



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 891

[Docket No. FR-5167-P-01]

RIN: 2502-AI67

Streamlining Requirements Governing the Use of Funding for Supportive Housing for the Elderly and Persons with Disabilities Programs

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend HUD's regulations governing the Section 202 Supportive Housing for the Elderly Program (Section 202) and the Section 811 Supportive Housing for Persons with Disabilities Program (Section 811), by streamlining the requirements for mixed-finance Section 202 and Section 811 developments. This rule would streamline the requirements for mixed-finance developments by removing restrictions on the portions of developments not funded through capital advances, thereby lifting barriers on participation in the development of the projects, and eliminating burdensome funding requirements. These proposed amendments would attract private capital and the expertise of the private developer community to create attractive and affordable supportive housing developments for the elderly and for persons with disabilities. HUD is also taking this opportunity to improve and bring up to date certain regulations governing all Section 202 and Section 811 developments. These changes will permit broader flexibility in the design of Section

202/811 units, extend the duration of the availability of capital advance funds, and make a technical correction.

This proposed rule is the first part of a larger regulatory effort to reform the Section 202 and Section 811 programs, which will include implementation of the changes made to these programs by the Frank Melville Supportive Housing Investment Act of 2010 and the Section 202 Supportive Housing for the Elderly Act of 2010. A subsequent rule, which will focus on the statutory changes, is expected to be published later in 2012.

DATES: Comment Due Date: **[Insert date 60 days after date of publication in the FEDERAL REGISTER].**

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, 451 7th Street, SW, Room 10276, Department of Housing and Urban Development, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0001.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to

make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule. *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 1-800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Aretha Williams, Office of Housing Assistance and Grant Administration, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 6136, Washington, DC 20410-8000; telephone number 202-708-3000 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Section 202 and Section 811 programs were established to allow very low-income elderly persons and persons with disabilities the opportunity to live with dignity by providing affordable rental housing offering a range of supportive services to meet the needs of these populations. By providing capital advance and project rental assistance to nonprofit developers seeking to build and maintain supportive housing for very low-income elderly persons and persons with disabilities, the Section 202 and Section 811 programs have proven to be examples of effective partnerships between the Federal Government and nongovernmental entities to achieve a common mission.

The American Homeownership and Economic Opportunity Act of 2000 (Public Law 106-569, 114 Stat. 2944, approved December 27, 2000) (AHEO Act) amended the authorizing statutes for the Section 202 program (Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q)) and the Section 811 program (Section 811 of the Cranston-Gonzalez National Affordable Housing Act of 1990 (42 U.S.C. 8013)) to allow for the participation of for-profit limited partnerships in the ownership of Section 202 and Section 811 supportive housing, which helped facilitate the use of low-income housing tax credits and mixed-finance methods to infuse private capital into Section 202 and Section 811 developments. An interim rule establishing the Section 202/811 mixed-finance program and implementing the AHEO Act, was published on December 1, 2003 (68 FR 67316). HUD followed publication of the interim rule with a final rule, published on September 13, 2005 (70 FR 54200), that took into account the comments received on the interim rule.

Current economic conditions have reduced the availability of private financing for the development of supportive housing. In order to attract needed private capital, HUD has determined that amendments to the regulations governing the Section 202 and Section 811 programs are needed to further streamline the mixed-finance development process for supportive housing for the elderly and persons with disabilities. While the existing regulations applicable to mixed-finance developments have facilitated the creation of approximately 1,017 mixed-finance units, they also, in certain circumstances, limit project sponsors from accessing private sector capital and expertise. The changes proposed in this rule will provide mixed-finance owners with more options, better facilitate the use of low-income housing tax credits, and attract other private funding. Moreover, the changes will promote the construction of supportive housing developments that include additional non-Section 202/811-supported units for the elderly and persons with disabilities.

The Section 202 Supportive Housing for the Elderly Act of 2010 (Public Law 111-372) (Section 202 Act of 2010) and the Frank Melville Supportive Housing Investment Act of 2010 (Public Law 111-374) (Melville Act) were both signed into law on January 4, 2011 (collectively, the Acts), and amended the authorizing statutes for Section 202 and Section 811, respectively. While additional regulatory changes will be necessary to implement these Acts, HUD is taking this opportunity to update the definitions of “private nonprofit organizations” to conform to the Acts, as these definitions directly impact the mixed-finance program. The Section 202 Act of 2010 and the Melville Act provide a much-needed foundation for practical improvements to the Section 202 and Section 811 programs. The regulatory amendments proposed in this rule

build upon the Acts from the 111th Congress to further modernize the operation of Section 202 and Section 811 in the mixed-finance context.

