderate income housing, Reporting and recordkeeping requirements.

#### *24 CFR Part 889*

Aged, Capital advance programs, Grant programs—housing and

community development, Loan programs—housing and community development, Low and moderate income housing, Rent subsidies, Reporting and recordkeeping requirements.

#### *24 CFR Part 890*

Capital advance programs, 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, Reporting and recordkeeping requirements.

#### *24 CFR Part 891*

Aged, Capital advance programs, 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.

Accordingly, under the authority of 42 U.S.C. 3535(d), for the reasons stated in the preamble, 24 CFR chapter VIII is amended as set forth below:

#### **PART 885—[REMOVED]**

1. Part 885 is removed.

#### **PART 889—[REMOVED]**

2. Part 889 is removed.

#### **PART 890—[REMOVED]**

3. Part 890 is removed.

4. A new part 891 is added to read as follows:

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

##### **Subpart A—General Program Requirements**

###### **Sec.**

- 891.100 Purpose and policy.
- 891.105 Definitions.
- 891.110 Allocation of authority.
- 891.115 Notice of funding availability.
- 891.120 Project design and cost standards.
- 891.125 Site and neighborhood standards.
- 891.130 Prohibited relationships.
- 891.135 Amount and terms of capital advances.
- 891.140 Development cost limits.
- 891.145 Owner deposit (Minimum Capital Investment).
- 891.150 Operating cost standards.
- 891.155 Other Federal requirements.
- 891.160 Audit requirements.
- 891.165 Duration of capital advance.
- 891.170 Repayment of capital advance.
- 891.175 Technical assistance.

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

- 891.200 Applicability.
- 891.205 Definitions.
- 891.210 Special project standards.
- 891.215 Limits on number of units.
- 891.220 Prohibited facilities.
- 891.225 Provision of services.
- 891.230 Selection preferences.

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

- 891.300 Applicability.
- 891.305 Definitions.
- 891.310 Special project standards.
- 891.315 Prohibited facilities.
- 891.320 Site and neighborhood standards.
- 891.325 Lead-based paint requirements.

##### **Subpart D—Project Management**

- 891.400 Responsibilities of Owner.
- 891.405 Replacement reserve.
- 891.410 Selection and admission of tenants.
- 891.415 Obligations of the household or family.
- 891.420 Overcrowded and underoccupied units.
- 891.425 Lease requirements.
- 891.430 Termination of tenancy and modification of lease.
- 891.435 Security deposits.
- 891.440 Adjustment of utility allowances.
- 891.445 Conditions for receipt of vacancy payments for assisted units.
- 891.450 HUD review.

##### **Subpart E—Loans for Housing for the Elderly and Handicapped**

- 891.500 Purpose and policy.
- 891.505 Definitions.
- 891.510 Displacement, relocation, and real property acquisition.
- 891.515 Audit requirements.

##### **Section 202—Projects for the Elderly or Handicapped—Section 8 Assistance**

- 891.520 Definitions applicable to 202/8 projects.
- 891.525 Amount and terms of financing.
- 891.530 Prepayment privileges.
- 891.535 Requirements for awarding construction contracts.
- 891.540 Loan disbursement procedures.
- 891.545 Completion of project, cost certification, and HUD approvals.
- 891.550 Selection preferences.
- 891.555 Smoke detectors.
- 891.560 HAP contract.
- 891.565 Term of HAP contract.
- 891.570 Maximum annual commitment and project account.
- 891.575 Leasing to eligible families.
- 891.580 HAP contract administration.
- 891.585 Default by Borrower.
- 891.590 Notice upon HAP contract expiration.
- 891.595 HAP contract extension or renewal.
- 891.600 Responsibilities of Borrower.
- 891.605 Replacement reserve.
- 891.610 Selection and admission of tenants.
- 891.615 Obligations of the family.
- 891.620 Overcrowded and underoccupied units.
- 891.625 Lease requirements.
- 891.630 Termination of tenancy and modification of lease.

- 891.635 Security deposits.
- 891.640 Adjustment of rents.
- 891.645 Adjustment of utility allowances.
- 891.650 Conditions for receipt of vacancy payments for assisted units.

Section 202—Projects for the Nonelderly Handicapped Families and Individuals—Section 162 Assistance

- 891.655 Definitions applicable to 202/162 projects.
- 891.660 Project standards.
- 891.665 Project size limitations.
- 891.670 Cost containment and modest design standards.
- 891.675 Prohibited facilities.
- 891.680 Site and neighborhood standards.
- 891.685 Prohibited relationships.
- 891.690 Other Federal requirements.
- 891.695 Operating cost standards.
- 891.700 Prepayment of loans.
- 891.705 Project assistance contract.
- 891.710 Term of PAC.
- 891.715 Maximum annual commitment and project account.
- 891.720 Leasing to eligible families.
- 891.725 PAC administration.
- 891.730 Default by Borrower.
- 891.735 Notice upon PAC expiration.
- 891.740 Responsibilities of Borrower.
- 891.745 Replacement reserve.
- 891.750 Selection and admission of tenants.
- 891.755 Obligations of the family.
- 891.760 Overcrowded and underoccupied units.
- 891.765 Lease requirements.
- 891.770 Termination of tenancy and modification of lease.
- 891.775 Security deposits.
- 891.780 Adjustment of rents.
- 891.785 Adjustment of utility allowances.
- 891.790 Conditions for receipt of vacancy payments for assisted units.

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

## Subpart A—General Program Requirements

### § 891.100 Purpose and policy.

(a) *Purpose.* The Section 202 Program of Supportive Housing for the Elderly and the Section 811 Program of Supportive Housing for Persons with Disabilities provide Federal capital advances and project rental assistance under section 202 of the Housing Act of 1959 (12 U.S.C. 1701q) (section 202) and section 811 of the National Affordable Housing Act (42 U.S.C. 8013) (section 811), respectively, for housing projects serving elderly households and persons with disabilities. Section 202 projects shall provide a range of services that are tailored to the needs of the residents. Owners of Section 811 projects shall ensure that the residents are provided with any necessary supportive services that address their individual needs.

(b) *General policy.* (1) *Supportive Housing for the Elderly.* A capital advance and contract for project rental assistance provided under this program

shall be used for the purposes described in Section 202 (12 U.S.C. 1701q(b)).

(2) *Supportive Housing for Persons with Disabilities.* A capital advance and contract for project rental assistance provided under this program shall be used for the purposes described in Section 811 (42 U.S.C. 8013(b)).

(c) *Use of capital advance funds.* No part of the funds reserved may be transferred by the Sponsor, except to the Owner caused to be formed by the Sponsor. This action must be accomplished prior to issuance of a commitment for capital advance funding.

(d) *Amendments.* Subject to the availability of funds, HUD may amend the amount of an approved capital advance only after initial closing has occurred.

### § 891.105 Definitions.

The following definitions apply, as appropriate, throughout this part. Other terms with definitions unique to the particular program are defined in §§ 891.205, 891.305, and 891.505, as applicable.

*Affiliated entities* means entities that the field office determines to be related to each other in such a manner that it is appropriate to treat them as a single entity. Such relationship shall include any identity of interest among such entities or their principals and the use by any otherwise unaffiliated entities of a single Sponsor or of Sponsors (or of a single Borrower or of Borrowers, as applicable) that have any identity of interest themselves or their principals.

*Annual income* is defined in part 813 of this chapter. In the case of an individual residing in an intermediate care facility for the developmentally disabled that is assisted under title XIX of the Social Security Act and this part, the annual income of the individual shall exclude protected personal income as provided under that Act. For the purposes of determining the total tenant payment, the income of such individuals shall be imputed to be the amount that the household would receive if assisted under title XVI of the Social Security Act.

*Household (eligible household)* means an elderly or disabled household (as defined in §§ 891.205 or 891.305, respectively), as applicable, that meets the project occupancy requirements approved by HUD and, if the household occupies an assisted unit, meets the very low-income requirements described in § 813.102 of this chapter, as modified by the definition of annual income in this section.

*Housing and related facilities* means rental housing structures constructed,

rehabilitated, or acquired as permanent residences for use by elderly or disabled households, as applicable. The term includes necessary community space. Except for intermediate care facilities for individuals with developmental disabilities, this term does not include nursing homes, hospitals, intermediate care facilities, or transitional care facilities. For the Loans for the Elderly and Persons with Disabilities Program, see § 891.505.

*Low-income families* shall have the same meaning provided in section 3(b)(2) of the United States Housing Act of 1937 (42 U.S.C. 1437a).

*National Sponsor* means a Sponsor that has one or more Section 202 or one or more Section 811 project(s) under reservation, construction, or management in two or more different HUD geographical regions.

*Operating costs* means HUD-approved expenses related to the provision of housing and includes:

(1) Administrative expenses, including salary and management expenses related to the provision of shelter and, in the case of the Section 202 Program, the coordination of services;

(2) Maintenance expenses, including routine and minor repairs and groundskeeping;

(3) Security expenses;

(4) Utilities expenses, including gas, oil, electricity, water, sewer, trash removal, and extermination services. The term “operating costs” excludes telephone services for households;

(5) Taxes and insurance;

(6) Allowances for reserves; and

(7) Allowances for services (in the Section 202 Program only).

*Project rental assistance contract (PRAC)* means the contract entered into by the Owner and HUD setting forth the rights and duties of the parties with respect to the project and the payments under the PRAC.

*Project rental assistance payment* means the payment made by HUD to the Owner for assisted units as provided in the PRAC. The payment is the difference between the total tenant payment and the HUD-approved per unit operating expenses except for expenses related to items not eligible under design and cost provisions. An additional payment is made to a household occupying an assisted unit when the utility allowance is greater than the total tenant payment. A project rental assistance payment, known as a “vacancy payment,” may be made to the Owner when an assisted unit is vacant, in accordance with the terms of the PRAC.

*Rehabilitation* means the improvement of the condition of a property from deteriorated or substandard to good condition. Rehabilitation may vary in degree from the gutting and extensive reconstruction to the cure of substantial accumulation of deferred maintenance. Cosmetic improvements alone do not qualify as rehabilitation under this definition. Rehabilitation may also include renovation, alteration, or remodeling for the conversion or adaptation of structurally sound property to the design and condition required for use under this part, or the repair or replacement of major building systems or components in danger of failure. Improvement of an existing structure must require 15 percent or more of the estimated development cost to rehabilitate the project to a useful life of 55 years.

*Replacement Reserve Account* means a project account into which specified funds are deposited. Such funds may be used only with the approval of the Secretary for repairs, replacement, and capital improvements to the project.

*Section 202* means section 202 of the Housing Act of 1959 (12 U.S.C. 1701q), as amended, or the Supportive Housing for the Elderly Program authorized by that section.

*Section 811* means section 811 of the National Affordable Housing Act (42 U.S.C. 8013), as amended, or the Supportive Housing for Persons with Disabilities Program authorized by that section.

*Start-up expenses* mean necessary costs (to plan a Section 202 or Section 811 project, as applicable) incurred by the Sponsor or Owner prior to initial closing.

*Tenant payment to Owner* equals total tenant payment less utility allowance, if any.

*Total tenant payment* means the monthly amount defined in, and determined in accordance with part 813 of this chapter.

*Utility allowance* is defined in part 813 of this chapter and is determined or approved by HUD.

*Very low-income families* shall have the same meaning provided in section 3(b)(2) of the United States Housing Act of 1937 (42 U.S.C. 1437a).

#### **§ 891.110 Allocation of authority.**

In accordance with 24 CFR part 791, the Assistant Secretary will separately allocate the amounts available for capital advances for the development of housing for elderly households and for disabled households, less amounts set aside by Congress for specific types of projects, and for amendments of fund

reservations made in prior years, for technical assistance, and for other contracted services.

#### **§ 891.115 Notice of funding availability.**

Following an allocation of authority under § 891.110, HUD shall publish a separate Notice of Funding Availability (NOFA) for the Section 202 Program of Supportive Housing for the Elderly and for the Section 811 Program of Supportive Housing for Persons with Disabilities in the Federal Register. The NOFAs will contain specific information on how and when to apply for the available capital advance authority, the contents of the application, and the selection process.

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

In addition to the special project standards described in §§ 891.210 and 891.310, as applicable, the following standards apply:

(a) *Property standards.* Projects under this part must comply with HUD Minimum Property Standards, unless otherwise indicated in this part.

(b) *Accessibility requirements.* Projects under this part must comply with the Uniform Federal Accessibility Standards (See 24 CFR 40.7 for availability), section 504 of the Rehabilitation Act of 1973 and HUD's implementing regulations (24 CFR part 8), and for new construction multifamily housing projects, the design and construction requirements of the Fair Housing Act and HUD's implementing regulations at 24 CFR part 100. For the Section 811 Program of Supportive Housing for Persons with Disabilities, see additional accessibility requirements in § 891.310(b).

(c) *Restrictions on amenities.* Projects must be modest in design. Amenities not eligible for HUD funding include individual unit balconies and decks, atriums, bowling alleys, swimming pools, saunas, jacuzzis, and dishwashers, trash compactors, and washers and dryers in individual units in supportive housing for the elderly or in independent living facilities for persons with disabilities. Sponsors may include certain excess amenities but they must pay for them from sources other than the section 202 or 811 capital advance. They must also pay for the continuing operating costs associated with any excess amenities from sources other than the Section 202 or 811 project rental assistance contract.

(d) *Smoke detectors.* After October 30, 1992, each dwelling unit must include at least one battery-operated or hard-wired smoke detector, in proper

working condition, on each level of the unit.

#### **§ 891.125 Site and neighborhood standards.**

All sites must meet the following site and neighborhood requirements:

(a) The site must be adequate in size, exposure, and contour to accommodate the number and type of units proposed, and adequate utilities (water, sewer, gas, and electricity) and streets must be available to service the site.

(b) The site and neighborhood must be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, the Fair Housing Act, Executive Order 11063 (27 FR 11527, 3 CFR, 1958-1963 Comp., p. 652); as amended by Executive Order 12259, (46 FR 1253, 3 CFR, 1980 Comp., p. 307)); section 504 of the Rehabilitation Act of 1973, and implementing HUD regulations.

(c) New construction sites must meet the following site and neighborhood requirements:

(1) The site must not be located in an area of minority concentration (or minority elderly concentration under the Section 202 Program) except as permitted under paragraph (c)(2) of this section, and must not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents (or minority elderly to nonminority elderly residents, under the Section 202 Program) in the area.

(2) A project may be located in an area of minority concentration (or minority elderly concentration, under the Section 202 Program) only if:

(i) Sufficient, comparable opportunities exist for housing for minority elderly households or minority disabled households, as applicable (or minority families, for projects funded under §§ 891.655 through 891.790), in the income range to be served by the proposed project, outside areas of minority concentration (see paragraph (c)(3) of this section for further guidance on this criterion); or

(ii) The project is necessary to meet overriding housing needs that cannot be met in that housing market area (see paragraph (c)(4) of this section for further guidance on this criterion).

(3) (i) *Sufficient* does not require that in every locality there be an equal number of assisted units within and outside of areas of minority concentration. Rather, application of this standard should produce a reasonable distribution of assisted units each year which over a period of several

years will approach an appropriate balance of housing opportunities within and outside areas of minority concentration. An appropriate balance in any jurisdiction must be determined in light of local conditions affecting the range of housing choices available for very low-income minority elderly or disabled households, as applicable (or low-income minority families, for projects funded under §§ 891.655 through 891.790), and in relation to the racial mix of the locality's population.

(ii) Units may be considered to be *comparable opportunities* if they have the same household type (elderly or disabled, as applicable) and tenure type (owner/renter); require approximately the same total tenant payment; serve the same income group; are located in the same housing market; and are in standard condition.

(iii) Application of this sufficient, comparable opportunities standard involves assessing the overall impact of HUD-assisted housing on the availability of housing choices for very low-income minority elderly or disabled households, as applicable (or low-income minority families, for projects funded under §§ 891.655 through 891.790), in and outside areas of minority concentration, and must take into account the extent to which the following factors are present, along with any other factor relevant to housing choice:

(A) A significant number of assisted housing units are available outside areas of minority concentration.

(B) There is significant integration of assisted housing projects constructed or rehabilitated in the past ten years, relative to the racial mix of the eligible population.

(C) There are racially integrated neighborhoods in the locality.

(D) Programs are operated by the locality to assist minority elderly or disabled households, as applicable (or minority families, for projects funded under §§ 891.655 through 891.790), that wish to find housing outside areas of minority concentration.

(E) Minority elderly or disabled households, as applicable (or minority families, for projects funded under §§ 891.655 through 891.790), have benefitted from local activities (e.g., acquisition and write-down of sites, tax relief programs for homeowners, acquisitions of units for use as assisted housing units) undertaken to expand choice for minority households (or families) outside of areas of minority concentration.

(F) A significant proportion of minority elderly or disabled households, as applicable (or minority

households, for projects funded under §§ 891.655 through 891.790), have been successful in finding units in nonminority areas under the Section 8 Certificate and Housing Voucher programs.

(G) Comparable housing opportunities have been made available outside areas of minority concentration through other programs.

(4) Application of the *overriding housing needs* criterion, for example, permits approval of sites that are an integral part of an overall local strategy for the preservation or restoration of the immediate neighborhood and of sites in a neighborhood experiencing significant private investment that is demonstrably changing the economic character of the area (a "revitalizing area"). An *overriding housing need*, however, may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise be feasibly met is that discrimination on the basis of race, color, creed, sex, or national origin renders sites outside areas of minority concentration unavailable, or if the use of this standard in recent years has had the effect of circumventing the obligation to provide housing choice.

(d) The neighborhood must not be one that is seriously detrimental to family life or in which substandard dwellings or other undesirable conditions predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.

(e) The housing must be accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of unassisted, standard housing of similar market rents.

(f) For the Section 811 Program of Supportive Housing for Persons with Disabilities, the additional site and neighborhood requirements in § 891.320 apply.

#### **§ 891.130 Prohibited relationships.**

This section shall apply to capital advances under the Section 202 Program and the Section 811 Program, as well as to loans financed under §§ 891.655 through 891.790.

