

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel Sleep Research Resource Project.

*Date:* December 12, 2012.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Suite 7192, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Giuseppe Pintucci, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892, 301-435-0287, [Pintuccig@nhlbi.nih.gov](mailto:Pintuccig@nhlbi.nih.gov)

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel Research Dissemination and Implementation.

*Date:* December 12, 2012.

*Time:* 1:00 p.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Crystal Gateway Marriott, 1700 Jefferson Davis Highway, Arlington, VA 22202.

*Contact Person:* Keith A. Mintzer, Ph.D., Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7186, Bethesda, MD 20892-7924, 301-594-7947, [mintzerk@nhlbi.nih.gov](mailto:mintzerk@nhlbi.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: November 15, 2012.

**Michelle Trout,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2012-28279 Filed 11-20-12; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Heart, Lung, and Blood Initial Review Group; NHLBI Institutional Training Mechanism Review Committee.

*Date:* December 14, 2012.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

*Contact Person:* Charles Joyce, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892-7924, 301-435-0288, [cjoyce@nhlbi.nih.gov](mailto:cjoyce@nhlbi.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5623-N-02]

### Federal Housing Administration (FHA) Healthcare Facility Documents: Revisions and Updates and Notice of Information Collection; 30-Day Notice

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

**ACTION:** Notice.

**SUMMARY:** On May 3, 2012, and consistent with the Paperwork Reduction Act of 1995 (PRA), HUD published for public comment, for a period of 60 days, a notice advising that HUD was updating and revising a set of production, underwriting, asset management, closing, and other documents used in connection with transactions involving healthcare facilities, excluding hospitals, that are insured pursuant to section 232 of the National Housing Act (Section 232). These documents are referred to collectively as the healthcare facility documents. The 60-day notice published on May 3, 2012, together with a companion proposed rule published on that same date, started the process of updating the healthcare facility documents and the Section 232 program regulations.

This 30-day notice published today continues the process required by the PRA. With the issuance of this notice,

HUD will submit the information collection for the closing documents to the Office of Management and Budget (OMB) for review and approval, and assignment of OMB control numbers. In accordance with the PRA, the closing documents will undergo the public comment process every three years to retain OMB approval.

**DATES:** *Comment Due Date:* December 21, 2012.

**ADDRESSES:** Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, 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 20410-0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://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](http://www.regulations.gov) Web site 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 notice.

*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 800-877-8339. Copies of all comments submitted are available for inspection and downloading at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:**

Kelly Haines, Director, Office of Residential Care Facilities, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410-0500; telephone number 202-708-0599 (this is not a toll-free number). Persons with hearing or speech disabilities may access this number through TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On May 3, 2012, at 77 FR 26304, HUD published, in accordance with PRA requirements, a notice (60-day notice) seeking comments for 60 days on proposed changes to the healthcare facility documents. In conjunction with publication of the 60-day notice, the proposed revised healthcare facility documents were made available at: [www.hud.gov/232forms](http://www.hud.gov/232forms). HUD presented the proposed revised healthcare facility documents in two formats: (1) A clean unmarked format for all documents; and (2) where available and appropriate, a redline/strikeout format showing changes made to either the final updated multifamily rental project closing documents or sample documents that have been in wide use.<sup>1</sup> Along with the 60-day notice, HUD also published on May 3, 2012, at 77 FR 26218, a proposed rule that proposed to strengthen regulations for HUD's Section 232 programs to reflect current policy and practices, and to improve accountability and strengthen risk management. A final rule following the May 3, 2012, proposed rule, and taking into consideration public comment, was published on September 7, 2012, at 77 FR 55120 (referred to in this Notice as the "2012 Final 232 Rule").

This 30-day notice published today continues the process required by the PRA for the healthcare facility documents. As was the case with the 60-day notice, HUD will post on its Web site the healthcare facility documents.

Again, HUD will show the documents (1) in a clean format, and (2) in redline/strikeout format, to show the changes made from the versions posted with issuance of the 60-day notice.

While complying with the PRA, this 30-day notice, as was the case with the 60-day notice, provides information beyond that normally provided in such notices. The 60-day notice published on May 3, 2012, provided descriptions of the major documents that are used in FHA's healthcare transactions and identified differences, as applicable, from the final multifamily rental project closing documents and existing healthcare facility documents. This notice issued today identifies substantive changes that HUD has made to the healthcare facility documents in response to public comment submitted on the 60-day notice, responds to significant issues raised by commenters, and identifies changes that HUD is proposing for comment in this 30-day notice following further consideration of certain issues.

The healthcare documents that HUD is submitting to OMB are posted on HUD's Web site at <http://www.hud.gov/232forms>. The Office of Residential Care Facilities (ORCF) is the office within HUD that manages the Section 232 program, which provides mortgage insurance for residential care facilities such as assisted living facilities, nursing homes, intermediate care facilities, and board and care homes.

**II. Document Changes Following 60-Day Notice**

This section identifies key changes made by HUD in response to public comment on the 60-day notice, and further consideration of certain issues by HUD as highlighted below.

**A. Numbers of Documents**

In the May 3, 2012, 60-day notice, HUD presented for public comment 154 healthcare facility documents. In response to public comment and upon further examination and consideration of the documents during the 60-day comment period, HUD now advises in this 30-day notice, that it has eliminated certain documents from the PRA process for various reasons, and separated concepts in certain existing documents into new documents. As a result of these changes, the number of healthcare facility documents presented for PRA purposes now numbers 115. Of the eliminated documents:

- 14 documents were removed for various reasons: the information in the forms is captured elsewhere; the information is no longer necessary; or the particular form would better serve

HUD and the industry as a sample document rather than a prescribed form. For example, the Healthcare Facility Summary Appraisal Report was eliminated, and any necessary portions were incorporated into HUD-92264a-ORCF Maximum Insurable Loan Calculation; the Certification titled FHA Retyped Forms was deleted as obsolete; and the Deposit Account Control Agreement (DACA) and Deposit Account Instructions and Service Agreement (DAISA) were deleted from the PRA process and are being made into samples.

- 20 checklists (including all 16 Production Checklists and 4 Asset Management Checklists) were removed. The Checklists summarize and list other exhibits in the application but do not collect information. The Checklists simply serve as a reminder of the documents that may be needed for a particular transaction.

- The 8 Firm Commitments have been removed. The Firm Commitments are letters from HUD to the lender setting forth the terms of the transaction and do not collect information or imposing recordkeeping requirements.

- The Subordination Agreement and Subordination, Non-Disturbance, and Attornment Agreement relating to the Operating Lease, were combined into one document.

In addition, 4 new documents were added:

- The HUD-2205A-ORCF, Borrower's Certificate of Actual Cost, was added, because the existing HUD multifamily form no longer applies to Section 232 projects.

- An additional addendum was added to the existing Section 223a7 Lender Narrative to address Transfers of Physical Assets (TPA), which now allows for more seamless processing of a refinance and TPA simultaneously.

- In addition to the existing Lender Narrative for a Blended Rate—Single Stage, two additional documents were added to allow a project to submit for a blended rate in a two stage process: Blended Rate—Initial Submission and Blended Rate—Final Submission.

**B. Key General Changes**

*Long-term debt service reserve.* A key provision proposed for the Section 232 program regulations and the healthcare facility documents was the establishment of a long-term debt service reserve. The proposed long-term debt service reserve was meant to provide a borrower facing operating difficulties at any time throughout the life of the mortgage the time to arrange a workout plan by providing a source of funds from which the borrower could

<sup>1</sup> The final multifamily rental project closing documents can be found at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/mfh/mfhclosingdocuments](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/mfhclosingdocuments). See also the announcement of the final documents published in the **Federal Register** on May 2, 2011 (76 FR 24507).

make debt service payments and thus delay or avoid an insurance claim by the lender. In the 2012 Final 232 Rule, HUD revised its policy so that this reserve will not be established for every project, but is likely to be implemented when there is an atypical long-term project risk. Atypical long-term risks could occur, for example, in circumstances in which there is an unusually high mortgage amount, or when some other risk mitigant, such as a master lease structure typically used in a portfolio transaction, is unavailable in a particular transaction.

Consistent with the change made in the 2012 Final 232 Rule, applicable healthcare facility documents have been revised to reflect the policy that the long-term debt reserve is not a requirement for every project.

*Segregation of operators' accounts.* HUD originally proposed a requirement to segregate accounts by facility. In the 2012 Final 232 Rule, HUD stated that public commenters advised, and HUD agreed, that accounting software was available today to maintain accounts in a manner that separates funds for HUD's reporting purposes. Consistent with the 2012 Final 232 Rule, the applicable healthcare facility documents provide that the operator must maintain accounts in a manner that will allow HUD and the lender to reliably and readily discern the funds attributable to the facility. To the extent an operator's accounting software maintains account information so that funds attributable to the facility can be readily and reliably tracked, segregating accounts by facility is not specifically required.

*Reasonable costs for goods and services.* HUD's 2012 Final 232 Rule at 24 CFR 232.1007 requires that the costs of goods and services purchased or acquired in connection with the project be reasonable and reflect market prices, which provides HUD with adequate protection in regard to the level of principals' salaries or other compensation. Applicable healthcare facility documents have been revised to reflect this change made at the final rule stage.