II. This Proposed Rule

This proposed rule would amend both the general section of HUD's regulations governing the Section 202 and Section 811 programs that are codified in 24 CFR part 891, and the sections in part 891 specifically governing the mixed-finance program. This rule would allow broader participation by the private development community in the financing of Section 202 and Section 811 mixed-finance developments. The proposed amendments to the regulations would also remove some of the financial restraints on developers in the mixed-finance context by allowing more flexibility in the drawdown of capital advance funds and noncapital advance funds. In addition, because mixed-finance developments have units that are funded via a capital advance by HUD and rental assistance through the Section 202 and Section 811 programs as well as units that are non-Section 202/811 supported, the changes would permit mixed-finance developers to have more flexibility in bringing in private capital by eliminating restrictions in regard to the non-capital advance units.

In terms of the regulations governing all Section 202 and Section 811 developments, regardless of the source of the financing, this rule would alter the definition sections to improve the clarity of the regulations, permit broader flexibility in the design of Section 202/811 units, extend the duration of the availability of capital advance funds, and make a technical correction.

This rule would also make conforming changes to the definition sections contained in part 891 to reflect the amendments to the Section 202 Act of 2010 and the Melville Act.

Definitions

1. Private nonprofit organizations. The Section 202 Act of 2010 and the Melville Act altered the definition of “private nonprofit organization.” This rule would amend the regulations found at §§ 891.205, 891.305, and 891.805 in order to conform to the statutory changes. Among other changes, the Section 202 Act of 2010 gives HUD the authority, in the case of a nonprofit organization sponsoring multiple developments, to determine the criteria for transferring the responsibilities of a single-entity nonprofit owner of an individual development to the governing board of the sponsor that is the sponsoring organization of multiple developments. These changes will be codified in § 891.205.

An additional change made by the Section 202 Act of 2010 is that the definition will now include for-profit limited partnerships of which the sole general partner is a for-profit corporation or a limited liability company that is wholly owned and controlled by one or more nonprofit organizations. Prior to this amendment, the sole general partner could only be a nonprofit organization or a for-profit corporation wholly owned and controlled by a single nonprofit organization. The extension of the type of for-profit limited partnership that may participate in Section 202 developments will be codified in § 891.805.

In the case of Section 811, the Melville Act changes the heading of the definition of “nonprofit organization” to “private nonprofit organization.” This change in

nomenclature will be codified in § 891.305. However, the substance of this definition in § 891.305 will not be changed, as the additional change made by the Melville Act to the definition of “private nonprofit organization” will be codified in § 891.805.

In addition, the Melville Act deleted the clause “wholly owned and” and simply requires that a corporation be “owned and controlled” by a nonprofit organization. However, the Melville Act does not extend the definition to include limited liability companies. This change will be codified in the definition of “Private nonprofit organization” in § 891.805.

2. Instrumentality of a public body. This rule also proposes amending the definitions of “owner” and “sponsor” in § 891.205 to permit an owner or sponsor of a section 202 development to be an “instrumentality of a public body.” A public body would still be prohibited from being an owner or sponsor, as a public body cannot, by definition, be considered a private nonprofit organization, but HUD has determined that, as long as an entity otherwise meets the criteria of ownership or sponsorship, the regulation is too prescriptive. By eliminating this restriction, HUD is expanding the number of private nonprofit organizations who will be able to participate in the development of section 202 projects.

3. Single-purpose/single-asset. In addition, the definitions of “owner” in §§ 891.205, 891.305, and 891.805, as well as the definition of “mixed-finance owner” will be amended to add the qualification that the owner be a single-asset entity. The definition currently requires the owner to be a single-purpose entity. HUD proposes to replace the term “single-purpose” with “single-asset.” The definitions of “owner” and “mixed-finance owner” already require that an owner’s purpose must include the

promotion of the elderly or persons with disabilities, as appropriate, and a strict interpretation of the term “single-purpose” limits the flexibility of owners, especially in the mixed-finance context. In the past, the terms “single-purpose” and “single-asset” have been used interchangeably; however, the proposed change in the regulations will more accurately reflect the type of ownership required for a Section 202 or Section 811 development. A single-asset entity will be defined in § 891.105 as an entity in which the mortgaged property is the only asset of the owner and that has no more than one owner. This definition will apply to the definitions of “owner” and “mixed-finance owner” in §§ 891.205, 891.305, and 891.805.

4. Repairs and rehabilitation. HUD proposes to add new definitions in § 891.105 in order to provide more targeted definitions based on the condition of the building being developed under Section 202 or Section 811. While the current regulation groups all types of rehabilitation into one category, HUD proposes to provide separate definitions for “repairs, renovations, and improvements” and “substantial rehabilitation.”