(a) *Conflicts of interest.* (1) Officers and Board members of either the Sponsor or the Owner (or Borrower, as applicable) may not have any financial interest in any contract with the Owner or in any firm which has a contract with the Owner. This restriction applies so long as the individual is serving on the Board and for a period of three years

following resignation or final closing, whichever occurs later.

(2) The following contracts between the Owner (or Borrower, as applicable) and the Sponsor or the Sponsor's nonprofit affiliate will not constitute a conflict of interest if no more than two persons salaried by the Sponsor or management affiliate serve as nonvoting directors on the Owner's board of directors:

(i) Management contracts (including associated management fees);

(ii) Supportive services contracts (including service fees) under the Supportive Housing for the Elderly Program; and

(iii) Developer (consultant) contracts.

(b) *Identity of interest.* An identity of interest between the Sponsor or Owner (or Borrower, as applicable) and any development team member or between development team members is prohibited until two years after final closing.

#### **§ 891.135 Amount and terms of capital advances.**

(a) *Amount of capital advances.* The amount of capital advances approved shall be the amount stated in the notification of fund reservation, including any adjustment required by HUD before the final closing. The amount of the capital advance may not exceed the appropriate development cost limit.

(b) *Estimated development cost.* The amount of the capital advance may not exceed the total estimated development cost of the project (as determined by HUD), less the incremental development cost associated with excess amenities and design features to be paid for by the Sponsor under § 891.120.

#### **§ 891.140 Development cost limits.**

(a) HUD shall use the development cost limits, established by Notice in the Federal Register and adjusted by locality, to calculate the fund reservation amount of the capital advance to be made available to individual Owners. Owners that incur actual development costs that are less than the amount of the initial fund reservation shall be entitled to retain 50 percent of the savings in a Replacement Reserve Account. Such percentage shall be increased to 75 percent for Owners that add energy efficiency features.

(b) The Replacement Reserve Account established under paragraph (a) of this section may only be used for repairs, replacements, and capital improvements to the project.

**§ 891.145 Owner deposit (Minimum Capital Investment).**

As a Minimum Capital Investment, the Owner must deposit in a special escrow account one-half of one percent (0.5%) of the HUD-approved capital advance, not to exceed \$10,000, to assure the Owner's commitment to the housing. Under the Section 202 Program, if an Owner has a National Sponsor or a National Co-Sponsor, the Minimum Capital Investment shall be one-half of one percent (0.5%) of the HUD-approved capital advance, not to exceed \$25,000.

**§ 891.150 Operating cost standards.**

HUD shall establish operating cost standards based on the average annual operating cost of comparable housing for the elderly or for persons with disabilities in each field office, and shall adjust the standard annually based on appropriate indices of increases in housing costs such as the Consumer Price Index. The operating cost standards shall be developed based on the number of units. However, under the Section 811 Program and for projects funded under §§ 891.655 through 891.790, the operating cost standard for group homes shall be based on the number of residents. HUD may adjust the operating cost standard applicable to an approved project to reflect such factors as differences in costs based on location within the field office jurisdiction. The operating cost standard will be used to determine the amount of the project assistance initially reserved for a project.

**§ 891.155 Other Federal requirements.**

In addition to the requirements set forth in 24 CFR part 5, the following requirements in this § 891.155 apply to the Section 202 and Section 811 Programs, as well as projects funded under §§ 891.655 through 891.790. Other requirements unique to a particular program are described in subparts B and C of this part, as applicable.

**(a) Affirmative fair housing marketing.**

(1) The affirmative fair housing marketing requirements of 24 CFR part 200, subpart M and the implementing regulations at 24 CFR part 108; and

(2) The fair housing advertising and poster guidelines at 24 CFR parts 109 and 110.

(b) *Environmental.* The National Environmental Policy Act of 1969, HUD's implementing regulations at 24 CFR part 50, including the related authorities described in 24 CFR 50.4. For the purposes of Executive Order No. 11988, Floodplain Management (42 FR 26951, 3 CFR, 1977 Comp., p. 117); as

amended by Executive Order 12148 (44 FR 43239, 3 CFR, 1979 Comp., p. 412)), and implementing regulations in 24 CFR part 55, all applications for intermediate care facilities for persons with developmental disabilities shall be treated as critical actions requiring consideration of the 500-year floodplain.

(c) *Flood insurance.* The Flood Disaster Protection Act of 1973 (42 U.S.C. 4001).

(d) *Labor standards.* (1) All laborers and mechanics (other than volunteers under the conditions set out in 24 CFR part 70) employed by contractors and subcontractors in the construction (including rehabilitation) of housing with 12 or more units assisted under this part shall be paid wages at rates not less than those prevailing in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act (40 U.S.C. 276a-276a-5). A group home for persons with disabilities is not covered by the labor standards.

(2) Contracts involving employment of laborers and mechanics shall be subject to the provisions of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333).

(3) Sponsors, Owners, contractors, and subcontractors must comply with all related rules, regulations, and requirements.

(e) *Displacement, relocation, and real property acquisition.* (1) *Minimizing displacement.* Consistent with the other goals and objectives of this part, Sponsors and Owners (or Borrowers, if applicable) shall assure that they have taken all reasonable steps to minimize the displacement of persons (families, individuals, businesses, nonprofit organizations, and farms) as a result of a project assisted under this part.

(2) *Relocation assistance for displaced persons.* A displaced person must be provided relocation assistance at the levels described in, and in accordance with the requirements of, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) (42 U.S.C. 4201-4655), as implemented by 49 CFR part 24.

(3) *Real property acquisition requirements.* The acquisition of real property for a project is subject to the URA and the requirements described in 49 CFR part 24, subpart B.

(f) *Intergovernmental review.* The requirements for intergovernmental review in Executive Order No. 12372 (47 FR 30959, 3 CFR, 1982 Comp., p. 197; as amended by Executive Order No. 12416 (48 FR 15587, 3 CFR, 1983 Comp., p. 186)) and the implementing regulations at 24 CFR part 52 are applicable to this program.

(g) *Lead-based paint.* (1) The requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846) and implementing regulations at 24 CFR part 35 apply to any dwellings (except zero-bedroom dwelling units) in section 811 housing that were:

(i) Constructed or substantially rehabilitated before 1978; and

(ii) In which any child under 6 years of age resides or is expected to reside.

(2) Under the Section 811 Program and projects funded under §§ 891.655 through 891.790, the lead-based paint requirements described in § 891.325 also apply.

**§ 891.160 Audit requirements.**

Nonprofits receiving assistance under this part are subject to the audit requirements in 24 CFR part 45.

**§ 891.165 Duration of capital advance.**

The duration of the fund reservation for the capital advance is 18 months from the date of issuance with limited exceptions up to 24 months, as approved by HUD on a case-by-case basis.

**§ 891.170 Repayment of capital advance.**

(a) *Interest prohibition and repayment.* A capital advance provided under this part shall bear no interest and its repayment shall not be required so long as the housing project remains available for very low-income elderly families or persons with disabilities, as applicable, in accordance with this part. The capital advance may not be repaid to extinguish the requirements of this part. To ensure its interest in the capital advance, HUD shall require a note and mortgage, use agreement, capital advance agreement and regulatory agreement from the Owner in a form to be prescribed by HUD.

(b) The transfer of physical and financial assets of any project under this part is prohibited, unless HUD gives prior written approval. Approval for transfer will not be granted unless HUD determines that the transfer to a private nonprofit corporation or consumer cooperative (under the Section 202 Program) or a nonprofit organization (under the Section 811 Program) is part of a transaction that will ensure the continued operation of the project for not less than 40 years (from the date of original closing) in a manner that will provide rental housing for very low-income elderly persons or persons with disabilities, as applicable, on terms at least as advantageous to existing and future tenants as the terms required by the original capital advance.

**§ 891.175 Technical assistance.**

For purposes of the Section 202 Program and the Section 811 Program, the Secretary shall make available appropriate technical assistance to assure that applicants having limited resources, particularly minority applicants, are able to participate more fully in the programs.

**Subpart B—Section 202 Supportive Housing for the Elderly****§ 891.200 Applicability.**

The requirements set forth in this subpart B apply to the Section 202 Program of Supportive Housing for the Elderly only, and to applicants, Sponsors, and Owners under that program.

**§ 891.205 Definitions.**

As used in this part in reference to the Section 202 Program, and in addition to the applicable definitions in § 891.105:

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

*Activities of daily living (ADL)* means eating, dressing, bathing, grooming, and household management activities, as further described below:

(1) *Eating*—May need assistance with cooking, preparing, or serving food, but must be able to feed self;

(2) *Bathing*—May need assistance in getting in and out of the shower or tub, but must be able to wash self;

(3) *Grooming*—May need assistance in washing hair, but must be able to take care of personal appearance;

(4) *Dressing*—Must be able to dress self, but may need occasional assistance; and

(5) *Home management activities*—May need assistance in doing housework, grocery shopping, laundry, or getting to and from activities such as going to the doctor and shopping, but must be mobile. The mobility requirement does not exclude persons in wheelchairs or those requiring mobility devices.

*Congregate space (hereinafter referred to as community space)* shall have the meaning provided in section 202 (12 U.S.C. 1701q(h)(1)). The term “community spaces” excludes offices, halls, mechanical rooms, laundry rooms, parking areas, dwelling units, and lobbies. Community space does not include commercial areas.

*Elderly person* means a household composed of one or more persons at least one of whom is 62 years of age or more at the time of initial occupancy.

*Frail elderly* means an elderly person who is unable to perform at least three

activities of daily living as defined in this section. Owners may establish additional eligibility requirements acceptable to HUD based on the standards in local supportive services programs.

*Owner* means a single-purpose private nonprofit organization that may be established by the Sponsor that will receive a capital advance and project rental assistance payments to develop and operate supportive housing for the elderly as its legal owner. Owner does not mean a public body or the instrumentality of any public body. The purposes of the Owner must include the promotion of the welfare of the elderly. The Owner may not be controlled by or under the direction of persons or firms seeking to derive profit or gain therefrom.

*Private nonprofit organization* means any incorporated private institution or foundation:

(1) That has tax-exempt status under section 501(c)(3) or (c)(4) of the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*);

(2) No part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual;

(3) That has a governing board:

- (i) The membership of which is selected in a manner to assure that there is significant representation of the views of the community in which such housing is located; and
- (ii) That is responsible for the operation of the housing assisted under this part; and

(4) That is approved by HUD as to administrative and financial responsibility.

*Services expenses* means those costs needed to provide the necessary services for the elderly tenants, which may include, but are not limited to: health related activities, continuing education, welfare, informational, recreational, homemaking, meal and nutritional services, counseling, and referral services as well as transportation as necessary to facilitate access to these services.

*Sponsor* means any private nonprofit entity, including a consumer cooperative:

(1) No part of the net earnings of which inures to the benefit of any private shareholder, member, founder, contributor, or individual;

(2) That is not controlled by, or under the direction of, persons or firms seeking to derive profit or gain therefrom; and

(3) That is approved by the Secretary as to administrative and financial capacity and responsibility. The term

“*Sponsor*” does not mean a public body or the instrumentality of a public body.

**§ 891.210 Special project standards.**

In addition to the applicable project standards in § 891.120, resident units in Section 202 projects are limited to efficiencies or one-bedroom units. If a resident manager is proposed for a project, up to two bedrooms could be provided for the resident manager unit.

**§ 891.215 Limits on number of units.**

(a) HUD may establish, through publication of a notice in the Federal Register, limits on the number of units that can be applied for by a Sponsor or Co-sponsor in a single geographical region and/or nationwide.

(b) Affiliated entities that submit separate applications shall be deemed to be a single entity for purposes of these limits.

(c) HUD may also establish, through publication of a notice in the Federal Register, the minimum size of a single project.

**§ 891.220 Prohibited facilities.**

Projects may not include facilities for infirmaries, nursing stations, or spaces for overnight care.

**§ 891.225 Provision of services.**

(a) In carrying out the provisions of this part, HUD shall ensure that housing assisted under this part provides services as described in section 202 (12 U.S.C. 1701q(g)(1)).

(b) (1) HUD shall ensure that Owners have the managerial capacity to perform the coordination of services described in 12 U.S.C. 1701q(g)(2).

(2) Any cost associated with this paragraph shall be an eligible cost under the contract for project rental assistance. Any cost associated with the employment of a service coordinator shall also be an eligible cost, except if the project is receiving congregate housing services assistance under section 802 of the National Affordable Housing Act. The HUD-approved service costs will be an eligible expense to be paid from project rental assistance, not to exceed \$15 per unit per month. The balance of service costs shall be provided from other sources, which may include co-payment by the tenant receiving the service. Such co-payment shall not be included in the Total Tenant Payment.

**§ 891.230 Selection preferences.**

For purposes of the Section 202 Program, the selection preferences in 24 CFR part 5, subpart D apply.

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

#### § 891.300 Applicability.

The requirements set forth in this subpart C apply to the Section 811 Program of Supportive Housing for Persons with Disabilities only, and to applicants, Sponsors, and Owners under that program.

#### § 891.305 Definitions.

As used in this part in reference to the Section 811 Program, and in addition to the applicable definitions in § 891.105:

*Acquisition* means the purchase of (or otherwise obtaining title to) existing structures to be used as housing for persons with disabilities, including housing and related facilities from the Resolution Trust Corporation. Capital advances are not available in connection with facilities owned and operated by the Sponsor as housing for persons with disabilities.

*Congregate space (hereinafter referred to as community space)* means space for multipurpose rooms, common areas, and other space necessary for the provision of supportive services. Community space does not include commercial areas.

*Disabled household* means a household composed of:

(1) One or more persons at least one of whom is an adult (18 years or older) who has a disability;

(2) Two or more persons with disabilities living together, or one or more such persons living with another person who is determined by HUD, based upon a certification from an appropriate professional (e.g., a rehabilitation counselor, social worker, or licensed physician) to be important to their care or well being; or

(3) The surviving member or members of any household described in paragraph (1) of this definition who were living in a unit assisted under this part, with the deceased member of the household at the time of his or her death.

*Nonprofit organization* means any institution or foundation:

(1) That has tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*);

(2) No part of the net earnings of which inures to the benefit of any Board member, founder, contributor, or individual;

(3) That has a governing board;

(i) The membership of which is selected in a manner to assure that there is significant representation of the views of the community in which such housing is located (including persons with disabilities); and

(ii) That is responsible for the operation of the housing assisted under this part; and

(4) That is approved by HUD as to financial responsibility.

*Owner* means a single-purpose nonprofit organization established by the Sponsor that will receive a capital advance and project rental assistance payments to develop and operate, as its legal owner, supportive housing for persons with disabilities under this part. The purposes of the Owner must include the promotion of the welfare of persons with disabilities. The Owner may not be controlled by or under the direction of persons or firms seeking to derive profit or gain therefrom.

*Person with disabilities* shall have the meaning provided in Section 811 (42 U.S.C. 8013(k)(2)). The term “*person with disabilities*” shall also include the following:

(1) A person who has a developmental disability, as defined in section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001(5)), i.e., if he or she has a severe chronic disability which:

(i) Is attributable to a mental or physical impairment or combination of mental and physical impairments;

(ii) Is manifested before the person attains age twenty-two;

(iii) Is likely to continue indefinitely;

(iv) Results in substantial functional limitation in three or more of the following areas of major life activity:

(A) Self-care;

(B) Receptive and expressive

language;

(C) Learning;

(D) Mobility;

(E) Self-direction;

(F) Capacity for independent living;

(G) Economic self-sufficiency; and

(v) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

(2) A person with a chronic mental illness, i.e., a severe and persistent mental or emotional impairment that seriously limits his or her ability to live independently, and which impairment could be improved by more suitable housing conditions.

(3) A person infected with the human acquired immunodeficiency virus (HIV) and a person who suffers from alcoholism or drug addiction, provided they meet the definition of “*person with disabilities*” in Section 811 (42 U.S.C. 8013(k)(2)). A person whose sole impairment is a diagnosis of HIV positive or alcoholism or drug addiction (i.e., does not meet the qualifying

criteria in section 811 (42 U.S.C. 8013(k)(2)) will not be eligible for occupancy in a section 811 project.

*Sponsor* means any nonprofit entity:

(1) That has tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*);

(2) No part of the net earnings of which inures to the benefit of any private shareholder, member, founder, contributor or individual;

(3) That is not controlled by or under the direction of persons or firms seeking to derive profit or gain therefrom;

(4) That has a governing board the membership of which is selected in a manner to assure that there is significant representation of the views of persons with disabilities; and

(5) That is approved by HUD as to administrative and financial capacity and responsibility.

#### § 891.310 Special project standards.

In addition to the applicable project standards in § 891.120, the following special standards apply to the Section 811 Program and to projects funded under §§ 891.655 through 891.790:

(a) *Minimum group home standards.* Each group home must provide a minimum of 290 square feet of prorated space for each resident, including a minimum area of 80 square feet for each resident in a shared bedroom (with no more than two residents occupying a shared bedroom) and a minimum area of 100 square feet for a single occupant bedroom; at least one full bathroom for every four residents; space for recreation at indoor and outdoor locations on the project site; and sufficient storage for each resident in the bedroom and other storage space necessary for the operation of the home. If the project involves acquisition (with or without rehabilitation), the structure must at least be in compliance with applicable State requirements. In the absence of such requirements, the above standards shall apply.

(b) *Additional accessibility requirements.* In addition to the accessibility requirements in § 891.120(b), the following requirements apply to the Section 811 Program and to projects funded under §§ 891.655 through 891.790:

(1) All entrances, common areas, units to be occupied by resident staff, and amenities must be readily accessible to and usable by persons with disabilities.

(2) In projects for chronically mentally ill individuals, a minimum of 10 percent of all dwelling units in an independent living facility (or 10 percent of all bedrooms and bathrooms in a group home, but at least one of each such space), must be designed to be



accessible or adaptable for persons with disabilities.

(3) In projects for developmentally disabled or physically disabled persons, all dwelling units in an independent living facility (or all bedrooms and bathrooms in a group home) must be designed to be accessible or adaptable for persons with physical disabilities. A project involving acquisition and/or rehabilitation may provide a lesser number if:

(i) The cost of providing full accessibility makes the project financially infeasible;

(ii) Fewer than one-half of the intended occupants have mobility impairments; and

(iii) The project complies with the requirements of 24 CFR 8.23.