*HUD approval of a material revision to management agreements.* In the 2012 Final 232 Rule, HUD decided to retain the proposed requirement for HUD initial approval of management agent agreements. However, the 2012 Final 232 Rule dropped the requirement that HUD approve every change to the management agent agreement and instead requires approval of only those revisions that are material. This requirement has been revised in the applicable documents, such as HUD-

90017-ORCF the Consolidated Certification—Management Agent.

*Requirements applicable to third parties.* Several commenters expressed concern that forms establishing privity with unrelated third parties would not be acceptable to such third parties who are not benefiting from the FHA-insured transaction. Commenters suggested that such documents be adopted as guides with variations permitted to suit the specifics of each respective transaction. HUD agrees with this proposal and the provisions of the proposed Deposit Account Control Agreement (DACA), the proposed Deposit Account Instructions and Services Agreement (DAISA), and the proposed Blocked Account Agreements will be incorporated into sample documents outside of the PRA process.

*Requirements for Financial Reports.* Consistent with the 2012 Final 232 Rule, the documents require that financial reports be submitted within 30 days of the end of a quarter to allow HUD to effectively monitor a property's financial operations and the trend of those operations. As the rule recognized the intricacies involved in developing year-end financial statements, HUD has extended the submission of the final quarter and year-to-date operator-certified statements submitted for the 4th fiscal year quarter to 60 calendar days following the end of the fiscal year. In addition, the documents still reflect the policy established in the 2012 Final 232 Rule that separate reports are still required when the borrower is also the operator, as operator reports are to be submitted in separate systems that allow for more prompt submission than audited reports.

*Surplus Cash.* Consistent with the 2012 Final 232 Rule, which removed a proposed regulatory definition of surplus cash and stated that the term would be defined in the documents, surplus cash is defined in the borrower's regulatory agreement. Commenters had stated that HUD was proposing inappropriate and unnecessary alterations of the definition of surplus cash as it has been used in practice, in accordance with guidance set forth in the Industry User Guide for the Financial Assessment Subsystem—Multifamily Housing (FASS-SUB)<sup>2</sup>, and other handbooks and guidance, for many years. Upon consideration of the issues raised by the commenters, HUD concluded there was no need to alter the definition of surplus cash, and returned

to that definition of surplus cash currently in use.

*Working Capital.* The proposed rule included a requirement to maintain positive working capital. In response to commenters' concerns about such matters as the need to look at operators' aggregate portfolios, and limitations on the operators' ability to efficiently manage cash at the multi-provider level, the 2012 Final 232 Rule dropped the requirement to maintain positive working capital at all times. Pursuant to comment, HUD has revised the definition of "Healthcare Facility Working Capital" in the operator's regulatory agreement and will provide additional details on its calculation as necessary.

HUD also revised the operator's regulatory agreement, consistent with the 2012 Final 232 Rule, to remove the requirement to maintain positive working capital. In lieu of such requirement, consistent with the 2012 Final 232 Rule, if a quarterly financial statement is not filed or demonstrates negative working capital, the operator's regulatory agreement now prohibits funds generated by the operation of the healthcare facility to be taken as distribution or used for other purposes, except as specified.

*Across-the-board changes.* Several of the certifications were revised to include language from HUD's regulations namely 24 CFR 200.62, which provides that any agreement, undertaking, statement or certification required by the Commissioner shall specifically state that it has been made, presented, and delivered for the purpose of influencing an official action of the FHA, and of the Commissioner, and may be relied upon by the Commissioner as a true statement of the facts contained therein.

Other nomenclature and wording changes were made. For example, in HUD-92415-ORCF, the Request for Permission to Commence Construction Prior to Initial Endorsement for Mortgage Insurance, the term "mortgagor" was changed to "applicant" throughout the document. Further, adjustments were made to make the forms more generic, and eliminate needless duplication. In addition, several of the documents were revised, in accordance with the 2012 Final 232 Rule, to revise the time frame for providing notices relating to certain operational deficiencies to two (2) business days.

All changes made to the healthcare facility documents, whether substantive changes or wordsmithing changes, are presented in the redline/strikeout

<sup>2</sup> Available on the HUD web page at [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_indian\\_housing/reac/products/fass/fassmf\\_guide](http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/reac/products/fass/fassmf_guide).

versions of the documents on HUD's Web site.

### *C. Key Changes by Category of Document*

#### **Production—Lender Narratives**

These documents include information and certifications that must be made by the lender to ensure that a project is consistent with the Section 232 program requirements and therefore meets FHA eligibility requirements. These "Lender Narratives" are the summary document for each application submission. Based on commenters' concerns, the Lender Narratives have been simplified and revised to make the documents as consistent as possible across each loan type.

While members of the public did not submit extensive public comments on these documents, many of the changes adopted reflect changes made in other healthcare facility documents. For example, the other documents include updated environmental requirements, and updated procedures such as those regarding the amount of commercial space allowed in a facility or the flood insurance requirements. Also, minor technical changes were made, such as cross references to new or changed documents. Changes to these documents are reflected in the redlined/strikeout documents posted on HUD's Web site at the address set forth in the introduction to this notice.

**HUD-9001h-ORCF: Addendum to Underwriting Narrative—Transfer of Physical Assets (TPA), Section 232/223(a)(7)**

HUD has added an additional addendum to the lender's narrative for the Section 223(a)(7) refinance program. This new addendum addresses the requirements for conducting a TPA concurrently with a refinance. This addendum takes the place of the previous addendum "h," which related to the operating lease and is being incorporated into the main lender's narrative document, Lender Narrative, Section 232/223(a)(7), HUD-9001-ORCF.

**HUD-9003a-ORCF: Addendum to Underwriting Narrative—Phase I Environmental Site Assessment, Section 232/241(a)**

This form has been eliminated, and relevant information has been incorporated into a checklist.

**HUD-90025-ORCF: Lender Narrative—Existing Buildings with New Construction, Section 232—Blended Rate 2 Stage, Initial Firm Submission; and HUD-90025a-ORCF: Lender Narrative—Blended Rate, Section 232—2 Stage, Final Firm Submission**

These forms were added as lenders have requested the option to submit blended rate projects via the two stage process.

#### **Production—Certifications**

This group of documents consists primarily of consolidated certifications, which allow each participant in the application submission process—the lender, borrower, principal of borrower, operator and/or management agent—to submit one document containing all required certifications. The required certifications mirror the certifications required for the multifamily program, and include certifications relating to: identifying parties to the transaction, whether there are identities of interest, granting credit authorizations, compliance with the Byrd Amendment, compliance with Title VI of the Civil Rights Act of 1964, and HUD mortgage insurance program requirements. These certifications also include language regarding previous participation disclosures. These certifications did not receive any public comments, and few substantive changes were made to them since the initial publication. Changes to the documents are reflected in the redlined documents posted on HUD's Web site at the address set forth in the introduction to this notice.

#### **Construction Documents**

There were few public comments on these documents, and those comments submitted predominately related to loans for the Section 232 program for new construction. The majority of changes to the documents were for minor editing changes or clarifications of policy. Changes to the documents are reflected in the redlined documents posted on HUD's Web site at the address set forth in the introduction to this notice.

#### **Escrow Documents**

These documents were generally updated to clarify escrow calculations. Some signature lines were added to specify certification of the calculations included on the forms.

#### **Asset Management Documents**

Few comments were submitted on these documents which are used by HUD for routine reviews and approval of facility operations.

#### **Accounts Receivable Documents**

**HUD-92322-ORCF: Intercreditor Agreement**

A provision related to the timeframe and scope of the lien was adjusted to provide at least 30 days notice before the "Cut-Off Time" when HUD assumes a priority lien position. This would allow additional time for a turnaround, rather than having the cut-off enforced at the time notice is served.

Several definitions were revised to accommodate concerns from the accounts receivable industry, including "Protective Advances," "AR Lender Priority Collateral" and "AR Loan Obligations."

**HUD-90020-ORCF: Account Receivable Financing Certification**

As a result of public comment to the Intercreditor Agreement, a new section clarifies HUD's requirements that property securing FHA-insured loans may not cross-collateralize obligations of properties without FHA insured loans.

**HUD-92321-ORCF: Blocked Account Agreement**

This document was removed as a result of public comments. It will be a sample document, not a required form.

**HUD-92324-ORCF: Rider to the Intercreditor Agreement**

This document was removed as a result of public comments. It has been incorporated directly into the Intercreditor Agreement.

#### **Master Lease Documents**

The collection of Master Lease documents was established to address the increase in the number of multifamily portfolio transactions submitted to the Section 232 program. The May 3, 2012 60-day notice proposed a master tenant security agreement, a master tenant regulatory agreement, a subordination/subordination non-disturbance and attornment agreement, a cross-default guaranty of subtenants, and an addendum to the master lease which includes provisions protecting the lender and HUD's interests. The master lease structure allows for any rental deficiencies at one facility to be supported by income from another facility under the master lease. A master lease does not, however, pool the assets of all facilities for underwriting a single mortgage; each individual loan must meet HUD's underwriting standards on its own merit.