“Substantial rehabilitation” will be defined as improvements to a property that is in a deteriorated or substandard condition that endangers the health, safety, or well-being of the residents. Substantial rehabilitation does not include cosmetic improvements and must meet one of the following criteria:

a. The cost of repairs, replacements, and improvements exceeds the greater of 15 percent of the estimated property replacement cost after completion of all repairs, replacements, and improvements, or \$6,500 per unit in repairs, replacements, and improvements to rehabilitate the project to a useful life of 55 years, *or*

b. Two or more major building components are being substantially replaced.

Additions are permitted in substantial rehabilitation projects, but the costs for the additions of

new units (not building component additions) are *not* included in the eligibility test.

“Repairs, replacements, and improvements” are basically anything other than substantial rehabilitation and may include cosmetic repairs. The amount of investment per unit must be below \$6,500 per unit. HUD recognizes that factors such as the state of the housing market and inflation may require an alteration of this amount, and this proposed rule provides that the amount may be adjusted by HUD after advance notice and the opportunity for public comment.

Specific solicitation of comment. The minimum investment of \$6,500 is a threshold amount used in almost all if not all of HUD’s multifamily programs and is an amount familiar to participants in these programs. HUD recognizes that this dollar amount and the minimum useful life of 55 years have been in place for many years, and seeks public comment on whether these thresholds remain a reasonable minimum investment amount in today’s housing market. Additionally, as provided in this rule and cognizant of the rapid changes that can occur in the housing market, HUD proposes for the rule to adjust this amount, but only after providing advance notice through Federal Register publication and the opportunity for comment.

Project Design and Cost Standards/Eligible Uses for Assistance

1. Requirements applicable to all Section 202 and Section 811 developments.

HUD proposes to make several changes to the regulations in § 891.120 governing project design and cost standards applicable to all Section 202 and Section 811 developments.

These changes are intended to bring HUD’s regulations up to date, as § 891.120 contains provisions that were held over from the predecessor direct loan program from the 1980s.

The first change updates § 891.120(a), by providing a reference to the Minimum Property Standards as codified in regulation. The current regulation was promulgated before the

codification of the current Minimum Property Standards in 24 CFR part 200 subpart S, and this rule proposes to cross-reference such subpart.

The second change updates § 891.120(c) to reflect the fact that many items formerly thought to be “excess amenities” are now standard requirements in today’s housing market. The current regulation requires that Section 202 and Section 811 developments be of “modest design” and prohibits the use of capital advance or project rental assistance to pay for the installation and continued operation of atriums, bowling alleys, swimming pools, saunas, Jacuzzis, balconies, and decks on individual units, and dishwashers, trash compactors, and washers and dryers in individual units. HUD will retain the restriction on use of HUD funds for atriums, bowling alleys, swimming pools, saunas, and jacuzzis, while permitting the use of capital advance and project assistance funds for balconies and decks, dishwashers, trash compactors, and washers and dryers for individual units. Lifting these restrictions not only brings HUD in line with the standards of the housing market, since they are no longer seen as “excessive amenities,” but also recognizes that the quality of life can be increased by permitting such items.

Lastly, HUD proposes to amend § 891.120(d) regarding smoke detectors to bring the provision up to current standards, by requiring that smoke detectors and alarm devices be installed in accordance with standards and criteria acceptable to HUD for the protection of occupants in any dwelling or facility bedroom or other primary sleeping area.

2. Mixed-finance developments. Both § 891.813(c) (“Eligible uses for assistance provided under this subpart”) and § 891.848 (“Project design and cost standards”) provide that the restrictions contained in §§ 891.220 and 891.315 regarding prohibited

facilities apply to mixed-finance developments. Under current regulations, § 891.220 prohibits the presence of facilities for infirmaries, nursing stations, or spaces for overnight care in Section 202 developments. Section 891.315 prohibits the presence of infirmaries, nursing stations, spaces for medical treatment or physical therapy, or padded rooms, even if paid by sources other than the HUD capital advance and project rental assistance contract for Section 811 developments.

HUD has determined that these restrictions of § 891.220 prevent the development of supportive housing for the elderly when the cost to develop and operate these types of facilities is being funded by other sources, and that restrictions on prohibited facilities in Section 202 mixed-finance developments should apply only to the capital advance-funded portion, and not to the entire development. The removal of these restrictions for Section 202 mixed-finance developments assures that HUD-financed developments are capable of having medical facilities and service spaces that may be necessary for ongoing occupancy of frail elderly. Inclusion of these Section 202 facilities will keep these projects competitive with those in the private sector, and assure continued building occupancy and the financial viability of these projects.

However, HUD recognizes the importance of maintaining the restrictions on prohibited facilities for Section 811 developments for both capital advance and non-capital advance portions of the project. HUD is committed to preventing the isolation of persons with disabilities that might occur should medical facilities be contained in Section 811 developments.