(4) For the purposes of paragraph (b) of this section, the following definitions apply:

(i) *Accessible* describes a site, building, facility, or portion thereof that complies with the Uniform Federal Accessibility Standards and that can be approached, entered, and used by physically disabled people;

(ii) *Adaptability* means the ability of certain building spaces and elements, such as kitchen counters, sinks, and grab bars, to be added or altered so as to accommodate the needs of either disabled or nondisabled persons, or to accommodate the needs of either disabled or nondisabled persons, or to accommodate the needs of persons with different types or degrees of disability.

#### **§ 891.315 Prohibited facilities.**

This section shall apply to capital advances under the Section 811 Program, as well as loans financed under subpart E of this part. Project facilities may not include infirmaries, nursing stations, spaces dedicated to the delivery of medical treatment or physical therapy, padded rooms, or space for respite care or sheltered workshops, even if paid for from sources other than the HUD capital advance or loan. Except for office space used by the Owner (or Borrower, if applicable) exclusively for the administration of the project, project facilities may not include office space.

#### **§ 891.320 Site and neighborhood standards.**

In addition to the requirements in § 891.125 and § 891.680, if applicable, the following site and neighborhood requirements apply to the Section 811 Program:

(a) Travel time and cost via public transportation or private automobile, from the neighborhood to places of employment providing a range of jobs

for very low-income workers (or low-income workers, as applicable), must not be excessive.

(b) Projects should be located in neighborhoods where other family housing is located. Projects should not be located adjacent to the following facilities, or in areas where such facilities are concentrated: schools or day-care centers for persons with disabilities, workshops, medical facilities, or other housing primarily serving persons with disabilities. Not more than one group home may be located on any one site and no such home may be located on a site contiguous to another site containing such a home.

#### **§ 891.325 Lead-based paint requirements.**

In addition to the other Federal requirements described in § 891.155, the following lead-based paint requirements apply to the Section 811 Program and to projects funded under §§ 891.655 through 891.790:

(a) The requirements of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846) and implementing regulations at 24 CFR part 35 (except as superseded in paragraph (b) of this section) apply to the dwellings (except zero-bedroom dwelling units or units that are certified by a qualified inspector to be free of lead-based paint or the lead-based paint hazards have been eliminated) in housing assisted under this subpart and to projects funded under §§ 891.655 through 891.790 that:

(1) Were constructed before 1978; and

(2) In which any child under 6 years of age resides or is expected to reside.

(b) (1) This paragraph (b) implements the provisions of the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4821 et seq., by establishing procedures to eliminate, as far as practicable, the hazards of lead-based paint poisoning with respect to covered structures for which assistance is provided under the Section 811 Program and under §§ 891.655 through 891.790. This paragraph (b) is promulgated under 24 CFR 35.24(b)(4) and supersedes, with respect to these programs, the requirements prescribed in subpart C of 24 CFR part 35.

(2) The following definitions apply to this section:

*Applicable surface* means all intact and nonintact painted interior and exterior surfaces of a residential structure.

*Chewable surface* means all protruding painted surfaces up to five feet from the floor or ground, that are readily accessible to children under 6 years of age, e.g., protruding corners,

windowsills and frames, doors and frames, and other protruding woodwork.

*Defective paint surfaces* means a surface on which the paint is cracking, scaling, chipping, peeling, or loose.

*Elevated blood lead level or EBL* means excessive absorption of lead: that is, a confirmed concentration of lead in whole blood of 20 ug/dl (micrograms of lead per deciliter) for a single test or of 15–19 ug/dl in two consecutive tests 3–4 months apart.

*Lead-based paint* means a paint surface, whether or not defective, identified as having a lead content greater than or equal to 1 mg/cm<sup>2</sup> (milligram per square centimeter) or .5 percent by weight or 5000 parts per million (PPM).

(3) In the case of a structure constructed before 1978, the Sponsor must inspect the structure for defective paint surfaces before it submits site information. If defective paint surfaces are found, treatment in accordance with paragraph (a)(5) of this section is required. Correction of defective surfaces found during the initial inspection must be completed before initial occupancy of the project. Correction of defective paint conditions discovered at periodic inspection must be completed within 30 calendar days of their discovery. When weather conditions prevent completion of repainting of exterior surfaces within the 30-day period, repainting may be delayed, but covering or removal of the defective paint must be completed within the prescribed period.

(4) In the case of a structure constructed before 1978, if the Owner (or Borrower, if applicable) is presented with test results that indicate that a child under the age of 6 years occupies the structure and has an elevated blood lead level (EBL), the Owner (or Borrower, if applicable) must cause the unit to be tested for lead-based paint on chewable surfaces. Testing must be conducted by a State or local health or housing agency, by an inspector certified or regulated by a State or local health or housing agency, or an organization recognized by HUD. Lead content shall be tested by using an X-ray fluorescence analysis (XRF) or by laboratory analysis of paint samples. Where lead-based paint on chewable surfaces is identified, covering or removal of the paint surface in accordance with paragraph (a)(5) of this section is required and treatment shall be completed within the time limits in paragraph (b)(3) of this section.

(5) Treatment of defective paint surfaces and chewable surfaces must consist of covering or removal of the

paint in accordance with the following requirements:

(i) A defective paint surface shall be treated if the total area of defective paint on a component is:

(A) More than 10 square feet on an exterior wall;

(B) More than 2 square feet on an interior or exterior component with a large surface area, excluding exterior walls and including, but not limited to, ceilings, floors, doors, and interior walls; or

(C) More than 10 percent of the total surface area on an interior or exterior component with a small surface area, including, but not limited to, window sills, baseboards and trim.

(ii) Acceptable methods of treatment are: removal by wet scraping, wet sanding, chemical stripping on or off site, replacing painted components, scraping with infra-red or coil type heat gun with temperatures below 1100 degrees, HEPA vacuum sanding, HEPA vacuum needle gun, contained hydroblasting or high pressure wash with HEPA vacuum, and abrasive sandblasting with HEPA vacuum. Surfaces must be covered with durable materials with joints and edges sealed and caulked as needed to prevent the escape of lead contaminated dust.

(iii) Prohibited methods of removal are: open flame burning or torching; machine sanding or grinding without a HEPA exhaust; uncontained hydroblasting or high pressure wash; and dry scraping except around electrical outlets or except when treating defective paint spots no more than two square feet in any one interior room or space (hallway, pantry, etc.) or totalling no more than twenty square feet on exterior surfaces.

(iv) During exterior treatment, soil and playground equipment must be protected from contamination.

(v) All treatment procedures must be concluded with a thorough cleaning of all surfaces in the room or area of treatment to remove fine dust particles. Cleanup must be accomplished by wet washing surfaces with a lead solubilizing detergent such as trisodium phosphate or an equivalent solution.

(vi) Waste and debris must be disposed of in accordance with all applicable Federal, State and local laws.

(6) In lieu of the procedures set forth in the preceding clause, the Owner (or Borrower, if applicable) may, at its discretion, abate all interior and exterior chewable surfaces in accordance with the methods set out paragraph (a)(5) of this section.

(7) The Owner (or Borrower, if applicable) must take appropriate action

to protect tenants from hazards associated with abatement procedures.

(8) The Owner (or Borrower, if applicable) must keep a copy of each inspection report for at least three years. If a unit requires testing, or treatment of chewable surfaces based on the testing, the Owner must keep the test results, and, if applicable, the certification of treatment indefinitely. The records must indicate which chewable surfaces in the units have been tested or treated. If records establish that certain chewable surfaces were tested, or tested and treated, in accordance with the standards prescribed in this section, these surfaces do not have to be tested or treated at any subsequent time.

#### Subpart D—Project Management

##### § 891.400 Responsibilities of Owner.

(a) *Marketing.* (1) The Owner must commence and continue diligent marketing activities not later than 90 days before the anticipated date of availability of the first unit or occupancy of the group home. Market activities shall include the provision of notices of the availability of housing under the program to operators of temporary housing for the homeless in the same housing market.

(2) Marketing must be done in accordance with a HUD-approved affirmative fair housing marketing plan and all Federal, State or local fair housing and equal opportunity requirements. The purpose of the plan and requirements is to achieve a condition in which eligible households of similar income levels in the same housing market area have a like range of housing choices available to them regardless of discriminatory considerations such as their race, color, creed, religion, familial status, disability, sex or national origin.

(3) At the time of PRAC execution, the Owner must submit to HUD a list of leased and unleased assisted units (or in the case of a group home, leased and unleased residential spaces) with a justification for the unleased units or residential spaces, in order to qualify for vacancy payments for the unleased units or residential spaces.

(b) *Management and maintenance.* The Owner is responsible for all management functions. These functions include selection and admission of tenants, required reexaminations of incomes for households occupying assisted units or residential spaces, collection of tenant payments, termination of tenancy and eviction, and all repair and maintenance functions (including ordinary and extraordinary maintenance and

replacement of capital items). All functions must be performed in compliance with equal opportunity requirements.

(c) *Contracting for services.* (1) With HUD approval, the Owner may contract with a private or public entity for performance of the services or duties required in paragraphs (a) and (b) of this section. However, such an arrangement does not relieve the Owner of responsibility for these services and duties. All such contracts are subject to the restrictions governing prohibited contractual relationships described in § 891.130. (These prohibitions do not extend to management contracts entered into by the Owner with the Sponsor or its nonprofit affiliate.)

(2) Consistent with the objectives of Executive Order No. 11625 (36 FR 19967, 3 CFR, 1971–1975 Comp., p. 616; as amended by Executive Order No. 12007 (42 FR 42839, 3 CFR, 1977 Comp., p. 139)); Executive Order No. 12432 (48 FR 32551, 3 CFR, 1983 Comp., p. 198); and Executive Order No. 12138 (44 FR 29637, 3 CFR, 1979 Comp., p. 393; as amended by Executive Order No. 12608 (52 FR 34617, 3 CFR, 1987 Comp., p. 245)), the Owner will promote awareness and participation of minority and women's business enterprises in contracting and procurement activities.

(d) *Submission of financial and operating statements.* The Owner must submit to HUD:

(1) Within 60 days after the end of each fiscal year of project operations, financial statements for the project audited by an independent public accountant and in the form required by HUD; and

(2) Other statements regarding project operation, financial conditions and occupancy as HUD may require to administer the PRAC and to monitor project operations.

(e) *Use of project funds.* The Owner shall maintain a separate interest bearing project fund account in a depository or depositories which are members of the Federal Deposit Insurance Corporation or National Credit Union Share Insurance Fund and shall deposit all tenant payments, charges, income and revenues arising from project operation or ownership to this account. All project funds are to be deposited in Federally insured accounts. All balances shall be fully insured at all times, to the maximum extent possible. Project funds must be used for the operation of the project (including required insurance coverage), and to make required deposits to the replacement reserve under § 891.405, in accordance with HUD-approved budget.

Any remaining project funds in the project funds account (including earned interest) following the expiration of the fiscal year shall be deposited in a Federally-insured residual receipts account within 60 days following the end of the fiscal year. Withdrawals from this account may be made only for project purposes and with the approval of HUD. If there are funds remaining in the residual receipts account when the mortgage is satisfied, such funds shall be returned to HUD.

(f) *Reports.* The Owner shall submit such reports as HUD may prescribe to demonstrate compliance with applicable civil rights and equal opportunity requirements. See § 891.410(a).

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#### **§ 891.405 Replacement reserve.**

(a) *Establishment of reserve.* The Owner shall establish and maintain a replacement reserve to aid in funding extraordinary maintenance and repair and replacement of capital items.

(b) *Deposits to reserve.* The Owner shall make monthly deposits to the replacement reserve in an amount determined by HUD.

(c) *Level of reserve.* The reserve must be built up to and maintained at a level determined by HUD to be sufficient to meet projected requirements. Should the reserve reach that level, the amount of the deposit to the reserve may be reduced with the approval of HUD.

(d) *Administration of reserve.* Replacement reserve funds must be deposited with HUD or in a Federally-insured depository in an interest-bearing account(s) whose balances(s) are fully insured at all times. All earnings including interest on the reserve must be added to the reserve. Funds may be drawn from the reserve and used only in accordance with HUD guidelines and with the approval of, or as directed by, HUD.

#### **§ 891.410 Selection and admission of tenants.**

(a) *Written procedures.* The Owner shall adopt written tenant selection procedures that ensure nondiscrimination in the selection of tenants and that are consistent with the purpose of improving housing opportunities for very low-income elderly persons and persons with disabilities (as applicable); and reasonably related to program eligibility and an applicant's ability to perform the obligations of the lease. Owners shall promptly inform in writing any rejected applicant of the grounds for any rejection. Additionally, Owners shall

maintain a written, chronological waiting list showing the name, race, gender, ethnicity, and date of each person applying for the program.

(b) *Application for admission.* The Owner must accept applications for admission to the project in the form prescribed by HUD, and (under the Section 202 Program only) is obligated to confirm all information provided by applicant families on the application. Applicant households applying for assisted units (or residential spaces in a group home) must complete a certification of eligibility as part of the application for admission. Applicant households must meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B. Applicant families must sign and submit consent forms for the obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 5, subpart B. Both the Owner and the applicant household must complete and sign the application for admission. On request, the Owner must furnish copies of all applications for admission to HUD.

(c) *Determination of eligibility and selection of tenants.* (1) The Owner is responsible for determining whether applicants are eligible for admission and for the selection of households. To be eligible for admission, an applicant must be an elderly person or a person with disabilities, as applicable (as defined in §§ 891.205 and 891.305, respectively); must meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B; must sign and submit consent forms for the obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 5, subpart B; and must be a very low-income family, as defined in § 891.105.

(2) Under the Section 811 Program: (i) In order to be eligible for admission, the applicant must also meet any project occupancy requirements approved by HUD.

(ii) Owners shall make selections in a nondiscriminatory manner without regard to considerations such as race, religion, color, sex, national origin, familial status, or disability. An Owner may, with the approval of the Secretary, limit occupancy within housing developed under this part 891 to persons with disabilities who have similar disabilities and require a similar set of supportive services in a supportive housing environment. However, the Owner must permit occupancy by any qualified person with a disability who could benefit from the

housing and/or services provided regardless of the person's disability.

(d) *Unit assignment.* If the Owner determines that the household is eligible and is otherwise acceptable and units (or residential spaces in a group home) are available, the Owner will assign the household a unit or residential space in a group home. If the household will occupy an assisted unit, the Owner will assign the household a unit of the appropriate size in accordance with HUD's general occupancy guidelines. If no suitable unit (or residential space in a group home) is available, the Owner will place the household on a waiting list for the project and notify the household when a suitable unit or residential space may become available. If the waiting list is so long that the applicant would not be likely to be admitted for the next 12 months, the Owner may advise the applicant that no additional applications for admission are being considered for that reason.

(e) *Ineligibility determination.* If the Owner determines that an applicant is ineligible for admission or the Owner is not selecting the applicant for other reasons, the Owner will promptly notify the applicant in writing of the determination, the reasons for the determination, and the applicant's right to request a meeting to review the rejection, in accordance with HUD requirements. The review, if requested, may not be conducted by a member of the Owner's staff who made the initial decision to reject the applicant. The applicant may also exercise other rights (e.g., rights granted under Federal, State or local civil rights laws) if the applicant believes he or she is being discriminated against on a prohibited basis.

(f) *Records.* Records on applicants and approved eligible households, which provide racial, ethnic, gender and place of previous residency data required by HUD, must be retained for three years. See § 891.410(a).

(g) *Reexamination of household family income and composition.* (1) *Regular reexaminations.* The Owner must reexamine the income and composition of the household at least every 12 months. Upon verification of the information, the Owner must make appropriate adjustments in the total tenant payment in accordance with part 813 of this chapter, as modified by § 891.105, and must determine whether the household's unit size is still appropriate. The Owner must adjust tenant payment and the project rental assistance payment, and must carry out any unit transfer in accordance with HUD standards. At the time of reexamination under paragraph (g)(1) of

this section, the Owner must require the household to meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B. For requirements regarding the signing and submitting of consent forms by families for obtaining of wage and claim information from State Wage Information Collection Agencies, see 24 CFR part 5, subpart B.

(2) *Interim reexaminations.* The household must comply with the provisions in its lease regarding interim reporting of changes in income. If the Owner receives information concerning a change in the household's income or other circumstances between regularly scheduled reexaminations, the Owner must consult with the household and make any adjustments determined to be appropriate. See 24 CFR part 5, subpart B for the requirements for the disclosure and verification of Social Security Number at interim reexaminations involving new household members. For requirements regarding the signing and submitting of consent forms by families for the obtaining of wage and claim information from State Wage Information Collection Agencies, see 24 CFR part 5, subpart B. Any change in the household's income or other circumstances that result in an adjustment in the total tenant payment, tenant payment, and project rental assistance payment must be verified.

(3) *Continuation of project rental assistance payment.* (i) A household shall remain eligible for project rental assistance payment until the total tenant payment equals or exceeds the gross rent (or a pro rata share of the gross rent in a group home). The termination of subsidy eligibility will not affect the household's other rights under its lease. Project rental assistance payment may be resumed if, as a result of changes in income, rent or other relevant circumstances during the term of the PRAC, the household meets the income eligibility requirements of 24 CFR part 813 (as modified in § 891.105) and project rental assistance is available for the unit or residential space under the terms of the PRAC. The household will not be required to establish its eligibility for admission to the project under the remaining requirements of paragraph (c) of this section.

(ii) A household's eligibility for project rental assistance payment may be terminated in accordance with HUD requirements for such reasons as failure to submit requested verification information, including information related to disclosure and verification of Social Security Numbers, as provided by 24 CFR part 5, subpart B or failure to sign and submit consent forms for the

obtaining of wage and claim information from State Wage Information Collection Agencies (as provided by 24 CFR part 5, subpart B).

(h) *Selection preferences.* Under the Section 202 Program, the selection preferences in 24 CFR part 5, subpart D apply.

#### **§ 891.415 Obligations of the household or family.**

This section shall apply to capital advances under the Section 202 Program and the Section 811 Program, as well as loans financed under subpart E of this part.