#### HUD-92211-ORCF: Master Lease Addendum

In reviewing this document in response to public comment, HUD attempted to eliminate unnecessary duplication and retain only those provisions most appropriate for the Master Lease Addendum. Provisions requiring direct enforcement rights were moved to the master tenant regulatory agreement. In addition, HUD clarified provisions regarding "bed authority," acknowledging that in most instances, the operator holds the licenses required to operate the healthcare facility. HUD clarified the term "Approved Use" consistent with current policy.

#### HUD-92331-ORCF: Cross-Default Guaranty of Subtenants

The title of this document was changed from "Subtenants Cross Guaranty" to "Cross-Default Guaranty of Subtenants." HUD also made additional clarifications pursuant to public comment.

#### HUD-92333-ORCF: Master Lease Subordination, Non-Disturbance and Attornment Agreement (SNDA)

Minor rewording and clarifications were made to make this document consistent with other documents and terminology used throughout all of the healthcare facility documents.

To be consistent with 24 CFR 232.1015 of HUD's 2012 Final 232 Rule, the time frame for providing notices relating to certain operational deficiencies has been clarified as two (2) business days.

In response to comments, this document was revised to give additional rights to and clarify the rights of the lender. For example, clarifications were adopted to provide the lender authority to allow the operator to select and engage the services of a management consultant in the event of a project operating deficiency.

#### HUD-92335-ORCF: Guide for Opinion of Master Tenant's Counsel

The title of this document was changed from Master Tenant's Attorney's Opinion to Guide for Opinion of Master Tenant's Counsel. New sections were added in the document to describe the exercise of rights or enforcement of remedies, security interest and rights to the collateral, which are consistent with the Guide for Opinion of Borrower's Counsel. A new section was added to clarify that the Guide for Opinion of Master Tenant's Counsel is governed by the laws of the state where the project is located.

#### HUD-92337-ORCF: Healthcare Regulatory Agreement—Master Tenant

Changes were made to make this document consistent with the borrower's and operator's regulatory agreements. Provisions that had required segregated accounts were revised in accordance with the 2012 Final 232 Rule. The provision requiring the healthcare facility to maintain positive working capital at all times has been removed.

#### HUD-92340-ORCF: Master Tenant Security Agreement

In response to public comments regarding Uniform Commercial Code (UCC) requirements, among other changes, the UCC definition of "Debtor's location" reflects UCC requirements rather than, as in the proposed document, the location of the chief executive's office. A new clarification was added for "Permitted Liens," encompassing both the security interest in favor of the secured party and any liens approved in writing by the secured party and HUD, which are allowable liens against the collateral. Additional recitals and optional language were added to this document to address different scenarios within a project (e.g. to account for a situation where the borrower is not the same as the operator or when a master lease is involved).

#### Additional Legal Documents

This category is mainly comprised of the documents relating to the borrower's and operator's attorneys' opinions. A summary of the substantive updates is presented below.

#### HUD-91725-ORCF: Guide for Opinion of Borrower's Counsel

The document was modified to provide that the enforceability opinion does not include the ground lease and certain other documents.

#### HUD-92325-ORCF: Guide for Opinion of Operator's Counsel and Certification

The documents include several revisions in response to public comments. One modification was to change all references to "Property" to refer to the "Project" when referring collectively to all of the types of property interest that are to serve as collateral for the loan.

#### Additional ORCF Documents

Changes to the documents are reflected in the redlined/strikeout documents posted on HUD's Web site at the address set forth in the introduction to this notice.

#### HUD-91121-ORCF: Deposit Account Control Agreement (DACA); HUD-91122-ORCF: Deposit Account Instructions and Services Agreement (DAISA); and HUD-92321-ORCF: Blocked Account Agreement

Several commenters recommended that these documents be eliminated as HUD mandated forms because they are used with third parties who do not normally do business with HUD. The commenters noted that many depository banks, which are large institutions, have their own forms and will not accept the HUD form. The commenters suggested, and HUD agrees, that these documents are more appropriate as samples rather than as forms. As a result, these documents have been removed from the PRA process. Several commenters also provided technical comments which will be addressed when the sample documents are generated.

#### HUD-92264-ORCF: Healthcare Facility Summary Appraisal Report

As this form was only used by Section 232 new construction program applicants, a few sections of this form (e.g., Land and Replacement Cost) were incorporated into the related Maximum Insurable Loan Calculation form. The Healthcare Facility Summary Appraisal Report has been eliminated.

#### HUD-92264a-ORCF: Maximum Insurable Loan Calculation

The document name was changed to Maximum Insurable Loan Calculation to avoid confusion with an existing FHA multifamily program form with a similar name. The document was also changed to an Excel spreadsheet with tabs for instructions, sources and uses, land, replacement cost, loan determination criteria and criteria by loan type. Additional features of the form include context sensitive comments for individual cells and calculations for many cells.

#### HUD-92323-ORCF: Operator Security Agreement

In response to public comment, a new attachment was added to provide an operator Assignment of Leases and Rents subpart of this form. This new document is the only portion of the operator Security Agreement that is recorded. This change removes the recordation requirement for the main document. Other changes were made in response to public comment, including adding a concept of "permitted liens," and clarifying government receivables account requirements.

**HUD-92466-ORCF: Healthcare Regulatory Agreement—Borrower**

This agreement reflects changes made in the 2012 Final 232 Rule. For example, the time frame for providing notices relating to certain operational deficiencies has been clarified as two (2) business days; the long-term debt service reserve requirement is no longer a standard provision for every transaction; provisions relating to reasonable operating expenses and ensuring goods and services are acquired at favorable prices were clarified, and in reliance of these clarifications, subsequently unnecessary provisions, such as provisions limiting payments to affiliates, have been relaxed.

HUD also made several changes to this document pursuant to public comment. Triggers for causing the termination of a management agreement were clarified. The surplus cash calculation provisions reflective of current policy were reinstated. Requirements for non-profit borrowers to take distributions were clarified to reflect current policy.

**HUD-92466a-ORCF: Healthcare Regulatory Agreement—Operator**

This agreement also reflects changes made in the 2012 Final 232 Rule. For example, since the 2012 Final 232 Rule allows aggregated accounts so long as accounting can readily and reliably identify and analyze each facility's financial transactions, provisions requiring segregated accounts have been revised accordingly. As with the borrower's regulatory agreement, the time frame for providing notices relating to certain operational deficiencies has been clarified as two (2) business days and the provisions relating to reasonable operating expenses and procedures for ensuring favorable pricing for goods and services have been clarified.

Several changes were made based on public comments received. The requirement to maintain positive working capital at all times was removed. Clearer standards triggering HUD's right to require the operator to hire a consultant were set forth. HUD limited its ability to declare an immediate event of default to situations where a termination, suspension or restriction on a necessary permit or approval would have a materially adverse effect on the operation of the healthcare facility.

**HUD-94000-ORCF: Security Instrument/Mortgage/Deed of Trust**

In addition to the revisions made in response to the comments discussed

below, language was added to this document in response to comment to obligate the borrower to assure that the operator, master tenant and management agent comply with UCC related provisions and to allow liens in favor of HUD-approved accounts receivable lenders.

**HUD-9839-ORCF: Management Certification**

This form has been revised to be consistent with HUD's 2012 Final 232 Rule, at 24 CFR 232.1011, captioned Management Agents, and to clarify the requirements for a management agent and the management agreement.

**Production—Firm Commitments**

As stated previously, HUD determined that these documents are inappropriate for the PRA process, and these documents have been removed. HUD will provide additional details about these documents as necessary.

**Production—Checklists**

As stated previously, HUD determined that these documents are inappropriate for the PRA process, and these documents have been removed. HUD will provide additional details about these documents as necessary.

**III. Discussion of Specific Public Comments**

Thirteen sets of public comments were submitted in response to the 60-day notice through [www.regulations.gov](http://www.regulations.gov), the government-wide portal for the receipt of public comments on federal agency documents.<sup>3</sup> Comments were submitted by a wide variety of parties including: commercial mortgage bankers and other lenders, a management oversight and consulting services company for skilled nursing facilities and related healthcare providers, companies that own, manage, and operate skilled nursing facilities and assisted living facilities; and national and state healthcare associations. Comments were also submitted by a coalition of national investment and mortgage bankers that participate in HUD's healthcare programs, as well as a trade association of lenders. The "HUD Practice Committee" submitted comments on behalf of the Forum on Affordable Housing and Community Development Law of the American Bar Association. Private individuals also submitted comments.

As a special outreach to the public on proposed changes to the Section 232 program regulations, HUD hosted a forum, the "Section 232 Document and Proposed Rule Forum" on May 31, 2012, in Washington, DC. A video of this forum is available on the HUD Internet site at <http://portal.hud.gov/hudportal/HUD?src=/press/multimedia/videos>. While comments were raised and discussed at the forum, as reflected in the video, HUD encouraged forum participants to file written comments through the [www.regulations.gov](http://www.regulations.gov) Web site so that all comments would be more easily accessible to interested parties. All comments, whether submitted through [www.regulations.gov](http://www.regulations.gov) or raised at the forum, were considered in the development of these revised documents.

In addition to comments submitted in response to the 60-day notice, 27 public comments were submitted in response to the companion May 3, 2012, Section 232 proposed rule. To the extent that comments submitted on the proposed rule related to the healthcare facility documents, those comments were taken into consideration in the further development of the healthcare facility documents presented for additional public comment in this 30-day notice.

