

Questions and Answers for HUD Notice H-2011-18

Part A.

1. Q:

What expenses are no longer accounted for in the developer fee but included in the total costs of the project?

A:

Legal, organizational, audits, working capital, third party technical costs, construction contingency, and non realty items. These costs are included in form 92264 and 92264-A as specified in the Notice on page 5.

Housing Consultants

2. Q:

Does HUD determine compensation limits? Information on compensation for housing consultants is contradictory. Section III, Paragraph A.5. notes the maximum fee for consultants is limited to what is in the NOFA. Paragraph D of this same section notes that HUD does not determine compensation limits.

A:

HUD does not determine compensation limits beyond the maximum specified in the NOFA, which is established by OPM.

3. Q:

Paragraph D.7 regulates the payments to the consultant. Subparagraph d. of this section limits final payment to the consultant to one year after final closing, provided the project is not having financial difficulty. Shouldn't remaining compensation due to the consultant be released at final closing?

A:

The mandatory use of the payment schedule is under administrative review. Until further notice, the provision in the Notice must be waived if requesting an alternative payment arrangement.

4. Q:

Should HUD monitor the payment schedule when funds are paid from other funding sources?

A:

If the fee is being paid from secondary financing the payment schedule applies. If it is a mixed financed project, a consultant fee is not an eligible cost and is considered part of the developer's duties; therefore, it must be paid by other sources and the payment schedule does not apply.

5. Q:

Should HUD staff review all of the information submitted for a consultant since disapproval is limited to delinquency on federal debt without a satisfactory repayment plan in place?

A:

Yes. If HUD does not agree with the use of a consultant after reviewing documentation as specified in the Notice on page 6, the sponsor should be strongly advised not to use the consultant.

6. Q: Can HUD staff require the applicant to order the credit reports for the review of the consultant?

A:

No, HUD is responsible for ordering the credit report not the applicant. Funds for credit reports should be requested at the beginning of each fiscal year as part of the salary and expense budget for the HUD office.

CLARIFICATIONS

XIII.B.2. Cost Certification

The Notice says, "For projects that are exempt from providing a cost certification, when the project reaches final completion, as deemed by the HUD Inspector, the Owner will be notified of the final completion date. This date will be used as the cost certification cut-off date for data purposes in Development Application Processing (DAP)." Please note that the date in question is the effective date of the cost certification and eligible expenses incurred up to 60 days beyond this date may be included as indicated in handbook 4470.1, paragraph 11-4.

II. Organizational Expenses

Financial Consultants in a tax credit transaction is a mixed finance cost and is NOT an eligible use of the capital advance. However, consultant costs for a traditional project with additional (non-tax credit) funding such as, HOME or FHLB, is an eligible organizational expense. A correction will be made to the Notice.

XIV. Owner/Architect Agreement

The HUD Amendment to the B108 is available on HUDClips as HUD-92408-M at <http://portal.hud.gov/hudportal/documents/huddoc?id=92408-m.pdf>

Paragraph 11 and 12 of the amendment form applies to traditional projects only. 24 CFR 891.130(b), identity of interest, no longer applies to mix-finance projects.

Paragraph 11 contains language that applies to fha projects only. Strikethrough the following sentences: ~~“The Architect designing the Project may have an identity of interest with Owner, Contractor, and/or any Project subcontractor, except however, any Architect administering the Construction Contract shall not have any identity of interest with Owner, Contractor, and/or any Project.”~~

Part B. – Mixed-Finance Transactions

Joint ventures:

1. Q:

Can HUD staff require the applicant to order the credit reports for the review of the joint venture partner?

A:

No, HUD is responsible for ordering the credit report not the applicant. Funds for credit reports should be requested at the beginning of each fiscal year as part of the salary and expense budget for the HUD office.

2. Q:

Does HUD have the authority to accept or reject a joint venture?

A:

No, a recommendation is given. Although a sponsor may disregard HUD’s recommendation, HUD staff should provide strong reasoning behind their position.

Developer Fee

3. Q:

How much is the developer fee?

A:

In a mixed finance, it is the lesser of 15% of the total project replacement cost or max allowed by allocating agency. It is not included in the 202/811 eligible costs and capital advance funds cannot be drawn down to pay for the fee. (NOTE: For a non-mixed finance project, a developer's fee is allowed in the 202/811 replacement cost & the calculation is discussed on page 4. Just as in a mixed finance, any Consultant fee is paid from the Developer's Fee & is not a separate line item in the HUD 92264)

Operations

4. Q:

Are floating units interchangeable with unassisted units?