(a) *Requirements.* The household (or family, as applicable) shall:

(1) Pay amounts due under the lease directly to the Owner (or Borrower, as applicable);

(2) Supply such certification, release of information, consent, completed forms or documentation as the Owner (or Borrower, as applicable) or HUD determines necessary, including information and documentation relating to the disclosure and verification of Social Security Numbers, as provided by 24 CFR part 5, subpart B, and the signing and submission of consent forms for the obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 5, subpart B;

(3) Allow the Owner (or Borrower, as applicable) to inspect the dwelling unit or residential space at reasonable times and after reasonable notice;

(4) Notify the Owner (or Borrower, as applicable) before vacating the dwelling unit or residential space; and

(5) Use the dwelling unit or residential space solely for residence by the household (or family, as applicable) and as the household's (or family's) principal place of residence.

(b) *Prohibitions.* The household (or family, as applicable) shall not:

(1) Assign the lease or transfer the unit or residential space; or

(2) Occupy, or receive assistance for the occupancy of, a unit or residential space governed under this part 891 while occupying, or receiving assistance for the occupancy of, another unit assisted under any Federal housing assistance program, including any section 8 program.

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#### **§ 891.420 Overcrowded and underoccupied units.**

If the Owner determines that because of change in household size, an assisted unit is smaller than appropriate for the eligible household to which it is leased, or that the assisted unit is larger than

appropriate, project rental assistance payment with respect to the unit will not be reduced or terminated until the eligible household has been relocated to an appropriate alternate unit. If possible, the Owner will, as promptly as possible, offer the household an appropriate alternate unit. The Owner may receive vacancy payments for the vacated unit if the Owner complies with the requirements of § 891.445.

#### **§ 891.425 Lease requirements.**

This section shall apply to capital advances under the Section 202 Program and the Section 811 Program, as well as loans financed under subpart E of this part.

(a) *Term of lease.* The term of the lease may not be less than one year. Unless the lease has been terminated by appropriate action, upon expiration of the lease term, the household and Owner (or family and Borrower, as applicable) may execute a new lease for a term not less than one year, or may take no action. If no action is taken, the lease will automatically be renewed for successive terms of one month.

(b) *Termination by the household (or family, as applicable).* All leases may contain a provision that permits the household (or family) to terminate the lease upon 30 days advance notice. A lease for a term that exceeds one year must contain such provision.

(c) *Form.* The Owner (or Borrower, as applicable) shall use the lease form prescribed by HUD. In addition to required provisions of the lease form, the Owner (or Borrower) may include a provision in the lease permitting the Owner (or Borrower) to enter the leased premises at any time without advance notice when there is reasonable cause to believe that an emergency exists or that health or safety of a family member is endangered.

#### **§ 891.430 Termination of tenancy and modification of lease.**

The provisions of part 247 of this title apply to all decisions by an Owner to terminate the tenancy or modify the lease of a household residing in a unit (or residential space in a group home).

#### **§ 891.435 Security deposits.**

This section shall apply to capital advances under the Section 202 Program and the Section 811 Program, as well as loans financed under subpart E of this part. For loans financed under subpart E of this part, the requirements in § 891.635 also apply.

(a) *Collection of security deposits.* At the time of the initial execution of the lease, the Owner (or Borrower, as applicable) will require each household

(or family, as applicable) occupying an assisted unit or residential space in a group home to pay a security deposit in an amount equal to one month's tenant payment or \$50, whichever is greater. The household (or family) is expected to pay the security deposit from its own resources and other available public or private resources. The Owner (or Borrower) may collect the security deposit on an installment basis.

(b) *Security deposit provisions applicable to units.* (1) *Administration of security deposit.* The Owner (or Borrower, as applicable) must place the security deposits in a segregated interest-bearing account. The amount of the segregated, interest-bearing account maintained by the Owner (or Borrower) must at all times equal the total amount collected from the households (or families, as applicable) then in occupancy plus any accrued interest and less allowable administrative cost adjustments. The Owner (or Borrower) must comply with any applicable State and local laws concerning interest payments on security deposits.

(2) *Household (or family, as applicable) notification requirement.* In order to be considered for the refund of the security deposit, a household (or family) must provide the Owner (or Borrower, as applicable) with a forwarding address or arrange to pick up the refund.

(3) *Use of security deposit.* The Owner (or Borrower, as applicable), subject to State and local law and the requirements of paragraphs (b)(1) and (b)(3) of this section, may use the household's (or family's, as applicable) security deposit balance as reimbursement for any unpaid amounts that the household (or family) owes under the lease. Within 30 days (or shorter time if required by State or local law) after receiving notification under paragraph (b)(2) of this section, the Owner (or Borrower) must:

(i) Refund to a household (or family) that does not owe any amount under the lease the full amount of the household's (or family's) security deposit balance;

(ii) Provide to a household (or family) owing amounts under the lease a list itemizing each amount, along with a statement of the household's (or family's) rights under State and local law. If the amount that the Owner (or Borrower) claims is owed by the household (or family) is less than the amount of the household's (or family's) security deposit balance, the Owner (or Borrower) must refund the excess balance to the household (or family). If the Owner (or Borrower) fails to provide the list, the household (or family) will be entitled to the refund of the full

amount of the household's (or family's) security deposit balance.

(4) *Disagreements.* If a disagreement arises concerning reimbursement of the security deposit, the household (or family, if applicable) will have the right to present objections to the Owner (or Borrower, if applicable) in an informal meeting. The Owner (or Borrower) must keep a record of any disagreements and meetings in a tenant file for inspection by HUD. The procedures of this paragraph do not preclude the household (or family) from exercising its rights under State or local law.

(5) *Decedent's interest in security deposit.* Upon the death of a member of a household (or family, as applicable), the decedent's interest, if any, in the security deposit will be governed by State or local law.

(c) *Reimbursement by HUD for assisted units.* If the household's (or family's, if applicable) security deposit balance is insufficient to reimburse the Owner (or Borrower, if applicable) for any amount that the household (or family) owes under the lease for an assisted unit or residential space, and the Owner (or Borrower) has provided the household (or family) with the list required by paragraph (b)(3)(ii) of this section, the Owner (or Borrower) may claim reimbursement from HUD for an amount not to exceed the lesser of:

(1) The amount owed the Owner (or Borrower); or

(2) One month's per unit operating cost (or contract rent, if applicable), minus the amount of the household's (or family's) security deposit balance. Any reimbursement under this section will be applied first toward any unpaid tenant payment (or rent, if applicable) due under the lease. No reimbursement may be claimed for any unpaid tenant payment (or rent) for the period after termination of the tenancy. The Owner (or Borrower) may be eligible for vacancy payments following a vacancy in accordance with the requirements of § 891.445 (or §§ 891.650 or 891.790, as applicable).

#### **§ 891.440 Adjustment of utility allowances.**

This section shall apply to projects funded under the Section 202 Program, to independent living complexes funded under Section 811 Program, and to projects financed with loans under subpart E of this part. The Owner (or Borrower, as applicable) must submit an analysis of any utility allowances applicable. Such data as changes in utility rates and other facts affecting utility consumption should be provided as part of this analysis to permit appropriate adjustments in the utility allowances for assisted units. In

addition, when utility rate changes would result in a cumulative increase of 10 percent or more in the most recently approved utility allowances, the Owner (or Borrower) must advise HUD and request approval of new utility allowances. Whenever a utility allowance for an assisted unit is adjusted, the Owner (or Borrower) will promptly notify affected households (or families, as applicable) and make a corresponding adjustment of the tenant payment (or rent, as applicable) and the amount of the project rental assistance payment (or housing or project assistance payment, as applicable).

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#### **§ 891.445 Conditions for receipt of vacancy payments for assisted units.**

(a) *General.* Vacancy payments under the PRAC will not be made unless the conditions for receipt of these project rental assistance payments set forth in this section are fulfilled.

(b) *Vacancies during rent-up.* For each unit (or residential space in a group home) that is not leased as of the effective date of the PRAC, the Owner is entitled to vacancy payments in the amount of 50 percent of the per unit operating cost (or pro rata share of the group home operating cost) for the first 60 days of vacancy, if the Owner:

(1) Conducted marketing in accordance with § 891.400(a) and otherwise complied with § 891.400;

(2) Has taken and continues to take all feasible actions to fill the vacancy; and

(3) Has not rejected any eligible applicant except for good cause acceptable to HUD.

(c) *Vacancies after rent-up.* If an eligible household vacates an assisted unit (or residential space in a group home) the Owner is entitled to vacancy payments in the amount of 50 percent of the approved per unit operating cost (or pro rata share of the group home operating cost) for the first 60 days of vacancy if the Owner:

(1) Certifies that it did not cause the vacancy by violating the lease, the PRAC, or any applicable law;

(2) Notified HUD of the vacancy or prospective vacancy and the reasons for the vacancy upon learning of the vacancy or prospective vacancy;

(3) Has fulfilled and continues to fulfill the requirements specified in § 891.400(a) (2) and (3) and § 891.445(b) (2) and (3); and

(4) For any vacancy resulting from the Owner's eviction of an eligible household, certifies that it has complied with § 891.430.

(d) *Prohibition of double compensation for vacancies.* If the

Owner collects payments for vacancies from other sources (tenant payment, security deposits, payments under § 891.435(c), or governmental payments under other programs), the Owner shall not be entitled to collect vacancy payments to the extent these collections from other sources plus the vacancy payment exceed the approved per unit operating cost.

#### § 891.450 HUD review.

HUD shall conduct periodic on-site management reviews of the Owner's compliance with the requirements of this part.

### Subpart E—Loans for Housing for the Elderly and Handicapped

#### § 891.500 Purpose and policy.

(a) *Purpose.* The program under subpart E of this part provides direct Federal loans under section 202 of the Housing Act of 1959 (42 U.S.C. 1701q) for housing projects serving elderly or handicapped families and individuals. The housing projects shall provide the necessary services for the occupants which may include, but are not limited to: Health, continuing education, welfare, informational, recreational, homemaking, meal and nutritional services, counseling, and referral services, as well as transportation where necessary to facilitate access to these services.

(b) *General policy.* A loan made under subpart E of this part shall be used to finance the construction or the substantial rehabilitation of projects for elderly or handicapped families, or for the acquisition with or without moderate rehabilitation of existing housing and related facilities for group homes for nonelderly handicapped individuals.

(c) *Applicability.* Subpart E of this part applies to all fund reservations made before October 1, 1990, except for loans not initially closed that were converted to capital advances. Specifically, § 891.520 through 891.650 of subpart E apply to projects for elderly or handicapped families that received reservations under section 202 of the Housing Act of 1959 (12 U.S.C. 1701q) and housing assistance under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*). Sections 891.655 through 891.790 of subpart E apply to projects for nonelderly handicapped families receiving reservations under section 202 and project assistance payments under section 202(h) of the Housing Act of 1959.

#### § 891.505 Definitions.

For the purposes of this subpart E:

*Act* means section 202 of the Housing Act of 1959, as amended (12 U.S.C. 1701q).

*Borrower* means a private nonprofit corporation or a nonprofit consumer cooperative that may be established by the Sponsor, which will obtain a Section 202 loan and execute a mortgage in connection therewith as the legal owner of the project. "*Borrower*" does not mean a public body or the instrumentality of any public body. The purposes of the Borrower must include the promotion of the welfare of elderly and/or handicapped families. No part of the net earnings of the Borrower may inure to the benefit of any private shareholder, contributor, or individual, and the Borrower may not be controlled by or under the direction of persons or firms seeking to derive profit or gain therefrom. Because of the nonprofit nature of the Section 202 program, no officer or director, or trustee, member, stockholder or authorized representative of the Borrower is permitted to have any financial interest in any contract in connection with the rendition of services, the provision of goods or supplies, project management, procurement of furnishings and equipment, construction of the project, procurement of the site or other matters whatsoever.

*Elderly family* means:

- (1) Families of two or more persons the head of which (or his or her spouse) is 62 years of age or older;
- (2) The surviving member or members of any family described in paragraph (1) of this definition living in a unit assisted under subpart E of this part with the deceased member of the family at the time of his or her death;
- (3) A single person who is 62 years of age or older; or
- (4) Two or more elderly persons living together, or one or more such persons living with another person who is determined by HUD, based upon a licensed physician's certificate provided by the family, to be essential to their care or well being.

*Handicapped family* means:

- (1) Families of two or more persons the head of which (or his or her spouse) is handicapped;
- (2) The surviving member or members of any family described in paragraph (1) of this definition living in a unit assisted under subpart E of this part with the deceased member of the family at the time of his or her death;
- (3) A single handicapped person over the age of 18; or
- (4) Two or more handicapped persons living together, or one or more such persons living with another person who is determined by HUD, based upon a

licensed physician's certificate provided by the family, to be essential to their care or well being.

*Handicapped person or individual* means:

(1) Any adult having a physical, mental, or emotional impairment that is expected to be of long-continued and indefinite duration, substantially impedes his or her ability to live independently, and is of a nature that such ability could be improved by more suitable housing conditions.

(2) A person with a developmental disability, as defined in section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001(5)), i.e., a person with a severe chronic disability that:

- (i) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (ii) Is manifested before the person attains age twenty-two;
- (iii) Is likely to continue indefinitely;
- (iv) Results in substantial functional limitation in three or more of the following areas of major life activity:

- (A) Self-care;
- (B) Receptive and expressive language;
- (C) Learning;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency; and
- (v) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

(3) A person with a chronic mental illness, i.e., if he or she has a severe and persistent mental or emotional impairment that seriously limits his or her ability to live independently, and whose impairment could be improved by more suitable housing conditions.

(4) Persons infected with the human acquired immunodeficiency virus (HIV) who are disabled as a result of infection with the HIV are eligible for occupancy in section 202 projects designed for the physically disabled, developmentally disabled, or chronically mentally ill depending upon the nature of the person's disability. A person whose sole impairment is alcoholism or drug addition (i.e., who does not have a developmental disability, chronic mental illness, or physical disability that is the disabling condition required for eligibility in a particular project) will not be considered to be disabled for the purposes of the section 202 program.

*Housing and related facilities* means rental or cooperative housing structures constructed or substantially

rehabilitated as permanent residences for use by elderly or handicapped families, or acquired with or without moderate rehabilitation for use by nonelderly handicapped families as group homes. The term includes structures suitable for use by families residing in the project or in the area, such as cafeterias or dining halls, community rooms, or buildings, or other essential service facilities. In the case of acquisition with or without moderate rehabilitation, at least three years must have elapsed from the later of the date of completion of the project or the beginning of occupancy to the date of the application for a Section 202 fund reservation. Except for intermediate care facilities for the mentally retarded and individuals with related conditions, this term does not include nursing homes, hospitals, intermediate care facilities, or transitional care facilities.

*Nonelderly handicapped family* means a handicapped family in which the head of the family (and spouse, if any) is less than 62 years of age at the time of the family's initial occupancy of a project.

*Section 8 Program* means the housing assistance payments program that implements section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f note).

**§ 891.510 Displacement, relocation, and real property acquisition.**

(a) *Minimizing displacement.* Consistent with the other goals and objectives of subpart E of this part, Sponsors and Borrowers shall assure that they have taken all reasonable steps to minimize the displacement of persons (families, individuals, businesses, nonprofit organizations, and farms) as a result of a project assisted under subpart E of this part.

(b) *Relocation assistance for displaced persons.* A displaced person (defined in paragraph (f) of this section) must be provided relocation assistance at the levels described in, and in accordance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA) (42 U.S.C. 4201–4655), as implemented by 49 CFR part 24. A displaced person shall be advised of his or her rights under the Fair Housing Act (42 U.S.C. 3601–3619). If the comparable replacement dwellings are located in areas of minority concentration, minority persons also must be given, if possible, referrals to suitable, decent, safe, and sanitary replacement dwellings not located in such areas.

(c) *Real property acquisition requirements.* The acquisition of real

property for a project is subject to the URA and the requirements described in 49 CFR part 24, subpart B.

(d) *Appeals.* A person who disagrees with the Sponsor's/Borrower's determination concerning whether the person qualifies as a "*displaced person*," or with the amount of relocation assistance for which the person is eligible, may file a written appeal of that determination with the Sponsor/Borrower. A low-income person who is dissatisfied with the Sponsor's/Borrower's determination on his or her appeal may submit a written request for review of that determination to the HUD field office.

(e) *Responsibility of Sponsor/Borrower.* The Sponsor/Borrower shall certify that it will comply (i.e., provide assurance of compliance, as required by 49 CFR part 24) with the URA, the regulations at 49 CFR part 24, and the requirements of this section, and shall ensure such compliance notwithstanding any third party's contractual obligation to comply with these provisions. The Sponsor/Borrower shall maintain records in sufficient detail to demonstrate compliance with the provisions of this section. The Sponsor/Borrower shall maintain data on the race, ethnic, gender, and handicap status of displaced persons.

(f) *Definition of a displaced person.* (1) For purposes of this section, the term "*displaced person*" means a person (family, individual, business, nonprofit organization, or farm) that moves from real property, or moves personal property from real property, permanently, as a direct result of acquisition, rehabilitation, or demolition for a project assisted under this part. This includes any permanent, involuntary move for an assisted project including any permanent move from the real property that is made:

(i) After notice by the Sponsor/Borrower to move permanently from the property if the move occurs on or after:

(A) The date of the submission of an application to HUD that is later approved, if the Sponsor has control of an appropriate site; or

(B) The date that the Sponsor obtains control of an approvable site, if such control is obtained after the submission of an application to HUD;

(ii) Before the date described in paragraph (f)(1)(i) of this section, if the Sponsor, Borrower or HUD determines that the displacement resulted directly from acquisition, rehabilitation, or demolition for the project;

(iii) By a tenant-occupant of a dwelling unit, if any one of the following three situations occurs;

(A) The tenant moves after execution of the Agreement between the Sponsor/Borrower and HUD, and the move occurs before the tenant is provided written notice offering him or her the opportunity to lease and occupy a suitable, decent, safe, and sanitary dwelling in the same building/complex upon completion of the project under reasonable terms and conditions. Such reasonable terms and conditions include a monthly rent and estimated average monthly utility costs that do not exceed the greater of:

(1) The tenant's monthly rent and estimated average monthly utility costs before the Agreement; or

(2) The total tenant payment, as determined under 24 CFR 813.107, if the tenant is low-income, or 30 percent of gross household income, if the tenant is not low-income; or

(B) The tenant is required to relocate temporarily, does not return to the building/complex, and either:

(1) The tenant is not offered payment for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation; or

(2) Other conditions of the temporary relocation are not reasonable; or

(C) The tenant is required to move to another dwelling in the same building/complex but is not offered reimbursement for all reasonable out-of-pocket expenses incurred in connection with the move, or other conditions of the move are not reasonable.