This section of the notice highlights the key issues raised by public comments on the documents and HUD responses to these comments. Some documents received no comments and therefore are not included in the discussion section below. For other documents, many of the changes suggested and those adopted by HUD have been discussed in Section II of this notice.

Many commenters recommended different terminology or different organizational structure to several of the documents. All these types of comments are not necessarily addressed in this section of the notice. To address each editorial/organizational structure recommended change would result in a very lengthy notice. The redline/strikeout versions of the documents, however, reflect all changes that HUD agreed with and adopted, and have taken into account any such recommended editorial/organizational changes that HUD did not agree or adopt. Finally, certain issues raised by the commenters on the documents were also raised in connection with the companion proposed rule. To the extent that comments were similar and have been addressed in the preamble to the 2012 Final 232 Rule, HUD does not repeat the issue and response in this notice.

<sup>3</sup> Public comments submitted in response to the May 3, 2012, 60-day notice can be found at <http://www.regulations.gov/#?searchResults:pp=25;po=0;s=FR-5623-N-01>.

Generally, in the discussion of public comments that follows, the terms “section” and “paragraph” are interchangeable. Some of the documents specifically use the term section, while others simply number paragraphs.

*HUD-93305-ORCF: Agreement and Certification*

*Comment:* A commenter raised questions about whether the language in the document regarding reduced costs (section 3) was determined by HUD to be a “loan reduction” and must either go to pay down the mortgage or be deposited into the reserve for replacement account to avoid modification of the loan and an accompanying prepayment penalty. Essentially, the commenter asked whether this constituted prepayment of the loan amount if it was less than estimated prior to final endorsement.

*HUD Response:* HUD revised the language in the document to clarify the treatment of these funds and re-characterize the calculation as excess mortgage proceeds. These amounts would thus not constitute a prepayment and accordingly would not trigger the need to look to the prepayment lockout and accompanying penalties.

*HUD-92441-ORCF: Building Loan Agreement*

*Comment:* A commenter recommended changing paragraph 4(c), which requires a disbursement agreement be attached to the document, to allow either separate disbursement agreement or an attached table of mortgageable cost items rather than requiring a separate disbursement agreement.

*HUD Response:* HUD declined to adopt this revision. HUD recently addressed this question in connection with the update of the multifamily rental project closing documents, and determined that a disbursement agreement is always required in new construction. HUD determined that it would be much harder to enforce a table of mortgageable costs versus a table of disbursement agreement that is signed by the parties.

*HUD-92441a-ORCF: Building Loan Agreement Supplemental*

*Comment:* A commenter suggested eliminating this supplemental form given that the provisions in this form are addressed in the Building Loan Agreement.

*HUD Response:* It is HUD’s view that it would be very rare that a borrower acts as its own general contractor, a supplement is more appropriate rather

than adding this language to the standard Building Loan Agreement.

*HUD-92554-ORCF: Supplementary Conditions of the Contract for Construction*

*Comment:* A commenter questioned why there was a supplement to the Construction Contract, stating that this structure made sense when HUD was using old documents, but that it seemed more efficient to incorporate these provisions into the contract now.

*HUD Response:* The approach to retain a set of supplemental conditions to the construction contract maintains a long-standing approach used in the multifamily documents and matches an approach used by the AIA construction forms.

*HUD-92412-ORCF: Working Capital Escrow*

*Comment:* A commenter suggested additional language at page 3, paragraph 4, specifying that for purposes of calculating the debt service coverage ratio, any operating lease will be disregarded and that the debt service coverage ratio will be calculated based upon the operating results of the project rather than of the borrower, master tenant or operator. A similar comment, to carve out the operating lease from debt service coverage calculation, is made to the Escrow for Operating Deficit.

*HUD Response:* Public commenter’s recommendation to exempt an operating lease in the debt service calculation has been adopted in both documents.

*HUD-91116-ORCF: Addendum to Operating Lease*

*Comment:* A commenter stated that in order to avoid possible confusion or conflicting requirements among the HUD documents, the operator Lease Addendum should be removed and its provisions should be addressed in the Regulatory Agreement.

*HUD Response:* HUD declined to adopt the commenter’s recommendation. HUD has decided to retain the Addendum.

*Comment:* Commenters submitted revisions to address what they stated were inconsistencies between the Master Lease Addendum and Operating Lease Addendum. Commenters suggested that HUD needed to develop a form of Operating Lease Addendum for use in Master Lease structures or should incorporate options in the Addendum to Operating Lease for use in a Master Lease structure. The commenters further suggested that HUD revise the documents to address inconsistencies between the Master

Lease Addendum and the Operating Lease Addendum. A commenter stated that the ability to tailor an agreement to the facts and circumstances of the loan and the parties needs to be retained, especially when dealing with agreements to be signed by third parties such as accounts receivable lenders and unaffiliated operators and/or managers. Several commenters stated that HUD should revise terminology and add definitions.

*HUD Response:* HUD accepted many of these recommendations, and added several definitions. The redline/strikeout version of this document reflects the recommendations adopted.

*Comment:* A commenter stated that if the tenant is not affiliated with the borrower, section 2 should be revised to require only that the tenant comply with the mortgage loan documents to which it is a party. If the tenant is not affiliated with the landlord, it may not even have a copy of the landlord’s mortgage loan documents and should not be required to comply with agreements to which it is not a party.

*HUD Response:* HUD disagrees. Operation of the healthcare facility in accordance with “Program Obligations” is vital to ensuring the success of the project.

*Comment:* Commenters stated that the provisions in section 3 allowed HUD to eliminate the need for a separate subordination agreement. Also, commenters stated that non-disturbance and attornment provisions could be built into this section and used when appropriate in lieu of a separate Subordination, Non-disturbance and Attornment Agreement (SNDA).

*HUD Response:* HUD determined to keep the paragraph on subordination and to also retain a separate subordination agreement in order to establish privity of contract between the lender and the tenant.

*Comment:* A commenter stated that if the tenant is not affiliated with the borrower, section 3(a) should be revised to preserve the tenant’s rights set forth in the SNDA which contains the HUD approved non-disturbance language that protects the tenant so long as the tenant is not in default under the operating lease.

*HUD Response:* HUD agrees with the commenter and accordingly adopts the change.

*Comment:* A commenter suggested that section 3(b) relating to easements and licenses, be revised to allow the tenant to enter into short term telecommunications services that are not recorded against the property and that are terminable upon 30 days’ notice without HUD’s consent. The commenter



stated that this change will allow the tenant to run its business without having to obtain HUD's approval for short-term telecommunications contracts.

*HUD Response:* HUD has determined that proper oversight requires notice of these and similar contracts and will provide additional details regarding the process for approval as necessary.

*Comment:* Multiple commenters suggested revisions to section 4, relating to furnishings, fixtures, and equipment (FF&E). A commenter stated that some operating leases provide that certain non-essential FF&E, such as the tenant's computers, will remain the property of the tenant. To prevent such FF&E from becoming the landlord's property under section 4 of the addendum, the commenter suggested inserting an exception for a lease between unaffiliated parties. Another commenter stated that HUD's requirements do not reflect how the industry actually works and that who owns the personalty should be irrelevant to HUD because HUD will obtain security agreements from both the borrower and the operator.

*HUD Response:* HUD largely agrees with the commenters and has revised section 4 accordingly. The revised section now contemplates that Lessee could own the FF&E but the borrower would have the right to purchase the FF&E at the termination of the Lease. HUD has also revised section 4 to permit removal of FF&E in the "ordinary course of business."

*Comment:* A commenter suggested that in cases where the tenant is not affiliated with the landlord, the tenant may not know if the rent payments are sufficient for the landlord to pay its bills. The commenter stated that the landlord, not the tenant, should make the representation in the first sentence of section 5. Similarly, because the landlord is the borrower under, and benefits from, the HUD insured loan, the landlord should be responsible to HUD for the various premiums that may be required under the landlord's mortgage. The commenter stated that while an existing lease may require the tenant to pay such premiums, to the extent the tenant did not agree to pay for these premiums and it is not affiliated with the landlord, it should not be required to incur additional fees as a result of the landlord's HUD financing.

*HUD Response:* Under the revised document both the borrower/lessor and the lessee make the representation.

*Comment:* A commenter stated that language should be added under section 6, "Operator's Regulatory Agreement and Security Agreement," that

addresses the termination of the operating lease if there is a programmatic default of the operator regulatory agreement.

*HUD Response:* HUD has revised this section to clarify the requirements and to make it consistent with section 13, HUD's right to require termination of the operating lease. Defaults of the operator's regulatory agreement will not terminate the operating lease unless requested or approved by HUD.

*Comment:* Commenters stated that sections 10 and 11 (Financial Statements, Reporting Requirements and Inspections) should be removed as these functions are already addressed in the operator Regulatory Agreement. The commenters stated that HUD should omit any provision addressed in the Regulatory Agreement from the Lease Addendum.

*HUD Response:* HUD adopted the commenter's recommendations and removed these sections from this document.

*Comment:* Commenters suggested adding language to make it clear that the tenant will maintain insurance. A commenter specifically suggested adding a sentence requiring proof of insurance compliance annually, since this requirement also appears in the Master Lease Addendum.

*HUD Response:* HUD adopted the commenter's recommendation into current section 10.