In order to provide owners with needed flexibility in the design of the non-capital advance portion of the mixed-finance Section 202 development, HUD proposes

amending paragraph (b) of § 891.813, which currently applies only to amenities, to make the provisions of paragraph (b) of § 891.813 applicable to both amenities and “prohibited facilities” in Section 202 mixed-finance developments. This would permit otherwise prohibited Section 202 facilities, provided that: (1) the facilities are not financed with funds made available under Section 202; (2) the facilities are not maintained and operated with funds made available under Section 202; (3) the facilities are designed with appropriate safeguards for the residents’ health and safety; and (4) the assisted residents are not required to use, participate in, or pay a fee for the use or maintenance of the facilities, although they are permitted to do so voluntarily. Any fee charged for the use of the facilities must be reasonable and affordable for all residents of the development. The exception on prohibited facilities in paragraph (b) of § 891.813 would not extend to Section 811 mixed-finance developments.

In addition, HUD proposes to amend paragraph (c) of § 891.813 by removing the references to Section 202 and the prohibited facilities provisions found in § 891.220, while maintaining the current applicability of § 891.315 to Section 811 mixed-finance developments.

Section 891.848 regarding project design and cost standards would be amended to reflect the changes being made to paragraphs (b) and (c) of § 891.813 by stating that the provisions regarding prohibited facilities contained in § 891.220 do not apply to mixed-finance developments, subject to the restrictions of paragraph (b) of § 891.813. The current statement in § 891.848 regarding the inclusion of prohibited facilities in Section 811 mixed-finance developments, as set forth in § 891.315, would remain the same.

HUD proposes to amend § 891.848 further by stating that while mixed-finance developments must comply with the project design and cost standards contained in § 891.120, the requirements regarding amenities specified in paragraph (c) of § 891.120 do not apply, subject to the restrictions in paragraph (b) of § 891.813. This would not be a substantive change to current regulations. Paragraph (b) of § 891.813 already states that the restrictions on amenities in paragraph (c) of § 891.120 do not apply to mixed-finance developments, provided that certain conditions are met, and this proposed rule would make §§ 891.813(b) and 891.848 consistent.

Prohibited Relationships

HUD's regulations at 24 CFR 891.130 specify prohibited relationships in the provision of capital advances under the Section 202 and Section 811 programs. In general, officers and board members of either the owner or the sponsor of the development are prohibited from having any financial interest in a contract with the owner or any firm that has a contract with the owner, and which would create a conflict of interest. In addition, § 891.130 prohibits an identity of interest between the sponsor or owner and any development team member or between development team members, for 2 years after closing.

Management contracts, supportive services contracts, and developer or consultant contracts between the owner and sponsor or the sponsor's nonprofit affiliate are exempted from the conflict-of-interest provisions, provided that no more than two persons salaried by the sponsor or management affiliate serve as nonvoting directors on the owner's board of directors. In order to provide more flexibility in the financing of Section 202 and Section 811 developments, HUD proposes amending § 891.130(a)(2) to

include an additional provision to the conflict-of-interest section that will exempt contracts for the sale of land between an owner and the sponsor or the sponsor's nonprofit affiliate.

In addition to broadening the exceptions to the conflict-of-interest rules, HUD proposes to amend § 891.832, which sets forth that mixed-finance projects are subject to the conflict-of-interest and identity-of-interest provisions, by stating that the requirements of paragraph (b) of § 891.130 regarding identity of interest do not apply in the mixed-finance context, while maintaining the applicability of the conflict-of-interest provisions in paragraph (a) of § 891.130. HUD has determined that the current identity-of-interest prohibitions limit the involvement of the private development community in the Section 202 and Section 811 mixed-finance program.

To correspond to the proposed amendment to § 891.832, HUD proposes removing paragraph (c) of § 891.130, which states that the provisions regarding prohibited relationships contained in § 891.130(a)-(b) apply to mixed-finance developments. Altering paragraph (c) of § 891.130 along with § 891.832 would make the regulations consistent.

Audit Requirements

Section 891.160 currently states that nonprofit organizations receiving assistance under the Section 202 and Section 811 programs are subject to the audit requirements in 24 CFR part 45. In 1996, HUD regulations were streamlined and some passages in the CFR, including 24 CFR part 45, were removed. Part 45 no longer exists, and HUD is correcting the citation in § 891.160 to refer to the correct portion of the CFR regarding audit requirements (24 CFR § 5.107). This is a technical correction and will not alter the

current audit requirements for nonprofit organizations receiving assistance under the Section 202 and Section 811 programs.