(2) Notwithstanding the provisions of paragraph (f)(1) of this section, however, a person does not qualify as a "*displaced person*" (and is not eligible for relocation assistance at URA levels), if:

(i) The person has been evicted for cause based upon a serious or repeated violation of the terms and conditions of the lease or occupancy agreement, violation of applicable Federal, State, or local law, or other good cause, and HUD determines that the eviction was not undertaken for the purpose of evading the obligation to provide relocation assistance.

(ii) The person moved into the property after the submission of the application and, before signing a lease and commencing occupancy, was provided written notice of the project, its possible impact on the person (e.g., displacement, temporary relocation or a rent increase) and the fact that he or she will not qualify as a displaced person as a result of the project;

(iii) The person is ineligible under 49 CFR 24.2(g)(2); or

(iv) HUD determines that the person was not displaced as a direct result of



acquisition, rehabilitation, or demolition for the project;

(3) The Sponsor/Borrower may request, at any time, a HUD determination of whether a displacement is or would be covered by this section.

#### **§ 891.515 Audit requirements.**

Nonprofits receiving assistance under this part are subject to the audit requirements in 24 CFR part 45.

Section 202 Projects for the Elderly or Handicapped—Section 8 Assistance

#### **§ 891.520 Definitions applicable to 202/8 projects.**

The following definitions apply to projects for eligible families receiving assistance under section 8 of the United States Housing Act of 1937 in addition to reservations under section 202 of the Housing Act of 1959 (202/8 projects):

*Assisted unit* means a dwelling unit eligible for assistance under a HAP contract.

*Contract rent* means the total amount of rent specified in the HAP contract as payable by HUD and the tenant to the Borrower for an assisted unit.

*Family (eligible family)* means an elderly or handicapped family that meets the project occupancy requirements approved by HUD and, if the family occupies an assisted unit, meets the requirements described in part 813 of this chapter.

*Gross rent* is defined in part 813 of this chapter.

*HAP contract (housing assistance payments contract)* means the contract entered into by the Borrower and HUD setting forth the rights and duties of the parties with respect to the project and the payments under the HAP contract.

*Housing assistance payment* means the payment made by HUD to the Borrower for assisted units as provided in the HAP contract. The payment is the difference between the contract rent and the tenant rent. An additional payment is made to a family occupying an assisted unit when the utility allowance is greater than the total tenant payment. A housing assistance payment, known as a "vacancy payment," may be made to the Borrower when an assisted unit is vacant, in accordance with the terms of the HAP contract.

*Project account* means a specifically identified and segregated account for each project that is established in accordance with § 891.570(b) out of the amounts by which the maximum annual commitment exceeds the amount actually paid out under the HAP contract each year.

*Project occupancy requirements* means that eligible populations to be

served under the Section 202 program are qualified individuals or families whose head of household or spouse is elderly, physically handicapped, developmentally disabled, or chronically mentally ill. Projects are designed to meet the special needs of the particular tenant population that the Borrower was selected to serve.

Individuals from one eligible group may not be accepted for occupancy in a project designed for a different tenant group. However, a Sponsor can propose to house eligible tenant groups other than the one it was selected to serve, but must apply to the HUD field office for permission to do so, based on a plan that demonstrates that it can adequately serve the proposed tenant group. Upon review and recommendation by the field office, HUD Headquarters will approve or disapprove the request.

*Rent*, in the case of a unit in a cooperative project, means the carrying charges payable to the cooperative with respect to occupancy of the unit.

*Tenant rent* means the monthly amount defined in, and determined in accordance with part 813 of this chapter.

*Total tenant payment* means the monthly amount defined in, and determined in accordance with part 813 of this chapter.

*Utility allowance* is defined in part 813 of this chapter and is determined or approved by HUD.

*Utility reimbursement* is defined in part 813 of this chapter.

*Vacancy payment* means the housing assistance payment made to the Borrower by HUD for a vacant assisted unit if certain conditions are fulfilled, as provided in the HAP contract. The amount of the vacancy payment varies with the length of the vacancy period and is less after the first 60 days of any vacancy.

#### **§ 891.525 Amount and terms of financing.**

(a) The amount of financing approved shall be the amount stated in the Notice of Section 202 Fund Reservation, including any increase approved by the field office prior to the final closing of a loan; provided, however, that the amount of financing provided shall not exceed the lesser of:

(1) The dollar amounts stated in paragraphs (b) through (f) of this section; or

(2) The total development cost of the project as determined by the field office.

(b) For such part of the property or project attributable to dwelling use (excluding exterior land improvements, as defined by the Assistant Secretary) the maximum loan amount, depending

on the number of bedrooms, may not exceed:

(1) \$28,032 per family unit without a bedroom.

(2) \$32,321 per family unit with one bedroom.

(3) \$38,979 per family unit with two bedrooms.

(c) In order to compensate for the higher costs incident to construction of elevator type structures of sound standards of construction and design, the field office may increase the dollar limitations per family unit, as provided in paragraph (b) of this section, to not to exceed:

(1) \$29,500 per family unit without a bedroom.

(2) \$33,816 per family unit with one bedroom.

(3) \$41,120 per family unit with two bedrooms.

(d) *Reduced loan amount—leaseholds.* In the event the loan is secured by a leasehold estate rather than a fee simple estate, the allowable cost of the property upon which the loan amount is based shall be reduced by the value of the leased fee.

(e) *Adjusted loan amount—rehabilitation projects.* A loan amount that involves a project to be rehabilitated shall be subject to the following additional limitations:

(1) *Property held in fee.* If the Borrower is the fee simple owner of the project not encumbered by a mortgage, the maximum loan amount shall not exceed 100 percent of the cost of the proposed rehabilitation.

(2) *Property subject to existing mortgage.* If the Borrower owns the project subject to an outstanding indebtedness, which is to be refinanced with part of the Section 202 loan, the maximum loan amount shall not exceed the cost of rehabilitation plus such portion of the outstanding indebtedness as does not exceed the fair market value of such land and improvements prior to the rehabilitation, as determined by the field office.

(3) *Property to be acquired.* If the project is to be acquired by the Borrower and the purchase price is to be financed with a part of the Section 202 loan, the maximum loan amount shall not exceed the cost of the rehabilitation plus such portion of the purchase price as does not exceed the fair market value of such land and improvements prior to the rehabilitation, as determined by the field office.

(f) *Increased Mortgage Limits—High Cost Areas.* (1)(i) The Assistant Secretary may increase the dollar amount limitations in paragraphs (b) and (c) of this section:

(A) By not to exceed 110 percent in any geographical area in which the Assistant Secretary finds that cost levels so require; and

(B) By not to exceed 140 percent where the Assistant Secretary determines it necessary on a project-by-project basis.

(ii) In no case, however, may any such increase exceed 90 percent, where the Assistant Secretary determines that there is involved a mortgage purchased or to be purchased by the Government National Mortgage Association (GNMA) in implementing its Special Assistance Functions under section 305 of the National Housing Act (as section 305 existed immediately before its repeal on November 30, 1983).

(2) If the Assistant Secretary finds that because of high costs in Alaska, Guam, or Hawaii it is not feasible to construct dwellings without the sacrifice of sound standards of construction, design, and livability within the limitations of maximum loan amounts provided in this section, the principal amount of mortgages may be increased by such amounts as may be necessary to compensate for such costs, but not to exceed in any event the maximum, including high cost area increases, if any, otherwise applicable by more than one-half thereof.

(g) *Loan interest rate.* Loans shall bear interest at a rate determined by HUD in accordance with this section.

(1) *Annual interest rate.* Except as provided under paragraph (g)(2), loans shall bear interest at the rate in effect at the time the loan is made. The loan interest rate shall not exceed:

(i) The average yield on the most recently issued 30-year marketable obligations of the United States during the 3-month period immediately preceding the fiscal year in which the loan is made (adjusted to the nearest one-eighth of one percent), plus an allowance to cover administrative costs and probable losses under the program; and

(ii) Any applicable statutory ceiling on the loan interest rate including the allowance to cover administrative costs and probable losses.

(2) *Optional interest rate.* The Borrower may elect an optional loan interest rate. To elect the optional rate, the Borrower must request that HUD determine the loan interest rate at the time of the Borrower's request for conditional or firm commitment for direct loan financing.

(i) If the Borrower elects the optional loan interest rate, the loan interest rate shall not exceed:

(A) The average yield on the most recently issued 30-year marketable

obligations of the United States during the 3-month period immediately preceding the fiscal year in which the request for commitment is submitted (adjusted to the nearest one-eighth of one percent), plus an allowance to cover administrative costs and probable losses under the program;

(B) The average yield on the most recently issued 30-year marketable obligations of the United States during the 1-month period immediately preceding the month in which the request for commitment is submitted (adjusted to the nearest one-eighth of one percent), plus an allowance to cover the administrative costs and probable losses under the program; and (C) Any applicable statutory ceiling on the loan interest rate including an allowance to cover administrative costs and probable losses under the program.

(ii) The date of submission of a request for conditional or firm commitment is the date that the Borrower submits the complete and acceptable request to HUD. The date of the submission of a request for commitment will not be affected by any subsequent resubmission of the request by the Borrower or by any reprocessing of the request by HUD.

(iii) The Borrower may withdraw its election of the optional interest rate at any time before initial loan closing. If the Borrower elected the optional interest rate with its request for conditional commitment and withdraws its election, the loan will bear interest at the rate determined under paragraph (g)(1) of this section, unless the Borrower elects an optional interest rate with its request for firm commitment. If the Borrower withdraws its election after the date of submission of its request for firm commitment, the loan will bear interest at the rate determined under paragraph (g)(1) of this section.

(iv) If initial loan closing has not occurred within 18 months after the Notice of Section 202 Fund Reservation is issued, the Borrower's election of the optional rate will be cancelled and the loan will bear interest at the rate determined under paragraph (g)(1) of this section.

(3) *Allowance for administrative costs and probable losses.* For the purpose of computing the loan interest rate under paragraphs (g) (1) and (2) of this section, the allowance to cover administrative costs and probable losses under the program is one-fourth of one percent (.25%) per annum for both the construction and permanent loan periods.

(h) *Announcement of interest rates.*

(1) HUD will annually announce the loan interest rate determination under

paragraph (g)(1) of this section by publishing notice of the rate in the Federal Register. The Federal Register notice will include a statement explaining the basis for the interest rate determination.

(2) Upon the Borrower's request, HUD will provide available current information concerning the determination of the interest rate under paragraph (g)(2) of this section.

(i) The loan shall be secured by a first mortgage on real estate in fee simple or long term leasehold. The mortgage shall be repayable during a term not to exceed 40 years and shall be subject to such terms and conditions as shall be determined by the Assistant Secretary.

(j) In order to assure HUD of the Borrower's continued commitment to the development, management, and operation of the project, a minimum capital investment is required of Section 202 Borrowers of one-half of one percent (0.5%) of the mortgage amount committed to be disbursed, not to exceed the amount of \$10,000. Section 106(b) loans made pursuant to section 106 of the Housing Act of 1968 may not be utilized to meet the minimum capital investment requirement. Such minimum capital investment shall be placed in escrow at the initial closing of the Section 202 loan and shall be held by HUD or other escrow agent acceptable to the field office for not less than a 3-year period from the date of initial occupancy and may be used for operating expenses or deficits as may be directed by the field office. Any unexpended balance remaining in the minimum capital investment account at the end of the escrow period shall be returned to the Borrower.

#### **§ 891.530 Prepayment privileges.**

(a) The prepayment (whether in whole or in part) or the assignment or transfer of physical and financial assets of any Section 202 project is prohibited, unless the Secretary gives prior written approval.

(b) The Secretary may not grant approval unless he or she has determined that the prepayment or transfer of the loan is part of a transaction that will ensure the continued operation of the project, until the original maturity date of the loan, in a manner that will provide rental housing for the elderly and handicapped on terms at least as advantageous to existing and future tenants as the terms required by the original Section 202 loan agreement and any other loan agreements entered into under other provisions of law.

**§ 891.535 Requirements for awarding construction contracts.**

(a) Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed construction contract. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(b) Each Borrower is permitted to use either competitive bidding (formal advertising) in selecting a construction contractor or the negotiated noncompetitive method of contract award under paragraph (c) of this section. In competitive bidding, sealed bids are publicly solicited and a firm, fixed-price contract is awarded (in accordance with the requirements of this paragraph (b)) to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is lowest in price. Regardless of which method a Borrower uses, there should be an opportunity for minority owned and women owned businesses to be awarded a contract.

(1) Bids shall be solicited from an adequate number of known contractors a reasonable time prior to the date set forth for opening of bids. In addition, the invitation shall be publicly advertised.

(2) The invitation for bids shall specify:

- (i) The name of the Borrower;
- (ii) A brief description of the proposed project and the proposed construction contract;
- (iii) A preliminary estimate of cost;
- (iv) That bids will be received at a specified place until a specified time at which time and place all bids will be publicly opened;
- (v) The location where the proposed forms of contract and bid documents, including plans and specifications, are on file and may be obtained on payment of a specified returnable deposit;
- (vi) That a certified check or bank draft or satisfactory bid bond in the amount of 5 percent of the bid shall be submitted with the bid;
- (vii) That the successful bidder will be required to provide assurance of completion in the form of a performance and payment bond or cash escrow; and
- (viii) That the Borrower reserves the right to reject any or all bids and to waive any informality.

(3) The bid form, which must be submitted by all bidders, must specify:

- (i) The name of the project;
- (ii) The name and address of the bidder;
- (iii) That the bidder proposes to furnish all labor, materials, equipment

and services required to construct and complete the project, as described in the invitation for bids (including the contents of all documents on file), for a specified lump-sum price;

(iv) That the security specified in paragraph (b)(2)(vi) of this section accompanies the bid;

(v) The period after the bid opening during which the bid shall not be withdrawn without the consent of the Borrower;

(vi) That the bidder will, if notified of acceptance of such bid within a specified period after the opening, execute and deliver a contract in the prescribed form and furnish the required bond within ten days thereafter;

(vii) That the bidder acknowledges any amendments to the invitation for bids; and

(viii) That the bidder certifies that the bid is in strict accordance with all terms of the invitation for bids (including the contents of all documents on file) and that the bid is signed by a person authorized to bind the bidder.

(4) Bidding shall be open to all general contractors who furnish the security guaranteeing their bid, as described in paragraph (b)(2)(vi) of this section.

(5) All bids shall be opened publicly at the time and place stated in the invitation for bids, in the presence of the HUD Regional Administrator or his designee.

(6) A firm, fixed-price contract award shall be made by written notice to the responsible bidder whose bid, conforming to the invitation for bids, is lowest. The contract may provide for an incentive payment to the contractor for an early completion.

(c) A Sponsor or Borrower may award a negotiated, noncompetitive construction contract.

**§ 891.540 Loan disbursement procedures.**

(a) Disbursements of loan proceeds shall be made directly by HUD to or for the account of the Borrower and may be made through an approved lender, mortgage servicer, title insurance company, or other agent satisfactory to the Borrower and HUD.

(b) All disbursements to the Borrower shall be made on a periodic basis in an amount not to exceed the HUD-approved cost of portions of construction or rehabilitation work completed and in place (except as modified in paragraph (d) of this section), minus the appropriate holdback, as determined by the field office.

(c) Requisitions for loan disbursements shall be submitted by the

Borrower on forms to be prescribed by the Assistant Secretary and shall be accompanied by such additional information as the field office may require in order to approve loan disbursements under subpart E of this part, including but not limited to evidence of compliance with the Davis-Bacon Act, Department of Labor regulations, all applicable zoning, building, and other governmental requirements, and such evidence of continued priority of the mortgage of the Borrower as the Assistant Secretary may prescribe.

(d) In loan disbursements for building components stored off-site, the term "*building component*" shall mean any manufactured or preassembled part of a structure as defined by HUD and that the Assistant Secretary has designated for off-site storage because it is of such size or weight that storage of the components required for timely construction progress at the construction site is impractical, or weather damage or other adverse conditions prevailing at the construction site would make storage at the site impractical or unduly costly. Each building component must be specifically identified for incorporation into the property as provided under paragraph (d)(1)(ii) of this section.

(1) *Storage.* (i) A loan disbursement may be made for up to 90 percent of the invoice value (to exclude costs of transportation and storage) of the building components stored off-site if the components are stored at a location approved by HUD.

(ii) Each building component shall be adequately marked so as to be readily identifiable in the inventory of the off-site location. It shall be kept together with all other building components of the same manufacturer intended for use in the same project for which loan disbursements have been made and separate and apart from similar units not for use in the project.

(iii) Storage costs, if any, shall be borne the general contractor.

(2) *Responsibility for transportation, storage and insurance of off-site building components.* The general contractor of the project shall have the responsibility for:

(i) Insuring the components in the name of the Borrower while in transit and storage; and

(ii) Delivering or contracting for the delivery of the components to the storage area and to the construction site, including payment of freight.

(3) *Loan disbursements.* (i) Before a loan disbursement for a building component stored off-site is made, the Borrower shall:

(A) Obtain a bill of sale for the component;

(B) Provide HUD with a security agreement pledged by a first lien on the building components with the exception of such other liens or encumbrances as may be approved by HUD; and

(C) File a financing statement in accordance with the Uniform Commercial Code.

(ii) Before each loan disbursement for building components stored off-site is made the manufacturer and the general contractor shall certify to HUD that the components, in their intended use, comply with HUD-approved contract plan and specifications.

(iii) Loan disbursements may be made only for components stored off-site in a quantity required to permit uninterrupted installation at the site.