*Comment:* A commenter recommended that HUD add provisions in section 13 (now section 11, Assignment) that require a transferee to obtain a Form HUD-2530: Previous Participation Certificate in the case of a transfer to a subsidiary. The commenter stated that HUD would therefore be required to give prior written consent when a change of control occurs involving a master tenant which is controlled or owned by a publicly traded entity. Another commenter recommended clarifications for transfers to affiliated or subsidiary parties be added as a new section.

*HUD Response:* HUD determined that the language in proposed section 13 (now section 11), as revised, is broad enough to provide adequate protection of HUD's interests and adequate notice of HUD's requirements to interested parties, whether such transfers involve affiliates or non-affiliates, and that additional language is not necessary.

*Comment:* Multiple commenters stated that section 14 (now section 12, relating to accounts receivable (AR) financing) is more appropriate in the operator Security Agreement.

*HUD Response:* HUD declines the commenter's recommendation and has

determined that this provision is appropriate to memorialize the understanding of the parties and clarify the expectations regarding accounts receivable financing.

*Comment:* A commenter suggested that in situations where the tenant is not affiliated with the landlord, section 15 (now section 13, relating to termination of the operating lease) be revised to clarify that HUD can terminate the lease only for violations by the tenant. The commenter stated that this is consistent with the tenant's rights under the Subordination Non-Disturbance and Attornment Agreement (SNDA) to be signed at closing.

*HUD Response:* HUD has determined that it must reserve the right to cause termination of the operator lease for any violations of the operator's regulatory agreement and for other violations of program obligations.

*Comment:* A commenter stated that the defined term of "Material Term" is used in section 14 of the Addendum to restrict the tenant's ability to make material changes to its accounts receivable documents. HUD, the mortgage lender, the AR Lender, the landlord and the tenant may negotiate the parameters of future amendments in the Intercreditor Agreement. Additionally, AR borrowers need some flexibility in managing the AR loans such as extending the maturity of the loans, adding additional guarantors, increasing or decreasing the principal balance by less than ten percent (10%), increasing the interest rate by no more than five percent (5%) or adding collateral.

*HUD Response:* Although these changes were not adopted for the Addendum to Operating Lease, consistent with current practice, provisions were added to the Intercreditor Agreement to provide this flexibility.

*Comment:* A commenter suggested that HUD add several new sections relating to operator responsibilities, defaults, and remedies upon default (to be sections 20–28). The commenter stated that, in particular, section 23 the "Special Purpose Entity Provisions" must be considered carefully as a number of the major long-term care companies that have existing operators are not special purpose entities. The commenter suggested that the "Special Purpose Entity Provisions" be waived as part of the underwriting process.

*HUD Response:* HUD adopted some of the commenter's suggested additions, but has declined to adopt others. HUD determined that where the provisions duplicated rights found in other provisions or other documents, they



were not necessary to repeat here. In addition, HUD determined that such provisions would be preferable in the operator's regulatory agreement, which HUD has the right to enforce directly.

*HUD-91111-ORCF: Survey Instructions and Borrower's Certification*

*Comment:* A commenter suggested that the Table A requirements be adjusted, reviewed and made more practical for use on a refinance (as opposed to new development or acquisition).

The commenter recommended that Table A, Item 1 be deleted, subject to being required by the title company in order to issue the title insurance required by HUD. The commenter further suggested that Item 6b should be dropped as current building setback and related items only impact new construction and not a previously existing structure. The commenter also suggested that Item 10(a) should be deleted, subject to being required by the title company in order to issue the title insurance required by HUD; Item 10(b) should be deleted; Item 11(b) should be deleted and replaced by 11a plotting or disclosure of utilities by observable evidence is sufficient. Going beyond observable evidence is extremely burdensome and oppressive; Item 19 should be deleted as a required item.

The commenter further recommended that section I—2nd paragraph modify the sections that the survey will comply with. The commenter recommended that section I E be revised to add “HUD Project Name” to basic information to be provided.

The commenter recommended that section II A be modified to say: “The title company will delete the title policy survey exception and accept the prior survey in issuing the policy of title insurance otherwise required at endorsement by HUD;”

*HUD Response:* HUD declined to adopt the commenter's recommendations at this time, but will consider these recommendations further in connection with future changes to the documents.

*HUD-9839-ORCF: Management Certification*

*Comment:* A commenter suggested that HUD revise proposed section 1(b)(2)(b), relating to compensation, to reflect variations in compensation. The commenter stated that managers typically receive a “Base Management Fee” comprised of a percentage of a project's gross revenue after adjustments and contractual allowances, and sometimes net of ancillary expenses. Third party managers frequently also

receive an “Incentive Management Fee” based on net cash flow from operations, Earnings Before Interest, Taxes, Depreciation, Amortization, (EBITDA) or net profits.

*HUD Response:* HUD agrees with the commenter, and made the section (now section B(2)(b)), generic to allow for various forms of compensation to be stated and to allow for industry practice changes for compensation. The form has been adjusted to consider any types of compensation that has been agreed upon between the owner and the management agent. The compensation is expected to be typical of industry practices and not excessive or grossly out of line from a norm. Industry abuse or excessive fees will not be approved based upon HUD's review and determination.

*Comment:* A commenter stated that the requirement to abide by any decisions HUD makes as a result of appeal of excessive fees is too vague, and recommended new language, further stating that if HUD can change the agreement and economics, the management agent should have the ability to terminate the contract.

*HUD Response:* The appeal process was removed from the form. As long as the compensation is typical of industry practices the compensation will be allowed.

*Comment:* A commenter suggested removing language about the management agent complying with payment requirements and reasonableness of the fees (proposed section 2(c), now section D(2)), stating it is too vague, that the management agent will need more definition of the requirements, and that reasonableness is already discussed in a previous section.

*HUD Response:* HUD declines to adopt the commenter's recommendation. The provision alerts the management agent that the fees charged are to be reasonable within industry standards and allocation of those costs between the management fee and the Healthcare Facility's account.

*Comment:* The commenter stated that section 3(f) should be deleted as it is too burdensome to maintain copies of verbal and written estimates.

*HUD Response:* HUD determined that an audit trail of transactions is necessary for compliance and for analysis and standard operating purposes. HUD determined that a record of the operations of the facility is typical of a project and is in the normal course of business and not burdensome. Therefore, the provision to keep records in accordance with program obligations was maintained (now section D(6)).

*Comment:* A commenter suggested that HUD reduce the number of documents with which the Agent must comply, since many of the loan documents are beyond the scope of the Agent's relationship.

*HUD Response:* HUD has determined that, in managing the healthcare facility, the management agent must comply with program obligations, including any regulatory agreements and the operating leases. In revising these provisions, HUD attempted to balance any burden to the management agent with the important role the management agent plays in the operation of the healthcare facility.

*Comment:* A commenter suggested that HUD delete proposed section 3(g) saying that it should be the borrower's obligation (not the management agent's) to invest project funds.

*HUD Response:* Although deal structures may vary, the management agent typically is collecting and depositing funds, including into accounts in the operator's or borrower's name. In revising this section (now section D(7)), HUD attempted to provide flexibility for deal-specific variations in a management agent's responsibilities.

*Comment:* A commenter stated that section (4) changes insurance notification to the lender (not HUD), and suggested that the correct “loss payee” designation is “the Lender, its successors and assigns.” Until HUD is assigned the Note, it is the lender who is the Loss Payee.

*HUD Response:* HUD agrees with the commenter. As this certification is meant only to confirm the management agent's compliance with HUD's insurance requirements set forth in other legal documents, this provision (now section D(8)) and other references to insurance have been revised accordingly.

*Comment:* A commenter suggested that proposed section 5(b)(2) be modified to allow accounting principles other than Generally Accepted Accounting Principles (GAAP) <sup>4</sup>.

*HUD Response:* HUD has revised this section (now section E) to clarify the bookkeeping requirements. HUD will provide more details as necessary.

*Comment:* A commenter stated that it may be in the project's best interests to allow the management agent to advance funds to the project, and as such, suggested deleting section 6(g) that disallows such advances.

*HUD Response:* HUD declines to adopt the commenter's recommendation

<sup>4</sup> GAAP refers to the standard framework of guidelines for financial accounting used in any given jurisdiction; generally known as accounting standards.

and has maintained this provision (now section F(7)). A management agent should not advance funds to a project without discussing with the operator and owner the current and future hardships necessitating such advances. Simply forwarding funds to the project can jeopardize the project if the owner or operator is not aware of the situation.

*Comment:* A commenter suggested deleting the entire “hold harmless” of section 7, stating the provision is too vague.

*HUD Response:* HUD disagrees with the commenter and declined to adopt the commenter’s recommendation. This section (now section F(9)) allows such agreements if approved by HUD. It is HUD’s position that, given the potential for harm, any hold harmless and similar arrangements should be rare and HUD requires HUD review of any such provisions.

*Comment:* A commenter suggested that HUD revise the form and update the termination provisions to provide a 30-day notice period.

*HUD Response:* HUD agrees in part with this comment and has revised the relevant sections (now sections H(1) and (2), and corresponding language in section C) accordingly. Although these sections now provide for a 30-day notice period for terminations based upon violations of the regulatory agreements, the provisions reserve HUD’s right to act immediately if the permits or approvals are in substantial and imminent risk of being terminated, suspended, or otherwise restricted in a way that would have a materially adverse effect on the project.