Duration of Capital Advance

Section 891.165, governing the duration of the availability of capital advance funds, currently limits the duration of the fund reservations for the capital advances to 18 months from the date of issuance of the fund reservation award with limited exceptions of up to 24 months, as approved by HUD on a case-by-case basis. HUD proposes to extend the duration of availability to 24 months in all cases, with the option of extending this period to 36 months, at HUD's discretion. Currently, owners often request waivers of this provision, and by extending the fund reservation period, HUD will be reducing the burden placed on owners who must apply for an extension and support the review of the waiver. Rather than spending time on this administrative requirement, owners can focus on the projects to ensure that projects reach initial closing and start construction within 24 months. The intent is to also encourage participation in the mixed-finance program, which normally requires additional time to reach initial closing.

Repayment of Capital Advance

In mixed-finance transactions in which HUD is one of many sources of funding, questions have arisen regarding the extent of HUD's interest in the supportive housing project. To address these questions, this rule provides that HUD's requirements applicable to capital advance units are not applicable to non-202/811 supported units in the project. Section 891.170 states that the transfer of physical or financial assets of a Section 202 or Section 811 development is not permitted unless HUD determines that the transfer is part of a transaction that will ensure "the continued operation of the project"

for at least 40 years in a manner that will provide low-income housing for the elderly or persons with disabilities. This proposed rule will change the phrase “the continued operation of the project” to “the continued operation of the capital advance units.” This will have the effect of clarifying that HUD’s regulatory authority over Section 202 and Section 811 developments to ensure that the units will provide rental housing for very low-income elderly persons or persons with disabilities extends only to units funded through capital advances or assisted by funds made available under the Section 202 and Section 811 programs.

HUD does not require that the non-202/811 supported units in a mixed-finance Section 202 or Section 811 development be rented to very low-income elderly persons or persons with disabilities. Explicitly limiting the scope of HUD’s regulatory oversight in mixed-finance developments to capital advance and supported units should eliminate any uncertainty among other lien holders with respect to the operation of non-202/811 supported units.

Drawdowns

Section 891.830 describes the drawdown procedures for the capital advance and non-capital advance funds. In some instances, this regulatory section lacks needed flexibility. HUD has processed several waiver requests because the regulation does not include a procedure for the release of capital advance financing upon completion of a project. The proposed amendment will have the effect of permitting mixed-finance developers to use low-income housing tax credits more effectively. Following promulgation of a final rule after the notice and comment procedure for this proposed rule is completed, HUD will issue further processing instructions on the release of capital

advance financing upon completion of a development as it relates to low-income housing tax credits.

Rather than grant additional regulatory waivers, HUD proposes to permit the release of capital advance funds upon completion of the project, by eliminating detailed requirements from the drawdown regulation. In particular, HUD proposes to amend § 891.830(b) to permit non-capital advance funds to be disbursed before the drawdown of capital advance funds to increase the developer's flexibility in financing the project, and this amendment would allow this flexibility to be worked out between the developer and HUD in formulating a drawdown schedule. Despite the changes to this section, developers will still be prohibited from using capital advance funds for ineligible costs, such as debt service on the financing.

Section 891.830(c)(4) currently prohibits the use of funds for paying off bridge or construction financing, or repaying or collateralizing bonds. HUD proposes to amend this provision by permitting the use of funds for these purposes, provided that the funds are used to pay off bridge or construction financing, or repaying or collateralizing bonds only for the portion of such financing or bonds that was used for capital advance units, permitting broader flexibility in a mixed-finance owner's use of financing and bonds. Many fixed transactions rely on 4 percent low-income housing tax credits paired with tax-exempt bonds. In these transactions, at least 51 percent of the qualified cost of construction must be bond-financed. Accordingly, the Section 202 funds cannot be used in lieu of the bonds and must instead be used as a "take-out source."

III. Findings and Certifications

Regulatory Review - Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a “significant regulatory action,” as defined in section 3(f) of the Executive Order (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Order).

As noted earlier in this preamble, the Section 202 Act of 2010 and the Melville Act made several changes to the Sections 202 and 811 programs. The majority of the changes made by these two acts that require regulatory change will be implemented through separate rulemaking. However, this proposed rule begins the process of amending the Supportive Housing Program regulations to expand flexibility for owners and sponsors by, for example, broadening the definition of private nonprofit organizations, as well as the definition of eligible participants to include a broader range of nonprofit organizations.

Only one change proposed by this rule represents a new requirement for program participants. The proposed rule requires owners to provide a smoke detector and alarm in

every bedroom or primary sleeping area that they own. Though this requirement is being added to the program regulations, it is already a requirement in most local codes and, therefore, does not reflect a significant cost that would result from this rulemaking.