(iv) At no time shall the invoice value of building components being stored off-site, for which advances have been insured, represent more than 25 percent of the total estimated construction costs for the insured mortgaged project as specified in the construction contract. Notwithstanding the preceding sentence and other regulatory requirements that set bonding requirements, the percentage of total estimated construction costs insured by advances under this section may exceed 25 percent but not 50 percent if the mortgagor furnishes assurance of completion in the form of a corporate surety bond for the payment and performance each in the amount of 100 percent of the amount of the construction contract. In no event will insurance of components stored off-site be made in the absence of a payment and performance bond.

(v) No single loan disbursement which is to be made shall be in an amount less than ten thousand (\$10,000) dollars.

#### **§ 891.545 Completion of project, cost certification, and HUD approvals.**

(a) The Borrower must satisfy the requirements for completion of construction and substantial rehabilitation and approvals by HUD before submission of a final requisition for disbursement of loan proceeds.

(b) The Borrower shall submit to the field office all documentation required for final disbursement of the loan, including:

(1) A Borrower's/Mortgagor's Certificate of Actual Cost, showing the actual cost to the mortgagor of the construction contract, architectural, legal, organizational, offsite costs, and all other items of eligible expense. The certificate shall not include as actual cost any kickbacks, rebates, trade

discounts, or other similar payments to the mortgagor or to any of its officers, directors, or members.

(2) A verification of the Certificate of Actual Cost by an independent Certified Public Accountant or independent public accountant acceptable to the field office.

(3) In the case of projects not subject to competitive bidding, a certification of the general contractor (and of such subcontractors, material suppliers, and equipment lessors as the Assistant Secretary or field office may require), on a form prescribed by the Assistant Secretary, as to all actual costs paid for labor, materials, and subcontract work under the general contract exclusive of the builder's fee and kickbacks, rebates, trade discounts, or other similar payments to the general contractor, the mortgagor, or any of its officers, directors, stockholders, partners, or members.

(c) In lieu of the requirements set forth in paragraphs (c)(1) and (3) of this section, a simplified form of cost certification prescribed by the Secretary may be completed and submitted by the Borrower for projects with mortgages of \$500,000 or less. The simplified cost certification shall be verified by an independent Certified Public Accountant or an independent public accountant in a manner acceptable to the Secretary.

(d) If the Borrower's certified costs provided in accordance with paragraph (c) or (d) of this section and as approved by HUD are less than the loan amount, the contract rents will be reduced accordingly.

(e) If the contract rents are reduced pursuant to paragraph (e) of this section, the maximum annual HAP Contract commitment will be reduced. If contract rents are reduced based on cost certification after HAP Contract execution, any overpayment after the effective date of the Contract will be recovered from the Borrower by HUD.

(Approved by the Office of Management and Budget under control number 2502-0044.)

#### **§ 891.550 Selection preferences.**

For purposes of projects assisted under §§ 891.520 through 891.650, the selection preferences in 24 CFR part 5, subpart D apply.

#### **§ 891.555 Smoke detectors.**

(a) *Performance requirement.* After October 30, 1992, each dwelling unit must include at least one battery-operated or hard-wired smoke detector, in proper working condition, on each level of the unit. If the unit is occupied by hearing-impaired persons, smoke detectors must have an alarm system

designed for hearing-impaired persons in each bedroom occupied by a hearing-impaired person.

(b) *Acceptability criteria.* The smoke detector must be located, to the extent practicable, in a hallway adjacent to a bedroom, unless the unit is occupied by a hearing-impaired person, in which case each bedroom occupied by a hearing-impaired person must have an alarm system connected to the smoke detector installed in the hallway.

#### **§ 891.560 HAP contract.**

(a) *HAP contract.* The housing assistance payments contract sets forth rights and duties of the Borrower and HUD with respect to the project and the housing assistance payments.

(b) *HAP contract execution.* (1) Upon satisfactory completion of the project, the Borrower and HUD shall execute the HAP contract on the form prescribed by HUD.

(2) The effective date of the HAP contract may be earlier than the date of execution, but no earlier than the date of HUD's issuance of the permission to occupy.

(3) If the project is completed in stages, the procedures of paragraph (b) of this section shall apply to each stage.

(c) *Housing assistance payments to owners under the HAP contract.* The housing assistance payments made under the HAP contract are:

(1) *Payments to the Borrower to assist eligible families leasing assisted units.* The amount of the housing assistance payment made to the Borrower for an assisted unit leased to an eligible family is equal to the difference between the contract rent for the unit and the tenant rent payable by the family.

(2) *Payments to the Borrower for vacant assisted units (vacancy payments).* The amount of and conditions for vacancy payments are described in § 891.650. The housing assistance payments are made monthly by HUD upon proper requisition by the Borrower, except payments for vacancies of more than 60 days, which are made semiannually by HUD upon requisition by the Borrower.

(d) *Payment of utility reimbursement.* As applicable, a utility reimbursement will be paid to a family occupying an assisted unit as an additional housing assistance payment. The HAP contract will provide that the Borrower will make this payment on behalf of HUD. Funds will be paid to the Borrower in trust solely for the purpose of making the additional payment. The Borrower may pay the utility reimbursement jointly to the family and the utility company, or, if the family and utility

company consent, directly to the utility company.

**§ 891.565 Term of HAP contract.**

The term of the HAP contract for assisted units shall be 20 years. If the project is completed in stages, the term of the HAP contract for assisted units in each stage shall be 20 years. The term of the HAP contract for all assisted units in all stages of a project shall not exceed 22 years.

**§ 891.570 Maximum annual commitment and project account.**

(a) *Maximum annual commitment.* The maximum annual amount that may be committed under the HAP contract is the total of the contract rents and utility allowances for all assisted units in the project.

(b) *Project account.* (1) HUD will establish and maintain a specifically identified and segregated project account for each project. The project account will be established out of the amounts by which the maximum annual commitment exceeds the amount actually paid out under the HAP contract each year. HUD will make payments from this account for housing assistance payments as needed to cover increases in contract rents or decreases in tenant income and other payments for costs specifically approved by the Secretary.

(2) If the HUD-approved estimate of required annual payments under the HAP contract for a fiscal year exceeds the maximum annual commitment for that fiscal year plus the current balance in the project account, HUD will, within a reasonable time, take such steps authorized by section 8(c)(6) of the United States Housing Act of 1937 (42 U.S.C. 1437f note), as may be necessary, to assure that payments under the HAP contract will be adequate to cover increases in contract rents and decreases in tenant income.

**§ 891.575 Leasing to eligible families.**

(a) *Availability of assisted units for occupancy by eligible families.* (1) During the term of the HAP contract, a Borrower shall make available for occupancy by eligible families the total number of units for which assistance is committed under the HAP contract. For purposes of this section, making units available for occupancy by eligible families means that the Borrower:

- (i) Is conducting marketing in accordance with § 891.600(a);
- (ii) Has leased or is making good faith efforts to lease the units to eligible and otherwise acceptable families, including taking all feasible actions to fill vacancies by renting to such families;

(iii) Has not rejected any such applicant family except for reasons acceptable to HUD.

(2) If the Borrower is temporarily unable to lease all units for which assistance is committed under the HAP contract to eligible families, one or more units may, with the prior approval of HUD, be leased to otherwise eligible families that do not meet the income eligibility requirements of part 813 of this chapter. Failure on the part of the Borrower to comply with these requirements is a violation of the HAP contract and grounds for all available legal remedies, including an action for specific performance of the HAP contract, suspension or debarment from HUD programs, and reduction of the number of units under the HAP contract as set forth in paragraph (b) of this section.

(b) *Reduction of number of units covered by the HAP contract.* HUD may reduce the number of units covered by the HAP contract to the number of units available for occupancy by eligible families if:

(1) The Borrower fails to comply with the requirements of paragraph (a) of this section; or

(2) Notwithstanding any prior approval by HUD, HUD determines that the inability to lease units to eligible families is not a temporary problem.

(c) *Restoration.* HUD will agree to an amendment of the HAP contract to provide for subsequent restoration of any reduction made under paragraph (b) of this section if:

(1) HUD determines that the restoration is justified by demand;

(2) The Borrower otherwise has a record of compliance with the Borrower's obligations under the HAP contract; and

(3) Contract and budget authority is available.

(d) *Applicability.* In accordance with section 555 of the Cranston-Gonzalez National Affordable Housing Act of 1990, paragraphs (a) and (b) of this section apply to all contracts. An owner who had leased an assisted unit to an ineligible family consistent with the regulations in effect at the time will continue to lease the unit to that family. However, the owner must make the unit available for occupancy by an eligible family when the ineligible family vacates the unit.

(e) *Occupancy by families that are not elderly or handicapped.* HUD may permit units in the project to be leased to other than elderly or handicapped families if:

(1) The Borrower has made reasonable efforts to lease assisted and unassisted units to eligible families;

(2) The Borrower has been granted HUD approval under paragraph (a) of this section; and

(3) The Borrower is temporarily unable to achieve or maintain a level of occupancy sufficient to prevent financial default and foreclosure under the Section 202 loan documents. HUD approval under paragraph (e)(3) of this section will be of limited duration. HUD may impose terms and conditions to this approval that are consistent with program objectives and necessary to protect its interest in the Section 202 loan.

**§ 891.580 HAP contract administration.**

HUD is responsible for the administration of the HAP contract.

**§ 891.585 Default by Borrower.**

(a) *HAP contract provisions.* The HAP contract will provide:

(1) That if HUD determines that the Borrower is in default under the HAP contract, HUD will notify the Borrower of the actions required to be taken to cure the default and of the remedies to be applied by HUD including an action for specific performance under the HAP contract, reduction or suspension of housing assistance payments and recovery of overpayments, where appropriate; and

(2) That if the Borrower fails to cure the default, HUD has the right to terminate the HAP contract or to take other corrective action.

(b) *Loan provisions.* Additional provisions governing default under the section 202 loan are included in the regulatory agreement and other loan documents.

**§ 891.590 Notice upon HAP contract expiration.**

(a) *Notice required.* The HAP contract will provide that the Borrower will, at least one year before the end of the HAP contract term, notify each family leasing an assisted unit of any increase in the amount the family will be required to pay as rent as a result of the expiration.

(b) *Service requirements.* The notice under paragraph (a) of this section shall be accomplished by sending a letter by first class mail, properly stamped and addressed, to the family at its address at the project, with a proper return address; and serving a copy of the notice on any adult person answering the door at the leased dwelling unit, or if no adult responds, by placing the notice under or through the door, if possible, or else by affixing the notice to the door. Service shall not be considered to be effective until both required notices have been accomplished. The date on which the notice shall be considered to

be received by the family shall be the date on which the Borrower mails the first class letter provided for in paragraph (b) of this section, or the date on which the notice provided for in paragraph (b) of this section is properly given, whichever is later.

(c) *Contents of notice.* The notice shall advise each affected family that, after the expiration date of the HAP contract, the family will be required to bear the entire cost of the rent and that the Borrower may, subject to requirements and restrictions contained in the regulatory agreement, the lease, and State or local law, change the rent. The notice also shall state:

(1) The actual (if known) or the estimated rent that will be charged following the expiration of the HAP contract;

(2) The difference between the new rent and the total tenant payment toward rent under the HAP contract; and

(3) The date the HAP contract will expire.

(d) *Certification to HUD.* The Borrower shall give HUD a certification that families have been notified in accordance with this section and shall attach to the certification an example of the text of the notice.

(e) *Applicability.* This section applies to all HAP contracts entered into under an agreement to enter into a housing assistance payments contract executed on or after October 1, 1981, or entered into under such an agreement executed before October 1, 1981 but renewed or amended after February 9, 1995.

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#### **§ 891.595 HAP contract extension or renewal.**

Upon expiration of the term of the HAP contract, HUD and the Borrower may agree (subject to available funds) to extend the term of the HAP contract or to renew the HAP contract. The number of assisted units under the extended or renewed HAP contract shall equal the number of assisted units under the original HAP contract, except that:

(a) HUD and the Borrower may agree to reduce the number of assisted units by the number of assisted units that are not occupied by eligible families at the time of the extension or renewal; and

(b) HUD and the Borrower may agree to permit reductions in the number of assisted units during the term of the extended or renewed HAP contract as assisted units are vacated by eligible families. Nothing in this section shall prohibit HUD from reducing the number of units covered under the extended or

renewed HAP contract in accordance with § 891.575(b).

#### **§ 891.600 Responsibilities of Borrower.**

(a) *Marketing.* (1) The Borrower must commence and continue diligent marketing activities not later than 90 days before the anticipated date of availability for occupancy of the first unit of the project. Market activities shall include the provision of notices of availability of housing under the program to operators of temporary housing for the homeless in the same housing market.

(2) Marketing must be done in accordance with the HUD-approved affirmative fair housing marketing plan and all Federal, State, or local fair housing and equal opportunity requirements. The purpose of the plan and requirements is to achieve a condition in which eligible families of similar income levels in the same housing market have a like range of housing choices available to them regardless of discriminatory considerations, such as their race, color, creed, religion, familial status, disability, sex or national origin. Marketing must also be done in accordance with the communication and notice requirements of Section 504 at 24 CFR 8.6 and 24 CFR 8.54.

(3) At the time of HAP contract execution, the Borrower must submit to HUD a list of leased and unleased assisted units, with a justification for the unleased units, in order to qualify for vacancy payments for the unleased units.

(b) *Management and maintenance.* The Borrower is responsible for all management functions. These functions include selection and admission of tenants, required reexaminations of incomes for families occupying assisted units (or residential spaces, as applicable), collection of rents, termination of tenancy and eviction, and all repair and maintenance functions (including ordinary and extraordinary maintenance and replacement of capital items). All functions must be performed in compliance with equal opportunity requirements.

(c) *Contracting for services.* (1) With HUD approval, the Borrower may contract with a private or public entity for performance of the services or duties required in paragraphs (a) and (b) of this section. However, such an arrangement does not relieve the Borrower of responsibility for these services and duties. All such contracts are subject to the restrictions governing prohibited contractual relationships described in §§ 891.130 and 891.505, if applicable.

(These prohibitions do not extend to management contracts entered into by the Borrower with the Sponsor or its nonprofit affiliate).

(2) Consistent with the objectives of Executive Order No. 11625 (36 FR 19967, 3 CFR, 1971-1975 Comp., p. 616; as amended by Executive Order No. 12007 (42 FR 42839, 3 CFR, 1977 Comp., p. 139; unless otherwise noted); Executive Order No. 12432 (48 FR 32551, 3 CFR, 1983 Comp., p. 198; unless otherwise noted); and Executive Order No. 12138 (44 FR 29637, 3 CFR, 1979 Comp., p. 393; unless otherwise noted), the Borrower will promote awareness and participation of minority and women's business enterprises in contracting and procurement activities.

(d) *Submission of financial and operating statements.* The Borrower must submit to HUD:

(1) Within 60 days after the end of each fiscal year of project operations, financial statements for the project audited by an independent public accountant and in the form required by HUD; and

(2) Other statements regarding project operation, financial conditions and occupancy as HUD may require to administer the housing assistance payments contract (HAP contract) or the project assistance contract (PAC), as applicable, and to monitor project operations.

(e) *Use of project funds.* The Borrower shall maintain a separate project fund account in a depository or depositories that are members of the Federal Deposit Insurance Corporation or National Credit Union Share Insurance Fund and shall deposit all rents, charges, income and revenues arising from project operation or ownership to this account. All project funds are to be deposited in Federally-insured accounts. All balances shall be fully insured at all times, to the maximum extent possible. Project funds must be used for the operation of the project (including required insurance coverage), to make required principal and interest payments on the Section 202 loan, and to make required deposits to the replacement reserve under §§ 891.605 and 891.745 (as applicable), in accordance with a HUD-approved budget. Any project funds in the project funds account (including earned interest) following the expiration of the fiscal year shall be deposited in a Federally-insured residual receipts account within 60 days following the end of the fiscal year. Withdrawals from this account may be made only for project purposes and with the approval of HUD. If there are funds remaining in the residual receipts account when the

mortgage is satisfied, such funds shall be returned to HUD.

(f) *Reports.* The Borrower shall submit such reports as HUD may prescribe to demonstrate compliance with applicable civil rights and equal opportunity requirements.

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#### **§ 891.605 Replacement reserve.**

(a) *Establishment of reserve.* The Borrower shall establish and maintain a replacement reserve to aid in funding extraordinary maintenance, and repair and replacement of capital items.

(b) *Deposits to reserve.* The Borrower shall make monthly deposits to the replacement reserve in an amount determined by HUD. Further requirements regarding the amount of the deposits for projects funded under §§ 891.655 through 891.790 are provided in § 891.745.

(c) *Level of reserve.* The reserve must be built up to and maintained at a level determined by HUD to be sufficient to meet projected requirements. Should the reserve reach that level, the amount of the deposit to the reserve may be reduced with the approval of HUD.

(d) *Administration of reserve.* Replacement reserve funds must be deposited with HUD or in a Federally-insured depository in an interest-bearing account(s) whose balances are fully insured at all times. All earnings including interest on the reserve must be added to the reserve. Funds may be drawn from the reserve and used only in accordance with HUD guidelines and with the approval of, or as directed by, HUD.

#### **§ 891.610 Selection and admission of tenants.**

(a) *Written procedures.* The Owner shall adopt written tenant selection procedures that ensure nondiscrimination in the selection of tenants and that are consistent with the purpose of improving housing opportunities for very low-income elderly or handicapped persons; and reasonably related to program eligibility and an applicant's ability to perform the obligations of the lease. Owners shall promptly notify in writing any rejected applicant of the grounds for any rejection. Additionally, owners shall maintain a written, chronological waiting list showing the name, race, gender, ethnicity and date of each person applying for the program.

(b) *Application for admission.* The Borrower must accept applications for admission to the project in the form prescribed by HUD and is obligated to confirm all information provided by the

applicant families on the application. Applicant families must be requested to complete a release of information consent for verification of information. Applicants applying for assisted units must complete a certification of eligibility as part of the application for admission. Applicant families must meet the disclosure and verification requirements for Social Security Numbers, and sign and submit consent forms for the obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 5, subpart B. Both the Borrower and the applicant must complete and sign the application for admission. On request, the Borrower must furnish copies of all applications for admission to HUD.