*Comment:* A commenter stated that a new provision be added to section 9 to require the management agent’s certification if the owner or operators plan to permit collection of a new fee which not set forth in a management agent’s certification.

*HUD Response:* HUD has clarified in this section (now section (I)) the triggers for requiring a new certification. The commenter’s suggestion is not necessary to add because similar protections are set forth elsewhere in the document.

*Comment:* A commenter stated that many projects have existing identity-of-interest management agents, and, that under the documents as proposed, these parties will now have the additional burden of “clearly establishing” that the fees charged are consistent with those charged by independent management agents.

*HUD Response:* Consistent with the 2012 Final 232 Rule, HUD is maintaining the requirement for HUD approval of a management agent and management agreement prior to a

management agent being retained. In light of new provisions in HUD’s Section 232 program regulations at 24 CFR 232.1007, which provide that operating expenses shall be reasonable and necessary for the operation or maintenance of the project, HUD determined that it was unnecessary to delineate further management agent restrictions in regulatory language. Accordingly, the documents are revised to be consistent with the policy established in the final regulation.

#### *HUD-92466-ORCF: Healthcare Regulatory Agreement—Borrower*

*Comment:* A commenter suggested adding the phrase “as evidenced by the discharge or satisfaction of the Security Instrument” to the third paragraph on page 2, to clarify when the regulatory agreement remains in effect.

*HUD Response:* HUD has revised this paragraph to include the phrase “as evidenced by the discharge or release of the Security Instrument,” as a release of the lien of the security instrument would be a recorded instrument that can provide adequate evidence of satisfaction of the note.

*Comment:* A commenter stated that the definition of “Approved Use” should be changed to conform to the Firm Commitment forms.

*HUD Response:* HUD agrees with the commenter and adopted the commenter’s recommendation.

*Comment:* A commenter stated that the definition of “distribution” should omit the phrase “any asset of borrower.”

*HUD Response:* HUD declines to adopt the commenter’s

recommendation. As set forth in the 2012 Final 232 Rule, the borrower is, unless otherwise approved by HUD, a single asset entity, so any assets of the borrower’s will be project funds subject to distribution requirements.

*Comment:* A commenter recommended that the definition of “healthcare facility” be expanded to include “independent living facility” and that the word “or” be changed to “and/or.”

*HUD Response:* HUD broadened the definition to include anything that might be insured under section 232 of the National Housing Act.

*Comment:* A commenter requested that, in the definition of “Identity of Interest,” HUD replace the term “party” with the term “entity” and that HUD provide an exclusion for ownership interests of less than five percent in public companies. The commenter also requested that the definition of “family member” be modified to exclude “aunts, uncles, mother-in-law, father-in-law, brothers-in-law and sisters-in-law.”

*HUD Response:* In consideration of other comments and otherwise in the course of HUD’s review of this and other documents, HUD determined that the defined term “Identity of Interest” is not necessary in the regulatory agreement and deleted the definition. HUD will follow the multifamily program’s model and rely on the definition in program obligations.

*Comment:* A commenter stated that, under the definition of “nonprofit borrower,” a statement that the nonprofit entity may not make distributions is unnecessarily overboard. The commenter recommended that an exception be added for distributions approved by HUD or permitted under program obligations.

*HUD Response:* The language specified in this comment has been deleted from the definition of “nonprofit borrower.” HUD has also revised the document to be consistent with HUD policy and has added section 16(e) to clarify if and when a non-profit borrower may take distributions.

*Comment:* A commenter proposed a change to the definition of principal to clarify the parties that are considered principals. The commenter stated that the original draft was confusing and seemed to indicate that members of a principal are to be considered a principal of the borrower.

*HUD Response:* HUD has clarified the definition of principal. HUD notes that it is not HUD’s intention in these documents to alter the policy currently in practice regarding previous participation clearance and other requirements relating to principals.

*Comment:* Several commenters commented on the provisions defining and relating to “Reasonable Operating Expenses.” One commenter stated that the definition of “Reasonable Operating Expenses” should be expanded to include “any other disbursement, conveyance or transfer provided for in the Agreement.” Another commenter stated that in the definition of “Reasonable Operating Expenses,” the general exclusion of compensation paid to affiliates or identity-of-interest entities is overly broad and the exclusion should be modified to allow such compensation to the extent it is not in excess of that payable in arms-length transactions. Another commenter stated that it is quite common and accepted in the health care market for related parties to engage in arms-length, market rate transactions. The commenter stated that in today’s market, HUD would be moving away from the nation’s healthcare delivery system to prohibit such affiliate transactions. To the extent

that an affiliate of the borrower is providing a service at a cost consistent with a market rate, arms-length transaction, then having HUD review and approve each one of those transactions across its portfolio will become extremely burdensome and will utilize valuable resources both within HUD and for its borrowers. Another commenter stated that since section 23 of this agreement provides that the costs must not exceed reasonable costs for the area, HUD should have the requisite protection to ensure that affiliate transactions are not detrimental to the project.

*HUD Response:* HUD recognizes the commenters' concerns and has revised the cited provisions accordingly. HUD has made the definition of Reasonable Operating Expenses consistent with § 232.1007 of the 2012 Final 232 Rule.

*Comment:* A commenter suggested changing the definition of "Rents" by changing "income from Healthcare Facility" to "income from Mortgaged Property."

*HUD Response:* HUD agrees with the commenter's concern but changed the wording to "income arising from the operation of the Healthcare Facility." Unlike the multifamily program, the terms "Mortgaged Property," "Healthcare Facility," and "Project" are all slightly different in the 232 program. Since the "Mortgaged Property" is granted by the borrower, it is limited to the borrower's interests. The term "Project" is meant to encompass all interests involved in the FHA-insured transaction.

*Comment:* A comment recommended changes to include an instructional note in bold and caps to clarify that sections 2, 3, 5, 6, 8, and 9 do not apply to loans under sections 223(a)(7) or 223(f) of the National Housing Act.

*HUD Response:* HUD does not believe such instructional notes are necessary and has not adopted the commenter's recommendation. Where the provisions may be confusing, HUD has added the phrase "if any" to indicate potential inapplicability.

*Comment:* A commenter recommended that HUD add a clause to the final sentence of section 7, stating that residency and operation of the facility do not require prior written HUD consent if the project is occupied and in operation as of loan closing (for sub-rehabilitation loans and loans insured under section 241(a) which provides insurance for mortgage loans to finance repairs, additions, and improvements).

*HUD Response:* HUD declines to adopt the commenter's recommendation. HUD believes the

provision for HUD approval provides sufficient flexibility where necessary.

*Comment:* A commenter stated that while section 8 states the borrower should have to disclose all obligations as of date of this agreement, HUD's interest should only require disclosure of delinquent obligations or those outside the ordinary course of business. Another commenter stated that such disclosure requirements would create substantial administrative burdens for HUD and distract staff from more important project reviews. Another commenter also suggested deleting the final sentence as unnecessary, stated that the section is overbroad, and questioned if HUD might be exposing itself to third-party claims asserting HUD liability for damages resulting from project operations.

*HUD Response:* HUD disagrees with these comments and has retained the proposed language. These requirements conform to the requirements in the multifamily program and are long-standing HUD requirements. It is important for the borrower to disclose all obligations so that HUD can accurately analyze the transaction and oversee the use of the loan proceeds.

*Comment:* A commenter stated that section 9 should include a "cost cut-off date" to describe the period for pre-completion accounting.

*HUD Response:* HUD clarifies that the cost cut-off date is any date chosen by the borrower after completion of the project, in accordance with program obligations.

*Comment:* A commenter stated the provisions in section 11(h) requiring all litigation against principals to be disclosed to HUD creates an unnecessary administrative burden. The commenter stated as an example that divorce proceedings or professional liability claims on any facility that an operator handles would need to be disclosed.

*HUD Response:* HUD determined to retain this provision. Appropriate oversight requires knowledge of the litigation risks and patterns confronting a project. To limit the administrative burden of this provision, HUD has added the phrase "pursuant to Program Obligations" and will provide additional details as and if necessary.

*Comment:* A commenter recommended that section 13(e), relating to transfer of "Replacement Reserve Accounts" upon refinancing be deleted.

*HUD Response:* HUD has adopted this recommendation because section 13(b) adequately addresses the interests involved and makes section 13(e) unnecessary.

*Comment:* A commenter recommended section 13(g) (now 13(f)), be revised to refer to "withdrawals" from the reserve for replacement, rather than "loans."

*HUD Response:* HUD declines to accept this recommendation. This section provides for the possibility that a borrower may take funds in the form of a loan to be repaid, rather than as a withdrawal, from the reserve, and that such funds would not be limited to the purposes for which withdrawals from this reserve must be limited.

*Comment:* Several commenters suggested elimination or substantial revision to the long-term debt service reserve requirements in proposed section 14.

*HUD Response:* As stated in the preamble, HUD has revised the borrower's regulatory agreement to eliminate the long term debt service reserve provisions in accordance with the 2012 Final 232 Rule, 24 CFR 232.11. The document reserves a section for provisions to be inserted in those rare instances where HUD will require a long-term debt service reserve.