The rule proposes to remove the existing prohibition on funding certain amenities and funding Section 202 and Section 811 developments that include health-care facilities. The removal of the prohibition on certain amenities allows for funding units that contain dishwashers, trash compactors, and washers and dryers, as well as units that have patios or balconies attached. With respect to health-care facilities, the existing regulations have a blanket prohibition against including health-care facilities within the developments as a safeguard against the institutionalization of the elderly and disabled residents. This rule does not propose to require program participants to include these amenities or health-care facilities in the developments. Rather, this rule proposes only to remove the prohibition for funding units that have these amenities or developments that have such facilities. The proposed rule does not allow for health-care facilities to be financed by HUD funds, and use of the facilities must be voluntary for the residents of the projects.

HUD funds can be used for units that contain or are attached to the previously prohibited amenities, but there is no requirement that units provide these amenities, and providing these amenities is unlikely to increase costs to the program. The amenities are fairly standard in today's apartments and will benefit the residents of program units and make these units more attractive and capable of attracting and retaining tenants. The wider range of allowable amenities is likely to also have the benefit of combating discrimination by reducing the potential for program units and their residents to be easily singled out within a mixed-finance development.

The voluntary nature of funding units with such amenities or developments that contain health-care facilities makes it difficult to predict the impact of these changes on future Section 202 and 811 units, since these two programs together produce only a few hundred developments a year (193 in 2008 and 170 in 2009). Consequently, the overall economic impact from these proposed limited changes in development and unit configuration is expected to be small.

The proposed rule also provides benefits from improving government processes. For example, extending the time of availability of capital advance funds from 18 to 24 months should limit the number of waivers that HUD traditionally processes for these programs as developers regularly exceed the 18 month time frame. The program regulations providing for the 18-month time frame were issued in 1996, and these regulations no longer reflect the additional time often needed by developers to obtain the requisite permits and approvals from local authorities. In Fiscal Year 2010, HUD processed 49 such waivers, and, in what has been described as a time-consuming, case-specific process, 33 percent of the waivers under the program were processed that year.

The remaining changes in the proposed rule are definitional and offer participants greater flexibility and clarity within the program at no obvious cost to the program or participants. Although this rule, as noted earlier, does not propose to implement the key changes from the Section 202 Act of 2010 and the Melville Act, the Congressional Budget Office (CBO) found no significant intergovernmental and private sector impacts in its analysis of the bills prior to enactment.

The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th

Street, SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulations Division at 202-708-3055 (this is not a toll-free number).

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. In the mixed-finance context, this proposed rule would amend HUD's Section 202 and 811 program regulations governing capital advances, for-profit limited partnerships, and mixed-finance development methods to facilitate the development and availability of housing for the elderly and persons with disabilities. The proposed regulatory amendments would not impose any additional regulatory burdens on entities participating in these programs. To the contrary and as more fully explained above in this preamble, the proposed amendments would streamline requirements, reduce requests for regulatory waivers, and increase flexibility in mixed-financed developments in order to attract private capital and expertise to the construction of supportive housing for the elderly and persons with disabilities. The proposed regulatory changes would also streamline the use of low-income tax credits, as well as the obtaining of funding from other sources. National, regional, and local developers utilize the mixed-finance program and will save time and gain efficiency from no longer having to request regulatory waivers.

In the context of the applicability of this rule to all Section 202 and 811 developments, this rule would reduce regulatory burden by extending the time period for

the availability of capital advances and increase flexibility by permitting developers to utilize capital advance and project rental assistance funds to install and operate amenities that are now commonly found in market-rate units and that assist in improving the lives of the elderly and persons with disabilities. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made, in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). That finding is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at 202-708-3055 (this is not a toll-free number).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial

direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This proposed rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the principal Federal Housing Authority single-family mortgage insurance program is 14.117.

List of Subjects in 24 CFR Part 891

Aged, Grant programs – housing and community development, Individuals with disabilities, Loan programs – housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

Accordingly, for the reasons discussed in the preamble, HUD proposes to amend 24 CFR part 891 as follows:

PART 891 – SUPPORTIVE HOUSING FOR THE ELDERLY AND PERSONS WITH DISABILITIES

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

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

2. In § 891.105, revise the introductory text, remove the definition of “Rehabilitation,” and add the definitions of “Acquisition with or without repair,” “Repairs, replacements, and improvements,” “Single-asset entity,” and “Substantial rehabilitation” in alphabetical order to read as follows:

§ 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, 891.505, and 891.805, as applicable.

Acquisition with or without repair means the purchase of existing housing and related facilities.

* * * * *

Repairs, replacements, and improvements means the improvement of the condition of a property, in a condition acceptable to HUD. Repairs may vary in degree from minor reconstruction to the cure of accumulation of deferred maintenance. Cosmetic improvements alone may qualify under this definition. Repair may also include renovation, alteration, or remodeling for the conversion or adaptation of structurally sound property to the design and condition required under this part, or the repair or replacement of major building systems or components in danger of failure. Repairs, replacements, and improvements of an existing structure may be up to \$6,500

per dwelling unit (or such other amount to be specified by HUD through notice and comment) of the estimated development cost to rehabilitate the project to a useful life of 55 years.