A:

The mandatory use of floating units is under administrative review. Notwithstanding, floating units are applicable when there are assisted & non assisted units of the same bedroom type within a project. The assisted units are not fixed units and can be occupied by an unassisted tenant upon move-out and vice versa. However, the Owner must ensure that they never exceed either the PRAC approved number of units for that bedroom size or the unassisted approved units for that bedroom size.

5. Q:

How can HUD ensure that the HUD-assisted units are similar to unassisted units if they are larger, a different bedroom type, or have features that are not allowed?

A:

Under 24 CFR 891.863(c), assisted units must look like unassisted units of the same bedroom type and comparable design in terms of location, size, appearance, and amenities. If during firm commitment processing, the design of the unassisted units are not comparable to HUD design requirements then the owner may either increase the size of the assisted units (paid by non capital advance funds) or modify the design of the unassisted units.

6. How are floating units tracked?

A:

The total amount of subsidy and associated reserve funds are a known dollar amount to be tracked regardless of the location of the units in the building. PRAC units will be identified by the total number approved for the project rather than by a fixed unit #.

Funds from replacement reserve should not be released in entirety. To ensure that replacements reserves for PRAC units are not used to pay for the capital cost of unassisted units, only release a percentage of the reserves according to the prorated number of PRAC units in the building. For example, if 60% of one-bedroom units are assisted with PRAC dollars, release 60% of the replacement cost for items requested in a 1-bedroom unit.

7. Q:

Should the PRAC be issued to the General Partner of the Limited Partnership since the GP has day to day operations responsibility on behalf of the Limited Partnership ?

A:

It is issued to the Owner Entity. The signatory will depend upon who has the authority to bind the entity. If a Limited Partnership, It will be signed by General Partner on behalf of Limited Partnership Entity.

8. Q:

How do you prorate operating costs when unit size of HUD units have been increased and paid for by other sources?

A:

1st- prorate the total operating expenses between the assisted & unassisted units. The method used (sq. ft vs number of units) will depend upon whether or not the unassisted units include different bedroom unit sizes. Replacement reserve (RR) will not be prorated in this step if the unassisted units are using a different method of calculation.

2nd -decide which operating expenses are affected by the increase in size. This would include RR because RR in new construction is based upon construction costs. Some expenses would be the same even if the unit sq. ft were within HUD standards.

3rd-calculate the excess sq. ft. for the units & the total sq. ft for the assisted units. Net Rentable is not a good figure to use from the 92013 if the owner has grouped ranges of units sizes.

4th-divide the excess sq. ft by the total assisted unit sq. ft.

5th-apply this proportion to the affected operating expenses.

6th-this is the amount for the first year that the owner must pay. Determine from the owner how the excess costs will be handled. If an escrow will be used, determine the amount that should be deposited to cover 40 yrs. Include a condition for escrow at initial closing.

For excess amenities, again you must determine which operating expenses are affected. Expenses for excess amenities in common areas should be prorated between assisted and non assisted units.

9. Q:

Is the vacancy rate retroactive for existing projects?

A:

No. This notice covers projects that have been submitted for firm processing as of 8/15/11 and thereafter. The vacancy rate is only applicable to projects with 100 or more PRAC units.

Use Agreement

10.Q:

Section XV. C. states the Capital Advance Use Agreement is subordinate to any tax credit Use Agreement. Would this also apply to a tax exempt bond Use Agreement?

A:

Yes

11.Q:

What are our review responsibilities on these agreements? What is our recourse if provisions in the bond or tax credit use agreements contradict provisions in HUD's loan documents?

A:

Contradictions that violate HUD program requirements are to be raised with the other funders and revised.

12. Q:

Do we allow DPG to be loaned to the project? If so, must it adhere to the same Use agreement requirements if debt is still outstanding after 40 years?

A:

Yes

13. Q:

Can the Use agreement be extended an additional 15 years after the first extension?

A:

No. It is HUD's determination that extending the use restriction from 40 to 55 years is sufficient to prevent "unjust enrichment to the Sponsor or Sponsor created lender entity". Therefore, if the mixed finance project is structuring the Capital Advance as a loan to the Owner with provision for repayment, then the mixed finance use agreement, Form HUD 90163.1-CA will be used. The form already provides for a use restriction of 55 years from completion of the project. If the capital advance funds are not structured as a loan or the terms of the note provide for the debt to be forgiven after 40 years, the Notice authorizes HUD field counsel to amend the Form to reduce it to 40 years. See pages 56-57.