*Comment:* Several commenters objected to language used in section 15 revising the definition and calculation of surplus cash.

*HUD Response:* As stated in the preamble, HUD recognizes the concerns raised by the commenters and has returned to the definition of surplus cash currently in use in the program.

*Comment:* Several commenters submitted comments on section 16 ("Distributions"). A commenter stated that, in section 16(a), reconciliation requirements are not defined, and recommended this provision be revised to include a reference to the requirements listed in section 16(d). The commenter further recommended a modification to the prohibition on distributions to non-profit borrowers in conformance with the revised definition of non-profit borrower. The commenter further recommended revising section 16(b) to include an exception to the prohibition on distributions from borrower funds in the instance where the borrower is the operator and the distribution is permitted under the operator's regulatory agreement. With respect to section 17, a commenter made a similar comment, recommending that in section 17(a) a statement that distributions to non-profit borrowers are prohibited be modified to reflect a revised definition of non-profit borrowers. With respect to section 17(b), the commenter stated that HUD's proposed agreement should be revised to include a method of calculating a standard for periodic determination of

the amount that constitutes residual receipts.

**HUD Response:** HUD has revised section 16 in accordance with these comments. HUD removed the capitalization from the words “Reconciliation Requirements” to indicate that the plain meaning of the words, as clarified in the context of the provision, should prevail. HUD also added section 16(e) to set the terms under which non-profit borrowers may make distributions, in accordance with HUD’s recent practice.

**Comment:** Multiple commenters commented on section 18. Multiple commenters stated that this section was confusing. Multiple commenters stated that section 18(c) requiring HUD approval of interest on advances was unnecessary since repayment of interest by affiliates must be in accordance with loan documents and program obligations, or approved by HUD.

**HUD Response:** HUD has revised this section to clarify the provisions. HUD has determined that proper oversight requires that repayment of advances be made on terms approved by HUD. HUD will provide further details as and if necessary.

**Comment:** A commenter recommended that section 19(c) be revised to stipulate that annual financial statements must comply with both HUD and GAAP requirements, and quarterly financial statements must meet HUD requirements but not GAAP requirements.

**HUD Response:** HUD agrees with the commenter and adopted the commenter’s recommendations. HUD will provide additional details for the requirements of operator’s financial statements as necessary.

**Comment:** Multiple commenters expressed concern that HUD’s requirements for expenses to be reasonable and necessary and specifying procedures for acquiring goods and services above certain thresholds (in section 23) are overly broad and may not be enforceable by HUD.

**HUD Response:** Similar comments were received in connection with the 2012 Final 232 Rule, and HUD has revised this document to be consistent with that final rule. In making such revisions, HUD has attempted to balance its interests in meaningful oversight without imposing unreasonable burdens on the project or creating unenforceable requirements. HUD determined that the level of specificity of this provision in the proposed document is unnecessary and may interfere with appropriately desired flexibility to address what is considered reasonable and necessary in any specific geographic area. To provide

some direction HUD establishes a high threshold as a benchmark. HUD set a threshold of 5 percent of the effective gross revenue of the facility, requiring that written cost estimates must be obtained by the purchaser (though not routinely provided to HUD) when goods and services having a cost about that threshold are being acquired.

**Comment:** Several commenters commented on section 25 (“Permits and Approvals”) and section 36 (“Declaration of Default”). One commenter objected to the rights that sections 36(b) and 25(c) provide to HUD if HUD determines there is a substantial risk of termination, suspension, or restriction with respect to any permits or approvals. The commenters stated that these provisions present concerns for the following reasons: (i) HUD obtains unilateral right to require replacement of the operator based upon a subjective determination; (ii) the extensive obligations set forth in the various regulatory agreements, security instrument and other program obligations provide HUD with more than adequate protections; (iii) HUD’s ability to declare a default due to a “material adverse diminution” in value could result in unreasonable outcomes; and (iv) HUD’s ability to declare a default due to a “restriction” on a permit or approval could result in unreasonable outcomes. The commenter stated that these provisions permit HUD to act in those situations when the risk would prevent the project from being operated for its approved use and would have a material adverse effect on the value of the mortgaged property. Another commenter recommended limiting HUD’s remedies to instances where risks jeopardized operation of the project for the approved use. The commenter recommended the deletion of the provision entitling HUD to declare a default.

**HUD Response:** HUD understands the commenters’ concerns and in response has limited the definition of “Permits and Approvals” to those “reasonably necessary” to operate the facility. In addition, HUD has modified the declaration of default provisions so that they apply only where such restrictions of the permits or approvals would have a materially adverse impact on the project.

**Comment:** A commenter suggested language be added to section 26(a) (“Operator; Cooperation in Change of Operator”) to require the borrower to execute an operator security agreement if the borrower is or becomes the operator.

**HUD Response:** HUD agrees and has revised this section accordingly.

**Comment:** A commenter stated that section 28 would require borrowers and operators to conform to post-closing changes in HUD’s professional liability insurance (PLI) requirements, and that, given the expense of such insurance, a unilateral right to HUD to modify is unreasonable.

**HUD Response:** HUD disagrees with this comment. These provisions conform to multifamily program requirements and protect HUD’s interest in maintaining up-to-date requirements for insurance.

**Comment:** Multiple commenters stated that section 31, which requires all third-party vendor contracts to include a provision entitling HUD to terminate the contract without cause or penalty, is intrusive and unnecessary. One commenter stated that it is unreasonable that section 31 allows HUD to require replacement of a Management Agent even if the borrower, operator and Managing Agent are in complete compliance with loan documents. Another commenter recommended limiting requirements to instances of violations of the borrower’s regulatory agreement, which would be parallel to the structure of section 12 (now section 13) of the operator’s regulatory agreement. Another commenter recommended that section 31 be deleted in its entirety. The commenter asked why HUD should require termination when such vendors are subordinate to the mortgage lien and may be terminated upon foreclosure. Another commenter suggested that the provision in section 30 entitling HUD to require actions by the borrower to cause conformance to program obligations should be tied to failure to cure a violation with 30 days of notice.

**HUD Response:** HUD modified the provision to limit HUD’s termination rights for management agreements to only those instances when there is an event of default under a loan document or when any of the necessary permits or approvals is in substantial and imminent risk of termination, so as to have a material adverse effect on the property. HUD limited the required termination provision for vendors to those having an identity of interest with the borrower and/or operator.

**Comment:** A commenter recommended revisions to section 33 to exclude leases for beauty parlors and other leases for support or ancillary services from the requirement of HUD written approval (provided any such lease is subordinate to Security Instrument), for a term not more than a year and represents less than two percent of projected gross revenues.

*HUD Response:* HUD agrees and has adopted the commenter's recommendation.

*Comment:* A commenter suggested revisions to section 34(d) to allow payment of fair and reasonable compensation to employees who are officers, directors, etc. The commenter also recommended that section 34(i) be deleted because HUD's purposes are not served by restricting a borrower's ability to accept receipt of endowments. The commenter also recommended revisions to section 34(j) to state more clearly the applicable limitations on amendment of borrower's organizational documents.

*HUD Response:* HUD has generally accepted these comments. HUD has made section 34(d) consistent with 24 CFR 232.1013 of the 2012 Final 232 Rule and has revised the other sections referenced to address the commenter's concerns.

*Comment:* A commenter stated that section 34(k) (now 34(j)) requires that a borrower must obtain HUD approval in order to institute litigation. The commenter stated that this was an inappropriate intrusion by HUD and commenters are unaware of any loan documents of any lender which would impose such lender approval rights.

*HUD Response:* HUD determined that this provision already included adequate limits to address the commenter's concerns. Litigation seeking a recovery below the \$100,000 threshold and litigation covered by professional liability are explicitly excluded from this section.

*Comment:* A commenter stated that section 34(m) (now 34(l)), that calls for HUD to approve any payments from a provider of goods and services did not seem to serve reasonable interests. The commenter stated that this provision would require approval for refunds of overpayments, refunds for unnecessary and unused goods, discounts, rebates, and returns of stolen funds or property, all of which would benefit the project.

*HUD Response:* HUD agrees and has limited this provision to instances where the fee is exchanged for a right to provide the goods and/or services.

*Comment:* A commenter stated that section 34(o) (now section 34 (n)), that requires HUD approval for all contract amendments, will involve HUD in mundane, day-to-day business decisions that do not warrant HUD's attention.

*HUD Response:* Pursuant to the changes in the 2012 Final 232 Rule, HUD modified this provision to exclude those instances where program obligations dictate that HUD approval is not required and to insert a materiality threshold to the enumerated types of amendments that require approval.

*Comment:* A commenter suggested revisions to section 38 ("Nonrecourse Debt"), to reference an attached non-recourse rider for execution and drafted a proposed rider.

*HUD Response:* HUD declines to adopt the suggestion, but has provided that this section may be executed in counterpart.

*Comment:* A commenter object to section 43 of the borrower's regulatory agreement that provides "any reference in this regulatory agreement to program obligations shall be construed as referring to those program obligations which are amended from time to time." The commenter asked whether this was intended to change the previously established definition of program obligations arrived at when HUD revised its multifamily documents.

*HUD Response:* HUD has modified the document to delete this sentence. HUD believes the document as revised is consistent with the corresponding multifamily rental project closing document provisions.