* * * * *

Single-asset entity, for the purpose of this subpart, means an entity in which the mortgaged property is the only asset of the owner, and there may not be more than one owner.

* * * * *

Substantial rehabilitation means the improvement of the condition of a property from deteriorated and substandard to a condition acceptable to HUD. Substandard or deteriorated properties are those which do not provide safe and adequate shelter, and in their present condition endanger the health, safety, or well-being of the occupants. Substantial rehabilitation may vary in degree from gutting and extensive reconstruction to the cure of substantial accumulation of deferred maintenance. Cosmetic improvements alone do not qualify as substantial rehabilitation under this definition. Substantial 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. Substantial rehabilitation must meet one of the following criteria:

(a) The cost of repairs, replacements, and improvements exceeds the greater of 15% of the estimated property replacement cost after completion of all repairs, replacements, and improvements, or \$6,500 per dwelling unit (or such other amount to be specified by HUD through notice and comment) to substantially rehabilitate the project to a useful life of 55

years; or (b) Two or more major building components are being substantially replaced.

Additions are permitted in substantial rehabilitation projects, but the costs for the additions of new units (not building component additions) are *not* included in the eligibility test.

* * * * *

3. In § 891.120, revise paragraphs (a), (c), and (d) to read as follows:

§ 891.120 Project design and cost standards.

* * * * *

(a) Property standards. Projects under this part must comply with HUD Minimum Property Standards as set forth in 24 CFR part 200, subpart S.

* * * * *

(c) Restrictions on amenities. Projects must be modest in design. Amenities not eligible for HUD funding include atriums, bowling alleys, swimming pools, saunas, and jacuzzis. 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. Smoke detectors and alarm devices must be installed in accordance with standards and criteria acceptable to HUD for the protection of occupants in any dwelling or facility bedroom or other primary sleeping area.

* * * * *

4. In § 891.130:

- a. Revise paragraph (a)(2) (ii) by removing the word “and” that follows the semicolon after paragraph (a)(2)(ii);
- b. Revise paragraph (a)(2)(iii) by removing the period at the end and replacing it with a semicolon, and adding the word “and” after the semicolon;
- c. Add a new paragraph (a)(2)(iv); and
- d. Remove paragraph (c) to read as follows:

§ 891.130 Prohibited relationships.

- * * * * *
- (a) * * *
- (2) * * *
- (iv) Contracts for the sale of land.
- * * * * *

- 5. Revise § 891.160 to read as follows:

§ 891.160 Audit requirements.

Nonprofit organizations receiving assistance under this part are subject to the audit requirements of 24 CFR 5.107.

- 6. Revise § 891.165 to read as follows:

§ 891.165 Duration of capital advance.

(a) The duration of the fund reservation for a capital advance with construction advances is 24 months from the date of initial closing. This duration can be up to 36 months, as approved by HUD on a case-by-case basis.

(b) The duration of the fund reservation for projects that elect not to receive any capital advance before construction completion is 24 months from the date of issuance of the award letter to the start of construction. This duration can be up to 36 months, as approved by HUD on a case-by-case basis.

7. In § 891.170, revise paragraph (b) to read as follows:

§ 891.170 Repayment of capital advance.

* * * * *

(b) Transfer of assets. 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, consumer cooperative (under the Section 202 Program), a private nonprofit organization (under the Section 811 Program), or an organization meeting the definition of “mixed-finance owner” in § 891.805, is part of a transaction that will ensure the continued operation of the capital advance units 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.

8. In § 891.205, revise the definitions of “*Owner*,” “*Private nonprofit organization*,” and paragraph (3) of the definition of “*Sponsor*” to read as follows:

§ 891.205 Definitions.

* * * * *

Owner means a single-asset 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 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 be 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) No part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual;

(2) 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) Which is responsible for the operation of the housing assisted under this section, except that, in the case of a nonprofit organization that is the sponsoring organization of multiple housing projects assisted under this section, HUD may determine the criteria or conditions under which financial, compliance, and other administrative responsibilities exercised by a single-entity private nonprofit organization that is the owner corporation of an individual housing project may be shared or transferred to the governing board of such sponsoring organization; and

(3) Which is approved by HUD as to financial responsibility.

* * * * *

Sponsor * * *

(3) That is approved by the Secretary as to administrative and financial capacity and responsibility. The term Sponsor does not mean a public body.