Other financing:

14. Q:

Section XVIII A. - states HUD does not dictate the terms and conditions of other financing. Does this mean that we do not need to review provisions in secondary loan documents to ensure they do not contradict HUD requirements?

A:

This section applies to mixed finance projects and HUD is not always in the first lien position. However, loan documents must be reviewed to see if there are any conflicts with HUD's program requirements. If so, they are to be addressed.

15. Q:

Can tax credit monitoring fees be prorated? How are they paid through the developer fee?

A:

1st-Proration

Pgs 27 & 44-The Notice allows the PRAC operating budget to include the reasonable costs for certain tax credit compliance reports & costs for preparing any tax return information required of the project. For example, the project must provide certain IRS schedules (The cost for the preparation of GP's & LP's tax return is not an eligible expense). Therefore, the fees must be prorated between the PRAC & unassisted LIHTC units. (e.g., 80 PRAC & 20 unassisted, include only 80% of costs in PRAC operating expenses)

2nd-Payment from Developer's Fee

HUD does not control how the Developer's Fee will be spent or its release. There is no list of eligible uses. The provision in the notice on page 31 is merely advising the GP that, before deciding how to split the Developer's fee with a Joint Venture Developer, it should consider its costs for monitoring responsibilities.

16. Q:

Is the MCI to be prorated?

A:

The MCI is calculated as a percentage of the Capital Advance amount not the total development cost. Pg 14. Therefore, there is no proration. Also it can only be used in relation to expenses, such as offsetting deficits on 202/811 units only.

Reserve for Replacement

17. Q:

Section XXI C.2.- Why is the amount of reserves different for PRAC units and non-PRAC units? How does HUD know that PRAC units would not subsidize Reserve Replacement items for non-PRAC units?

A:

HUD does not control the operation of unassisted units therefore a minimal threshold for reserves was set. The owner does have the option to use the HUD calculation for the non-capital advance units in which case the funds will be held in a HUD controlled account. However, if not, separate accounts are required to facilitate separate and identifiable recordkeeping. A replacement reserve schedule should be requested for review.

18.Q:

Do Delegated Processing Agencies adhere to this notice?

**A:
Yes**

CLARIFICATIONS

VI. D, E Joint Venture Identity of Interest

Paragraphs D and E are obsolete and no longer apply per changes to regulation 24 CFR 891.130(b) exempting mixed-finance projects from identity of interest between owner, sponsor and development team members.

IX. Prohibited Facilities

This section no longer requires a waiver for Section 202 mix-finance projects. Per changes to regulation 24 CFR 891.813 prohibited facilities are allowed if paid with other funds.

XXI. Tax Credit Issues

When loaning the capital advance to the project, the HUD mortgage and note are signed by the sponsor. The loan between the sponsor and owner should include language assigning the collateral to HUD.

XXIII.A.2. Project Operating Budget

“Projects with 100[%] PRAC units may include a vacancy loss rate of 3 percent in the budget.” 100 should be written and read as a percentage.

XV. Use Agreement

When the Use Agreement is a 55-year term, the Mortgage term should be 55 years as well. This can be written into form 90165-CA, Capital Advance Mortgage.

XXV. First Lien Position

When the capital advance mortgage is not in first lien position, the Use Agreement should be recorded before any mortgage instruments. This assures that HUD’s statutory requirements are upheld in the event of a default exercised by the first trust lender. Subordination Agreements should be thoroughly examined for any provisions that conflict with HUD requirements and are not protected in the Use Agreement.

Section C. Mixed Finance Capital Advance Upon Completion (CAUC)

1. Q:

Is a Capital Advance Agreement executed?

A:

No

2. Q:

If HUD does not sign off on change orders what authority do we have in protecting the capital advance if there are issues with the changes proposed?

A:

Part C XI lists construction changes to be monitored and commented on by HUD. Although we are not signing change orders, comments are to be resolved before changes are made. The firm commitment should include the language that HUD at all times has the right to require compliance with the original Drawings and Specifications.

3. Q:

What qualifies as an early start of construction?

A:

The firm commitment has conditions that must be met before construction can commence. If an Owner requests to start construction before these conditions have been met then it is an early start.