(c) *Determination of eligibility and selection of tenants.* The Borrower is responsible for determining whether applicants are eligible for admission and for the selection of families. To be eligible for admission, an applicant must be an elderly or handicapped family as defined in § 891.505; meet any project occupancy requirements approved by HUD; meet the disclosure and verification requirements for Social Security Numbers and sign and submit consent forms for obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 5, subpart B; and, if applying for an assisted unit, be eligible for admission under part 813 of this chapter.

(d) *Unit assignment.* If the Borrower determines that the family is eligible and is otherwise acceptable and units are available, the Borrower will assign the family a unit. The Borrower will assign the family a unit of the appropriate size in accordance with HUD's general occupancy guidelines. If no suitable unit is available, the Borrower will place the family on a waiting list for the project and notify the family of when a suitable unit may become available. If the waiting list is so long that the applicant would not be likely to be admitted within the next 12 months, the Borrower may advise the applicant that no additional applications for admission are being considered for that reason, except that the Borrower may not refuse to place an applicant on the waiting list if the applicant is otherwise eligible for assistance and claims that he or she qualifies for a Federal preference as provided in 24 CFR part 5, subpart D.

(e) *Ineligibility determination.* If the Borrower determines that an applicant is ineligible for admission or the Borrower is not selecting the applicant for other reasons, the Borrower will

promptly notify the applicant in writing of the determination, the reasons for the determination, and that the applicant has a right to request a meeting with the Borrower or managing agent to review the rejection, in accordance with HUD requirements. The review, if requested, may not be conducted by a member of the Borrower's staff who made the initial decision to reject the applicant. The applicant may also exercise other rights (e.g., rights granted under Federal, State, or local civil rights laws) if the applicant believes he or she is being discriminated against on a prohibited basis. The informal review provisions for the denial of a Federal preference are provided in § 5.410(g) of this title.

(f) *Records.* Records on applicants and approved eligible families, which provide racial, ethnic, gender, handicap status, and place of previous residency data required by HUD, must be retained for three years.

(g) *Reexamination of family income and composition.* (1) *Regular reexaminations.* The Borrower must reexamine the income and composition of the family at least every 12 months. Upon verification of the information, the Borrower shall make appropriate adjustments in the total tenant payment in accordance with part 813 of this chapter and determine whether the family's unit size is still appropriate. The Borrower must adjust tenant rent and the housing assistance payment and must carry out any unit transfer in accordance with the administrative instructions issued by HUD. At the time of reexamination under paragraph (g)(1) of this section, the Borrower must require the family to meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B.

(2) *Interim reexaminations.* The family must comply with the provisions in its lease regarding interim reporting of changes in income. If the Borrower receives information concerning a change in the family's income or other circumstances between regularly scheduled reexaminations, the Borrower must consult with the family and make any adjustments determined to be appropriate. Any change in the family's income or other circumstances that results in an adjustment in the total tenant payment, tenant rent and housing assistance payment must be verified.

(3) *Continuation of housing assistance payments.* (i) A family shall remain eligible for housing assistance payments until the total tenant payment equals or exceeds the gross rent. The termination of subsidy eligibility will not affect the family's other rights under its lease. Housing assistance payments may be



resumed if, as a result of changes in income, rent or other relevant circumstances during the term of the HAP contract, the family meets the income eligibility requirements of part 813 of this chapter and housing assistance is available for the unit under the terms of the HAP contract. The family will not be required to establish its eligibility for admission to the project under the remaining requirements of paragraph (c) of this section.

(ii) A family's eligibility for housing assistance payments may be terminated in accordance with HUD requirements for such reasons as failure to submit requested verification information, including information related to disclosure and verification of Social Security Numbers, or failure to sign and submit consent forms for the obtaining of wage and claim information from State wage information collection agencies, as provided by 24 CFR part 5, subpart B.

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#### **§ 891.615 Obligations of the family.**

The obligations of the family are provided in § 891.415.

#### **§ 891.620 Overcrowded and underoccupied units.**

If the Borrower determines that because of change in family size, an assisted unit is smaller than appropriate for the eligible family to which it is leased, or that the assisted unit is larger than appropriate, housing assistance payments or project assistance payments (as applicable) with respect to the unit will not be reduced or terminated until the eligible family has been relocated to an appropriate alternate unit. If possible, the Borrower will, as promptly as possible, offer the family an appropriate alternate unit. The Borrower may receive vacancy payments for the vacated unit if the Borrower complies with the requirements of § 891.650.

#### **§ 891.625 Lease requirements.**

The lease requirements are provided in § 891.425.

#### **§ 891.630 Termination of tenancy and modification of lease.**

The provisions of part 247 of this title apply to all decisions by a Borrower to terminate the tenancy or modify the lease of a family residing in a unit.

#### **§ 891.635 Security deposits.**

The general requirements for security deposits on assisted units are provided in § 891.435. For purposes of subpart E

of this part, the additional requirements apply:

(a) The Borrower may require each family occupying an unassisted unit (or residential space in a group home) to pay a security deposit equal to one month's rent payable by the family.

(b) The Borrower shall maintain a record of the amount in the segregated interest-bearing account that is attributable to each family in residence in the project. Annually for all families, and when computing the amount available for disbursement under § 891.435(b)(3), the Borrower shall allocate to the family's balance the interest accrued on the balance during the year. Unless prohibited by State or local law, the Borrower may deduct for the family, from the accrued interest for the year, the administrative cost of computing the allocation to the family's balance. The amount of the administrative cost adjustment shall not exceed the accrued interest allocated to the family's balance for the year.

#### **§ 891.640 Adjustment of rents.**

(a) *Contract rents.* (1) *Adjustment based on approved budget.* If the HAP contract provides, or has been amended to provide, that contract rents will be adjusted based upon a HUD-approved budget, HUD will calculate contract rent adjustments based on the sum of the project's operating costs and debt service (as calculated by HUD), with adjustments for vacancies, the project's nonrental income, and other factors that HUD deems appropriate. The calculation will be made on the basis of information provided by the Borrower on a form acceptable to the Secretary. The automatic adjustment factor described in part 888 of this chapter is not used to adjust contract rents under paragraph (a)(1) of this section, except to the extent that the amount of the replacement reserve deposit is adjusted under § 880.602 of this chapter.

(2) *Annual and special adjustments.* If the HAP contract provides that contract rents will be adjusted based on the application of an automatic adjustment factor and by special additional adjustments:

(i) Consistent with the HAP contract, contract rents may be adjusted in accordance with part 888 of this chapter;

(ii) Special additional adjustments will be granted, to the extent determined necessary by HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the assisted units that have resulted from substantial general increases in real property taxes, assessments, utility rates or similar costs (i.e., assessments and

utilities not covered by regulated rates), and that are not adequately compensated for by an annual adjustment. The Borrower must submit to HUD required supporting data, financial statements, and certifications for the special additional adjustment.

(b) *Rent for unassisted units.* The rent payable by families occupying units that are not assisted under the HAP contract shall be equal to the contract rent computed under paragraph (a) of this section.

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#### **§ 891.645 Adjustment of utility allowances.**

In connection with adjustments of contract rents as provided in § 891.640(a), the requirements for the adjustment of utility allowances provided in § 891.440 apply.

#### **§ 891.650 Conditions for receipt of vacancy payments for assisted units.**

(a) *General.* Vacancy payments under the HAP contract will not be made unless the conditions for receipt of these housing assistance payments set forth in this section are fulfilled.

(b) *Vacancies during rent-up.* For each unit that is not leased as of the effective date of the HAP contract, the Borrower is entitled to vacancy payments in the amount of 80 percent of the contract rent for the first 60 days of vacancy, if the Borrower:

- (1) Complied with § 891.600;
- (2) Has taken and continues to take all feasible actions to fill the vacancy; and
- (3) Has not rejected any eligible applicant except for good cause acceptable to HUD.

(c) *Vacancies after rent-up.* If an eligible family vacates a unit, the Borrower is entitled to vacancy payments in the amount of 80 percent of the contract rent for the first 60 days of vacancy if the Borrower:

- (1) Certifies that it did not cause the vacancy by violating the lease, the HAP contract, or any applicable law;
- (2) Notified HUD of the vacancy or prospective vacancy and the reasons for the vacancy immediately upon learning of the vacancy or prospective vacancy;
- (3) Has fulfilled and continues to fulfill the requirements specified in § 891.600(a)(2) and (3), and in paragraphs (b)(2) and (3) of this section; and
- (4) For any vacancy resulting from the Borrower's eviction of an eligible family, certifies that it has complied with § 891.630.

(d) *Vacancies for longer than 60 days.* If a unit continues to be vacant after the 60-day period specified in paragraph (b) or (c) of this section, the Borrower may

apply to receive additional vacancy payments in an amount equal to the principal and interest payments required to amortize that portion of the debt service attributable to the vacant unit for up to 12 additional months for the unit if:

- (1) The unit was in decent, safe, and sanitary condition during the vacancy period for which payment is claimed;
- (2) The Borrower has fulfilled and continues to fulfill the requirements specified in paragraph (b) or (c) of this section, as appropriate; and
- (3) The Borrower has demonstrated to the satisfaction of HUD that:
  - (i) For the period of vacancy, the project is not providing the Borrower with revenues at least equal to project expenses (exclusive of depreciation) and the amount of payments requested is not more than the portion of the deficiency attributable to the vacant unit; and
  - (ii) The project can achieve financial soundness within a reasonable time.

(e) *Prohibition of double compensation for vacancies.* If the Borrower collects payments for vacancies from other sources (tenant rent, security deposits, payments under § 891.435(c), or governmental payments under other programs), the Borrower shall not be entitled to collect vacancy payments to the extent these collections from other sources plus the vacancy payment exceed contract rent.

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#### Section 202 Projects for the Nonelderly Handicapped Families and Individuals—Section 162 Assistance

#### § 891.655 Definitions applicable to 202/162 projects.

The following definitions apply to projects for eligible families receiving project assistance payments under section 202(h) of the Housing Act of 1959 in addition to reservations under section 202 (202/162 projects):

*Annual income* is defined in part 813 of this chapter. In the case of an individual residing in an intermediate care facility for the mentally retarded that is assisted under Title XIX of the Social Security Act and subpart E of this part, the annual income of the individual shall exclude protected personal income as provided under that Act. For the purposes of determining the total tenant payment, the income of such individuals shall be imputed to be the amount that the family would receive if assisted under Title XVI of the Social Security Act.

*Assisted unit* means a dwelling unit that is eligible for assistance under a project assistance contract (PAC).

*Contract rent* means the total amount of rent specified in the PAC as payable by HUD and the family to the Borrower for an assisted unit or residential space.

*Family (eligible family)* means a handicapped family (as defined in § 891.505) that meets the project occupancy requirements approved by HUD and, if the family occupies an assisted unit, meets the low-income requirements described in § 813.102 of this chapter, as modified by the definition of “*annual income*” in this section.

*Gross rent* is defined in part 813 of this chapter.

*Group home* means a single family residential structure designed or adapted for occupancy by nonelderly handicapped individuals.

*Housing for handicapped families* means housing and related facilities occupied by handicapped families that are primarily nonelderly handicapped families.

*Independent living complex* means a project designed for occupancy by nonelderly handicapped families in separate dwelling units where each dwelling unit includes a kitchen and a bath.

*Operating costs* means expenses related to the provision of housing and excludes expenses related to administering, or managing the provision of, supportive services. Operating costs include:

- (1) Administrative expenses, including salary and management expenses related to the provision of shelter;
- (2) Maintenance expenses, including routine and minor repairs and groundskeeping;
- (3) Security expenses;
- (4) Utilities expenses, including gas, oil, electricity, water, sewer, trash removal, and extermination services. Operating costs exclude telephone services for families;
- (5) Taxes and insurance; and
- (6) Allowances for reserves.

*PAC (project assistance contract)* means the contract entered into by the Borrower and HUD setting forth the rights and duties of the parties with respect to the project and the payments under the PAC.

*Project account* means a specifically identified and segregated account for each project which is established in accordance with § 891.715(b) out of the amounts by which the maximum annual commitment exceeds the amount actually paid out under the PAC each year.

*Project assistance payment* means the payment made by HUD to the Borrower for assisted units as provided in the

PAC. The payment is the difference between the contract rent and the tenant rent. An additional payment is made to a family occupying an assisted unit in an independent living complex when the utility allowance is greater than the total tenant payment. A project assistance payment, known as a “vacancy payment,” may be made to the Borrower when an assisted unit (or residential space in a group home) is vacant, in accordance with the terms of the PAC.

*Rent* is defined in § 891.505.

*Tenant rent* means the monthly amount defined in, and determined in accordance with part 813 of this chapter.

*Total tenant payment* means the monthly amount defined in, and determined in accordance with part 813 of this chapter.

*Utility allowance* is defined in part 813 of this chapter and is determined or approved by HUD.

*Utility reimbursement* is defined in part 813 of this chapter.

*Vacancy payment* means the project assistance payment made to the Borrower by HUD for a vacant assisted unit (or residential space in a group home) if certain conditions are fulfilled, as provided in the PAC. The amount of the vacancy payment varies with the length of the vacancy period and is less after the first 60 days of any vacancy.

#### § 891.660 Project standards.

(a) *Property standards.* The property standards for 202/162 projects are provided in § 891.120(a).

(b) *Minimum group home standards.* The minimum group home standards for 202/162 projects are provided in § 891.310(a).

(c) *Accessibility requirements.* The accessibility requirements for 202/162 projects are provided in §§ 891.120(b) and 891.310(b).

(d) *Smoke detectors.* The requirements for smoke detectors for 202/162 projects are provided in § 891.120(d).

#### § 891.665 Project size limitations.

(a) *Maximum project size.* Projects funded under §§ 891.655 through 891.790 are subject to the following project size limitations:

(1) Group homes may not be designed to serve more than 15 persons on one site;

(2) Independent living complexes for chronically mentally ill individuals may not be designed to serve more than 20 persons on one site; and

(3) Independent living complexes for handicapped families in the developmental disability or physically

handicapped occupancy categories may not have more than 24 units nor more than 24 households on one site. For the purposes of this section, "household" has the same meaning as "handicapped family," except that unrelated handicapped individuals sharing a unit (other than a handicapped person living with another person who is essential to the handicapped person's well-being) are counted as separate households. For independent living complexes for handicapped families in the developmental disability or physically handicapped occupancy categories, units with three or more bedrooms may only be developed to serve handicapped families of one or two parents with children.

(b) *Additional limitations.* Based on the amount of loan authority appropriated for a fiscal year, HUD may have imposed additional limitations on the number of units or residents that may be proposed under an application for Section 202 loan fund reservation, as published in the annual notice of funding availability or the invitation for Section 202 fund reservation.

(c) *Exemptions.* On a case-by-case basis, HUD may approve independent living complexes that do not comply with the project size limitations prescribed in paragraphs (a)(2), (a)(3), or (b) of this section. HUD may approve such projects if the Sponsor demonstrates:

(1) The increased number of units is necessary for the economic feasibility of the project;

(2) A project of the size proposed is compatible with other residential development and the population density of the area in which the project is to be located;

(3) A project of the size proposed can be successfully integrated into the community; and

(4) A project of the size proposed is marketable in the community.

#### **§ 891.670 Cost containment and modest design standards.**

(a) *Restrictions on amenities.* Projects must be modest in design. Except as provided in paragraph (d) of this section, amenities must be limited to those amenities, as determined by HUD, that are generally provided in unassisted decent, safe, and sanitary housing for low-income families in the market area. Amenities not eligible for HUD funding include balconies, atriiums, decks, bowling alleys, swimming pools, saunas, and jacuzzis. Dishwashers, trash compactors, and washers and dryers in individual units will not be funded in independent living complexes. The use of durable

materials to control or reduce maintenance, repair, and replacement costs is not an excess amenity.

(b) *Unit sizes.* For independent living complexes, HUD will establish limitations on the size of units and number of bathrooms, based on the number of bedrooms that are in the unit.

(c) *Special spaces and accommodations.* (1) The costs of construction of special spaces and accommodations may not exceed 10 percent of the total cost of construction, except as provided in paragraph (d) of this section. Special spaces and accommodations include multipurpose rooms, game rooms, libraries, lounges, and, in independent living complexes, central kitchens and dining rooms.

(2) Special spaces and accommodations exclude offices, halls, mechanical rooms, laundry rooms, and parking areas; dwelling units and lobbies in independent living complexes; and bedrooms, living rooms, dining and kitchen areas, shared bathrooms, and resident staff dwelling units in group homes.

(d) *Exceptions.* HUD may approve a project that does not comply with the cost containment and modest design standards of paragraphs (a) through (c) of this section if:

(1) The Sponsor demonstrates a willingness and ability to contribute the incremental development cost and continuing operating costs associated with the additional amenities or design features; or

(2) The proposed project involves substantial rehabilitation or acquisition with or without moderate rehabilitation, the additional amenities or design features were incorporated into the existing structure before the submission of the application, and the total development cost of the project with the additional amenities or design features does not exceed the cost limits.

#### **§ 891.675 Prohibited facilities.**

The requirements for prohibited facilities for 202/162 projects are provided in § 891.315, except that Section 202/162 projects may not include commercial spaces.

#### **§ 891.680 Site and neighborhood standards.**

The general requirements for site and neighborhood standards for 202/162 projects are provided in §§ 891.125 and 891.320. In addition to the requirements in §§ 891.125 and 891.320, the following requirements apply to 202/162 projects:

(a) The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(b) Projects must be located in neighborhoods where other family housing is located. Except as provided below, projects may not be located adjacent to the following facilities, or in areas where such facilities are concentrated: schools or day care centers for handicapped persons, workshops, medical facilities, or other housing primarily serving handicapped persons. Projects may be located adjacent to other housing primarily serving handicapped persons if the projects together do not exceed the project size limitations under § 891.665(a).

#### **§ 891.685 Prohibited relationships.**

The requirements for prohibited relationships for 202/162 projects are provided in § 891.130.

#### **§ 891.690 Other Federal requirements.**

In addition to the Federal requirements set forth in 24 CFR part 5, other Federal requirements for the 202/162 projects are provided in §§ 891.155 and 891.325.