* * * * *

9. In § 891.305, revise the heading of the definition of “*Nonprofit organization*” to read “*Private nonprofit organization*” and relocate in correct alphabetical order, and revise the first sentence of the definition of “*Owner*” to read as follows:

§ 891.305 Definitions.

* * * * *

Owner means a single-asset private 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. * * *

* * * * *

10. Revise § 891.805 to read as follows:

§ 891.805 Definitions.

In addition to the definitions at §§ 891.105, 891.205, and 891.305, the following definitions apply to this subpart:

Mixed-finance owner, for the purpose of the mixed-finance development of housing under this part, means a single-asset, for-profit limited partnership of which a private nonprofit organization is the sole general partner. The purpose of the mixed-finance owner must include the promotion of the welfare of the elderly or persons with disabilities, as appropriate.

Private nonprofit organization, for the purpose of this subpart, means:

- (1) In the case of supportive housing for the elderly:
 - (i) An organization that meets the requirements of the definition of “private nonprofit organization” in § 891.205; and
 - (ii) A for-profit limited partnership, the sole general partner of which owns at least one-hundredth of one percent of the partnership assets whereby the sole general partner is either: an organization meeting the requirements of § 891.205; or a for-profit corporation wholly owned and controlled by one or more organizations meeting the requirements of § 891.205; or a limited liability company wholly owned and controlled by one or more organizations meeting the requirements of § 891.205. If the project will include units financed with the use of federal Low-Income Housing Tax Credits and the organization is a limited partnership, the requirements of section 42 of the IRS code, including the requirements of section 42(h)(5), apply. The general partner may also be the sponsor, so long as it meets the requirements of this part for sponsors and general partners.
- (2) In the case of supportive housing for persons with disabilities:
 - (i) An organization that meets the requirements of the definition of “private nonprofit organization” in § 891.305; and

(ii) A for-profit limited partnership, the sole general partner of which owns at least one-hundredth of one percent of the partnership assets whereby the sole general partner is either: an organization meeting the requirements of § 891.305 or a corporation owned and controlled by an organization meeting the requirements of § 891.305. If the project will include units financed with the use of federal Low-Income Housing Tax Credits and the organization is a limited partnership, the requirements of section 42 of the IRS code, including the requirements of section 42(h)(5), apply. The general partner may also be the sponsor, so long as it meets the requirements of this part for sponsors and general partners.

11. In § 891.813, revise paragraphs (b) and (c) to read as follows:

§ 891.813 Eligible uses for assistance provided under this subpart.

* * * * *

(b) Assistance under this subpart may not be used for excess amenities, as stated in § 891.120(c), or for Section 202 “prohibited facilities,” as stated in § 891.220. Such amenities or Section 202 prohibited facilities may be included in a mixed-finance development only if:

(1) The amenities or prohibited facilities are not financed with funds provided under the Section 202 or Section 811 program.

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

(3) The amenities or prohibited facilities are designed with appropriate safeguards for the residents’ health and safety; and

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

(c) Notwithstanding any other provision of this section, § 891.315 on “prohibited facilities” shall apply to mixed-finance developments containing units assisted under section 811.

12. In § 891.830, revise paragraphs (b) and (c)(4) to read as follows:

§ 891.830 Drawdown.

* * * * *

(b) Non-capital advance funds may be disbursed before capital advance proceeds or the capital advance funds may be drawn down in an approved ratio to other funds, in accordance with a drawdown schedule approved by HUD.

(c) * * *

(4) The capital advance funds drawn down will be used only for eligible costs actually incurred in accordance with the provisions of this subpart and the approved mixed-finance project, which include costs stated in 12 U.S.C. 1701q(h) and 42 U.S.C. 8013(h). Capital advance funds may be used for paying off bridge or construction financing, or repaying or collateralizing bonds, but only for the portion of such financing or bonds that was used for capital advance units;

* * * * *

13. Revise § 891.832 to read as follows:

§ 891.832 Prohibited relationships.

(a) Paragraph (a) of § 891.130, describing conflicts of interest, applies to mixed finance developments.

(b) Paragraph (b) of § 891.130, describing identity of interest, does not apply to mixed-finance developments.

14. Revise § 891.848 to read as follows:

§ 891.848 Project design and cost standards.

(a) The project design and cost standards at § 891.120 apply to mixed-finance developments under this subpart, with the exception of § 891.120(c), subject to the provisions of § 891.813(b).

(b) For Section 202 mixed-finance developments, the prohibited facilities requirements described at § 891.220 shall apply to only the capital advance-funded portion of the Section 202 mixed-finance developments under this subpart, subject to the provisions of § 891.813(b).

(c) For Section 811 mixed-finance developments, the prohibited facilities requirements described at § 891.315 shall apply to the entire mixed-finance development.

Date: March 2, 2012

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

[FR-5167-P-01]

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