#### **§ 891.695 Operating cost standards.**

The requirements for the operating cost standards are provided in § 891.150.

#### **§ 891.700 Prepayment of loans.**

(a) *Prepayment prohibition.* The prepayment (whether in whole or in part) or the assignment or transfer of physical and financial assets of any Section 202 project is prohibited, unless the Assistant Secretary gives prior written approval.

(b) *HUD-approved prepayment.* Approval for prepayment or transfer will not be granted unless HUD determines that the prepayment or transfer of the loan is a part of a transaction that will ensure the continued operation of the project until the original maturity date of the loan in a manner that will provide rental housing for the handicapped families on terms at least as advantageous to existing and future tenants as the terms required by the original Section 202 loan agreement and any other loan agreements entered into under other provisions of law.

#### **§ 891.705 Project assistance contract.**

(a) *Project assistance contract (PAC).* The PAC sets forth rights and duties of the Borrower and HUD with respect to the project and the project assistance payments.

(b) *PAC execution.* (1) Upon satisfactory completion of the project, the Borrower and HUD shall execute the PAC on the form prescribed by HUD.

(2) The effective date of the PAC may be earlier than the date of execution, but no earlier than the date of HUD's issuance of the permission to occupy.

(3) If the project is completed in stages, the procedures of paragraph (b) of this section shall apply to each stage.

(c) *Project assistance payments to owners under the PAC.* The project assistance payments made under the PAC are:

(1) Payments to the Borrower to assist eligible families leasing assisted units. The amount of the project assistance payment made to the Borrower for an assisted unit (or residential space in a group home) that is leased to an eligible family is equal to the difference between the contract rent for the unit (or pro rata share of the contract rent in a group home) and the tenant rent payable by the family.

(2) Payments to the Borrower for vacant assisted units ("vacancy payments"). The amount of and conditions for vacancy payments are described in § 891.790. HUD makes the project assistance payments monthly upon proper requisition by the Borrower, except payments for vacancies of more than 60 days, which HUD makes semiannually upon requisition by the Borrower.

(d) *Payment of utility reimbursement.* If applicable, a utility reimbursement will be paid to a family occupying an assisted unit in an independent living complex as an additional project assistance payment. The PAC will provide that the Borrower will make this payment on behalf of HUD. Funds will be paid to the Borrower in trust solely for the purpose of making the additional payment. The Borrower may pay the utility reimbursement jointly to the family and the utility company, or, if the family and utility company consent, directly to the utility company.

#### **§ 891.710 Term of PAC.**

The term of the PAC shall be 20 years. If the project is completed in stages, the term of the PAC for each stage shall be 20 years. The term of the PAC for stages of a project shall not exceed 22 years.

#### **§ 891.715 Maximum annual commitment and project account.**

(a) *Maximum annual commitment.* The maximum annual amount that may be committed under the PAC is the total of the initial contract rents and utility allowances for all assisted units in the project.

(b) *Project account.* (1) HUD will establish and maintain a specifically identified and segregated project account for each project. The project account will be established out of the

amounts by which the maximum annual commitment exceeds the amount actually paid out under the PAC each year. HUD will make payments from this account for project assistance payments as needed to cover increases in contract rents or decreases in tenant income and other payments for costs specifically approved by the Secretary.

(2) If the HUD-approved estimate of required annual payments under the PAC for a fiscal year exceeds the maximum annual commitment for that fiscal year plus the current balance in the project account, HUD will, within a reasonable time, take such steps authorized by section 202(h)(4)(A) of the Housing Act of 1959, as may be necessary, to assure that payments under the PAC will be adequate to cover increases in contract rents and decreases in tenant income.

#### **§ 891.720 Leasing to eligible families.**

(a) *Availability of assisted units for occupancy by eligible families.* During the term of the PAC, a Borrower shall make all units (or residential spaces in a group home) available for eligible families. For purposes of this section, making units or residential spaces available for occupancy by eligible families means that the Borrower:

(1) Is conducting marketing in accordance with § 891.740(a);

(2) Has leased or is making good faith efforts to lease the units or residential spaces to eligible and otherwise acceptable families, including taking all feasible actions to fill vacancies by renting to such families; and (3) Has not rejected any such applicant family except for reasons acceptable to HUD. If the Borrower is temporarily unable to lease all units or residential spaces to eligible families, one or more units or residential spaces may, with the prior approval of HUD, be leased to otherwise eligible families that do not meet the income requirements of part 813 of this chapter, as modified by § 891.505.

Failure on the part of the Borrower to comply with these requirements is a violation of the PAC and grounds for all available legal remedies, including an action for specific performance of the PAC, suspension or debarment from HUD programs, and reduction of the number of units (or in the case of group homes, reduction of the number of residential spaces) under the PAC as set forth in paragraph (b) of this section.

(b) *Reduction of number of units covered by the PAC.* HUD may reduce the number of units (or in the case of group homes, the number of residential spaces) covered by the PAC to the number of units or residential spaces

available for occupancy by eligible families if:

(1) The Borrower fails to comply with the requirements of paragraph (a) of this section; or

(2) Notwithstanding any prior approval by HUD, HUD determines that the inability to lease units or residential spaces to eligible families is not a temporary problem.

(c) *Restoration.* HUD will agree to an amendment of the PAC to provide for subsequent restoration of any reduction made under paragraph (b) of this section if:

(1) HUD determines that the restoration is justified by demand;

(2) The Borrower otherwise has a record of compliance with the Borrower's obligations under the PAC; and

(3) Contract and budget authority is available.

(d) *Occupancy by families that are not handicapped.* HUD may relieve the Borrower of the requirement that all units in the project (or residential spaces in a group home) must be leased to handicapped families if:

(1) The Borrower has made reasonable efforts to lease to eligible families;

(2) The Borrower has been granted HUD approval under paragraph (a) of this section; and

(3) The Borrower is temporarily unable to achieve or maintain a level of occupancy sufficient to prevent financial default and foreclosure under the Section 202 loan documents. HUD approval under this paragraph will be of limited duration. HUD may impose terms and conditions to this approval that are consistent with program objectives and necessary to protect its interest in the Section 202 loan.

#### **§ 891.725 PAC administration.**

HUD is responsible for the administration of the PAC.

#### **§ 891.730 Default by Borrower.**

(a) *PAC provisions.* The PAC will provide:

(1) That if HUD determines that the Borrower is in default under the PAC, HUD will notify the Borrower of the actions required to be taken to cure the default and of the remedies to be applied by HUD, including an action for specific performance under the PAC, reduction or suspension of project assistance payment and recovery of overpayments, as appropriate; and

(2) That if the Borrower fails to cure the default, HUD has the right to terminate the PAC or to take other corrective action.

(b) *Loan provisions.* Additional provisions governing default under the

Section 202 loan are included in the regulatory agreement and other loan documents.

**§ 891.735 Notice upon PAC expiration.**

The PAC will provide that the Borrower will, at least 90 days before the end of the PAC contract term, notify each family occupying an assisted unit (or residential space in a group home) of any increase in the amount the family will be required to pay as rent as a result of the expiration. The notice of expiration will contain such information and will be served in such manner as HUD may prescribe.

**§ 891.740 Responsibilities of Borrower.**

(a) *Marketing.* (1) The Borrower must commence and continue diligent marketing activities not later than 90 days before the anticipated date of availability for occupancy of the group home or the anticipated date of availability of the first unit in an independent living complex. Market activities shall include the provision of notices of the availability of housing under the program to operators of temporary housing for the homeless in the same housing market.

(2) Marketing must be done in accordance with the HUD-approved affirmative fair housing marketing plan and all fair housing and equal opportunity requirements. The purpose of the plan and requirements is to achieve a condition in which eligible families of similar income levels in the same housing market have a like range of housing choices available to them regardless of their race, color, creed, religion, sex, or national origin.

(3) At the time of PAC execution, the Borrower must submit to HUD a list of leased and unleased assisted units (or in the case of a group home, leased and unleased residential spaces) with a justification for the unleased units or residential spaces, in order to qualify for vacancy payments for the unleased units or residential spaces.

(b) *Management and maintenance.* The responsibilities of the Borrower with regard to management and maintenance are provided in § 891.600(b).

(c) *Contracting for services.* The responsibilities of the Borrower with regard to contracting for services are provided in § 891.600(c).

(d) *Submission of financial and operating statements.* The responsibilities of the Borrower with regard to the submission of financial and operating statements are provided in § 891.600(d).

(e) *Use of project funds.* The responsibilities of the Borrower with

regard to the use of project funds are provided in § 891.600(e).

(f) *Reports.* The responsibilities of the Borrower with regard to reports are provided in § 891.600(f).

**§ 891.745 Replacement reserve.**

The general requirements for the replacement reserve are provided in § 891.605. For projects funded under §§ 891.655 through 891.790, the amount of the deposits for the initial year of operation shall be an amount equal to 0.6 percent of the cost of the total structures (for new construction projects), 0.4 percent of the cost of the initial mortgage amount (for all other projects), or such higher rate as required by HUD. For the purposes of this section, total structures include main buildings, accessory buildings, garages, and other buildings. The amount of the deposits will be adjusted each year by the amount of the annual adjustment factor as described in part 888 of this chapter.

**§ 891.750 Selection and admission of tenants.**

(a) *Application for admission.* The Borrower must accept applications for admission to the project in the form prescribed by HUD. Applicant families applying for assisted units (or residential spaces in a group home) must complete a certification of eligibility as part of the application for admission. Applicant families must meet the disclosure and verification requirements for Social Security Numbers, and sign and submit consent forms for the obtaining of wage and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 5, subpart B. Both the Borrower and the applicant family must complete and sign the application for admission. On request, the Borrower must furnish copies of all applications for admission to HUD.

(b) *Determination of eligibility and selection of tenants.* The Borrower is responsible for determining whether applicants are eligible for admission and for the selection of families. To be eligible for admission, an applicant family must be a handicapped family (as defined in § 891.505); meet any project occupancy requirements approved by HUD; meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B; and be a low-income family, as defined in § 813.102 of this chapter (as modified by § 891.505). Under certain circumstances, HUD may permit the leasing of units (or residential space in a group home) to ineligible families under § 891.720.

(1) *Local residency requirements are prohibited.* Local residency preferences may be applied in selecting tenants only to the extent that they are not inconsistent with affirmative fair housing marketing objectives and the Borrower's HUD-approved affirmative fair housing marketing plan. Preferences may not be based on the length of time the applicant has resided in the jurisdiction. With respect to any residency preference, persons expected to reside in the community as a result of current or planned employment will be treated as residents.

(2) If the Borrower determines that the family is eligible and is otherwise acceptable and units (or residential spaces in a group home) are available, the Borrower will assign the family a unit or residential space in a group home. If the family will occupy an assisted unit the Borrower will assign the family a unit of the appropriate size in accordance with HUD standards. If no suitable unit (or residential space in a group home) is available, the Borrower will place the family on a waiting list for the project and notify the family when a suitable unit or residential space may become available. If the waiting list is so long that the applicant would not be likely to be admitted within the next 12 months, the Borrower may advise the applicant that no additional applications for admission are being considered for that reason.

(3) If the Borrower determines that an applicant is ineligible for admission or the Borrower is not selecting the applicant for other reasons, the Borrower will promptly notify the applicant in writing of the determination, the reasons for the determination, and that the applicant has a right to request a meeting to review the rejection, in accordance with HUD requirements. The review, if requested, may not be conducted by the member of the Borrower's staff who made the initial decision to reject the applicant. The applicant may also exercise other rights if the applicant believes the applicant is being discriminated against on the basis of race, color, creed, religion, sex, handicap, or national origin.

(4) Records on applicants and approved eligible families, which provide racial, ethnic, gender and place of previous residency data required by HUD, must be maintained and retained for three years.

(c) *Reexamination of family income and composition* (1) *Regular reexaminations.* If the family occupies an assisted unit (or residential space in a group home), the Borrower must reexamine the income and composition

of the family at least every 12 months. Upon verification of the information, the Borrower shall make appropriate adjustments in the total tenant payment in accordance with part 813 of this chapter, as modified by § 891.505, and determine whether the family's unit size is still appropriate. The Borrower must adjust tenant rent and the project assistance payment and must carry out any unit transfer in accordance with HUD standards. At the time of the annual reexamination of family income and composition, the Borrower must require the family to meet the disclosure and verification requirements for Social Security Numbers, as provided by 24 CFR part 5, subpart B.

(2) *Interim reexamination.* If the family occupies an assisted unit (or residential space in a group home) the family must comply with provisions in the lease regarding interim reporting of changes in income. If the Borrower receives information concerning a change in the family's income or other circumstances between regularly scheduled reexaminations, the Borrower must consult with the family and make any adjustments determined to be appropriate. Any change in the family's income or other circumstances that results in an adjustment in the total tenant payment, tenant rent, and project assistance payment must be verified.

(3) *Continuation of project assistance payment.* (i) A family occupying an assisted unit (or residential space in a group home) shall remain eligible for project assistance payment until the total tenant payment equals or exceeds the gross rent (or a pro rata share of the gross rent in a group home). The termination of subsidy eligibility will not affect the family's other rights under its lease. Project assistance payment may be resumed if, as a result of changes in income, rent, or other relevant circumstances during the term of the PAC, the family meets the income eligibility requirements of part 813 of this chapter (as modified in § 891.505) and project assistance is available for the unit or residential space under the terms of the PAC. The family will not be required to establish its eligibility for admission to the project under the remaining requirements of paragraph (b) of this section.

(ii) A family's eligibility for project assistance payment may also be terminated in accordance with HUD requirements for such reasons as failure to submit requested verification information, including failure to meet the disclosure and verification requirements for Social Security Numbers, or failure to sign and submit consent forms for the obtaining of wage

and claim information from State Wage Information Collection Agencies, as provided by 24 CFR part 5, subpart B.

(Approved by the Office of Management and Budget under control number 2502-0204 and 2505-0267.)

**§ 891.755 Obligations of the family.**

The obligations of the family are provided in § 891.415.

**§ 891.760 Overcrowded and underoccupied units.**

The requirements for overcrowded and underoccupied units are provided in § 891.620.

**§ 891.765 Lease requirements.**

The lease requirements are provided in § 891.425.

**§ 891.770 Termination of tenancy and modification of lease.**

The provisions of part 247 of this title apply to all decisions by a Borrower to terminate the tenancy or modify the lease of a family residing in a unit (or residential space in a group home).

**§ 891.775 Security deposits.**

The general requirements for security deposits on assisted units are provided in § 891.435. For purposes of subpart E of this part, the additional requirements in § 891.635 apply.

**§ 891.780 Adjustment of rents.**

(a) *Contract rents.* HUD will calculate contract rent adjustments based on the sum of the project's operating costs and debt service (as calculated by HUD), with adjustments for vacancies, the project's nonrental income, and other factors that HUD deems appropriate. The calculation will be made on the basis of information provided by the Borrower on a form prescribed by HUD.

(b) *Rent for unassisted units.* The rent payable by families occupying units or residential spaces that are not assisted under the PAC shall be equal to the contract rent computed under paragraph (a) of this section.

**§ 891.785 Adjustment of utility allowances.**

In connection with adjustments of contract rents as provided in § 891.780(a), the requirements for the adjustment of utility allowances provided in § 891.440 apply.

**§ 891.790 Conditions for receipt of vacancy payments for assisted units.**

(a) *General.* Vacancy payments under the PAC will not be made unless the conditions for receipt of these project assistance payments set forth in this section are fulfilled.

(b) *Vacancies during rent-up.* For each unit (or residential space in a group

home) that is not leased as of the effective date of the PAC, the Borrower is entitled to vacancy payments in the amount of 80 percent of the contract rent (or pro rata share of the contract rent for a group home) for the first 60 days of vacancy, if the Borrower:

- (1) Complied with § 891.740;
- (2) Has taken and continues to take all feasible actions to fill the vacancy; and
- (3) Has not rejected any eligible applicant except for good cause acceptable to HUD.

(c) *Vacancies after rent-up.* If an eligible family vacates an assisted unit (or residential space in a group home) the Borrower is entitled to vacancy payments in the amount of 80 percent of the contract rent (or pro rata share of the contract rent in a group home) for the first 60 days of vacancy if the Borrower:

- (1) Certifies that it did not cause the vacancy by violating the lease, the PAC, or any applicable law;
- (2) Notified HUD of the vacancy or prospective vacancy and the reasons for the vacancy immediately upon learning of the vacancy or prospective vacancy;
- (3) Has fulfilled and continues to fulfill the requirements specified in § 891.740(a)(2) and (3), and in paragraphs (b)(2) and (3) of this section; and

(4) For any vacancy resulting from the Borrower's eviction of an eligible family, certifies that it has complied with § 891.770.

(d) *Vacancies for longer than 60 days.* If an assisted unit (or residential space in a group home) continues to be vacant after the 60-day period specified in paragraph (b) or (c) of this section, HUD may approve additional vacancy payments for 60-day periods up to a total of 12 months in an amount equal to the principal and interest payments required to amortize that portion of the debt service attributable to the vacant unit (or, in the case of group homes, the residential space). Such payments may be approved if:

- (1) The unit was in decent, safe, and sanitary condition during the vacancy period for which payment is claimed;
- (2) The Borrower has fulfilled and continues to fulfill the requirements specified in paragraph (b) or (c) of this section, as appropriate; and
- (3) The Borrower has demonstrated to the satisfaction of HUD that:

(i) For the period of vacancy, the project is not providing the Borrower with revenues at least equal to project expenses (exclusive of depreciation) and the amount of payments requested is not more than the portion of the deficiency attributable to the vacant unit (or residential space in a group home); and

(ii) The project can achieve financial soundness within a reasonable time.

(e) *Prohibition of double compensation for vacancies.* If the Borrower collects payments for vacancies from other sources (tenant rent, security deposits, payments under § 891.435(c), or governmental payments under other programs), the Borrower shall not be entitled to collect vacancy payments to the extent these collections from other sources plus the vacancy payment exceed contract rent.

Dated: March 7, 1996.

Nicolas P. Retsinas,  
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Housing Commissioner.*

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