#### *HUD-92466A-ORCF: Healthcare Regulatory Agreement—Operator*

*Comment:* A commenter stated that section 1 requires that rent due under a borrower-operator agreement be sufficient to pay all of the borrower's required mortgage loan payment including, replacement reserves, debt service reserves, and any maintenance and/or repairs for which the borrower has responsibility. The section further requires that if the operator and the borrower are not affiliated and have already executed a lease agreement or other borrower-operator agreement, the effect of the requirement is to either create an administrative obligation that is not reflected in the parties' contracts, or to force the parties to re-negotiate their business relationship. The commenter stated that in either case, the requirement shifts more cost to the operator, and while the borrower has the right to pursue a HUD loan, a non-affiliated operator should not be required to pay more than the rent it originally agreed to in the contract between the parties. The commenter stated that this provision clearly should apply only if the borrower and the operator are affiliates.

*HUD Response:* HUD declines to accept this recommendation. HUD has determined that its oversight responsibilities require it to ensure that the borrower will have sufficient funds available to meet its debt service and related responsibilities.

*Comment:* A commenter stated that the provisions of section 3 could result in HUD being overwhelmed with

notices for every minor violation, and that HUD should therefore establish a materiality threshold.

*HUD Response:* A materiality threshold for receipt of notices of violation is established at the end of section 3(c).

*Comment:* Multiple commenters objected to section 4(e) (now section 5(e)) that requires resident consent in the event the operator proposes to add an additional resident to an existing unit. One commenter stated that such requirement could prevent the operator from adding the additional resident, even if HUD approves it and such change has complied with any requirements of state or local law. As there may be financial implications that support a proposal to add an additional resident, the commenter stated that such situation should at least be considered, but that the language as proposed by HUD would not allow such consideration. The commenter therefore proposed deleting the requirement for resident consent in all cases.

*HUD Response:* These provisions are required by 12 U.S.C. 1715w(d)(4)(C)(ii).

*Comment:* Several commenters commented that the provisions in section 5 (now section 6), requiring the operator to hire a consultant if HUD determines that an operator's performance may be placing the operational and/or financial viability of a healthcare facility at risk, were overly broad and vague. One commenter stated that HUD should not have the power to cause consultants to dictate how the operator should run its business or require the operator to pay for the consultant, especially for an operator not affiliated with the borrower. Another commenter stated that such requirement can be very expensive and third-party operators will not want to be forced to hire a consultant without a "bright-line" trigger for this requirement. Several commenters suggested revisions to limit the applicability of this provision. One commenter stated that even after a monetary default, to avoid wasting funds, a consultant should only be brought in upon certain significant threshold events such as: (a) the facility has multiple surveys within a significant time period with actual "harm tags" not corrected within the time periods required by the Centers for Medicare and Medicaid Services (CMS); (b) the facility's survey puts the facility on fast track decertification and such issue has not been resolved within the time periods required by CMS; and (c) the operating income plus management fees Earnings Before Interest, Taxes, Depreciation, Amortization, Rent and

Management Fees (EBITDARM) becomes negative on a trailing twelve-month basis.

**HUD Response:** HUD acknowledges the commenters' concerns and has significantly revised this provision. HUD has set forth the concept of "project operating deficiency" as a bright-line trigger for requirements to hire a consultant, and has detailed the circumstances that constitute such a project operating deficiency, as set forth in revised section 5. HUD has also clarified that HUD will consult with operator, lender, and borrower before approving the consultant's recommendations.

**Comment:** A commenter stated that the requirement in section 6 (now section 7) that the operator must create a risk management program can be a very expensive endeavor for small single facilities with little benefit to HUD that is not covered by Housing Notice 04-15: Professional Liability Insurance.

**HUD Response:** HUD acknowledges the commenter's concern but has determined that a risk management program is vital to managing the risks inherent in operating healthcare facilities. HUD has determined that the requirements for the risk management program are flexible and are not overly burdensome, and HUD will provide additional details as necessary.

**Comment:** Many commenters commented on the provisions in section 7(c) making it a violation of the agreement if the operator fails to maintain positive healthcare facility working capital. Multiple commenters stated that operators routinely move cash around their operations so that, on a short term basis, a project may have negative working capital. Another commenter stated that the violation should be tied to occurrences of negative working capital in the aggregate on a quarterly basis. Another commenter stated that merely having a poor performing property should not be an event of default, but that HUD should restrict specific actions, such as cash distributions, if the working capital goes negative.

**HUD Response:** HUD acknowledges the commenters' concerns and has deleted the provisions making it a violation of the operator's regulatory agreement to have negative working capital. Instead, HUD tied a project operating deficiency, which triggers HUD's rights to require the operator to hire a consultant, to three quarters of negative working capital. In addition, HUD has restricted the operator's ability to take distributions if the operator's most recent quarterly financial

statement indicates negative working capital.

**Comment:** A commenter stated that section 20 (now section 21, "Uniform Commercial Code/Liens") provides that if the project includes a skilled nursing home, the operator is permitted to pledge the facility's accounts receivables to an accounts receivable lender. But in typical accounts receivable financing, the operator is generally required to pledge more than its accounts receivables. The commenter stated that the operator should be allowed to pledge all of its personal property in such form as approved by the lender and HUD.

**HUD Response:** HUD has revised this section to accommodate the commenter's concern. In addition, HUD notes that granting liens on collateral, including but not limited to the accounts receivable, may be allowed by the language of this provision if such liens are approved by HUD. The HUD-required intercreditor agreement may evidence certain HUD approvals.

**Comment:** A commenter stated that several provisions of this agreement effectively penalize a performing operator for the borrower's failure to satisfy borrower obligations, and that such regulatory structure is inappropriate, particularly in a non-identity-of-interest case.

**HUD Response:** HUD acknowledges the commenter's concerns but has determined that HUD's interests, including those of protecting the insurance fund, require HUD to approach oversight of the project in a holistic manner. HUD notes that in a non-identity-of-interest scenario, the operator can secure a right to cure borrower's defaults, with an extendable cure period, through the Subordination, Non-Disturbance, and Attornment Agreement (SNDA) relating to its operating lease.

#### **HUD 94000-ORCF: Security Instrument/ Mortgage Deed of Trust**

**Comment:** A commenter stated that the "Mortgaged Property" as defined includes licenses and accounts receivable held by the operator. The commenter stated that this is problematic because HUD cannot require the operator (especially third party operators) to offer the license in the operator's name as collateral for the borrower's mortgage. The commenter stated that, in addition, if a facility's operator has accounts receivable financing, HUD will not have the first priority on that collateral.

**HUD Response:** The definition of "Mortgaged Property" is limited to the "borrower's present and future right,

title, and interest in" the items listed. HUD is attempting, through the documents in their totality, to protect its interests comprehensively, given the variety of possible deal structures. With regard to accounts receivable financing, any discrepancies in the respective loan documents will be governed by the Intercreditor Agreement.

**Comment:** A commenter stated that section 48, Environmental Hazards, should account for state-specific requirements, such as states with a "One Act Rule."

**HUD Response:** HUD has revised this section, giving instruction to add state-specific requirements as necessary. Such provisions may provide, for example, that a separate environmental indemnity may need to be recorded to comply with the practice and requirements of that jurisdiction.

**Comment:** A commenter stated that HUD should consider requiring a separate Security Agreement for borrowers, rather than relying upon the security agreement language contained in the Security Instrument.

**HUD Response:** HUD declines to adopt the commenter's recommendation. The security agreements contained within the Security Instrument follow the model set by the multifamily program and conform to industry practice.

#### **HUD-92070-ORCF: Lease Addendum (ground lease)**

**Comment:** A commenter requested that HUD revise the instructions to allow for buildings, improvements, and fixtures to be either owned in fee simple by the ground lease tenant or leased to the tenant under the ground lease; exclude the instructions from inclusion with the Addendum in the Lease; and remove all signature blocks on the form because the lease addendum must be incorporated by reference in the ground lease and the lender is not party to the ground lease.

**HUD Response:** HUD agrees with the recommended changes, but not with removal of the signature blocks.

#### **HUD-94001-ORCF: Healthcare Facility Note.**

**Comment:** A commenter recommended that paragraph 9(h), which relates to loans insured under the section 207 program, pursuant to sections 207 and section 223 of the National Housing Act, be removed. The commenter stated that this provision is not applicable to healthcare loans and it is an optional provision for mortgages insured under section 223(f) of the National Housing Act concerning use agreements for rental housing projects.

*HUD Response:* HUD agrees with the commenter and the recommended change was accepted.

*Comment:* A commenter stated that section 13 of the Note converts an interest payment into a partial prepayment in the event that the interest rate exceeds the maximum legal rate in the property jurisdiction. The commenter stated that such a partial prepayment could trigger a prepayment penalty under section 9. As such, the commenter recommended that section 9(c) be modified so that any prepayment which results from section 13 will not trigger any prepayment penalty.

*HUD Response:* HUD has determined that no change to the documents is necessary. Section 13 dictates that, under the specified conditions, in order to preserve payments the lender has previously received, that portions of such payments would be deemed payments toward the reduction of the indebtedness owed the lender. In order to charge a prepayment premium in such circumstance, a lender would have to argue that as a result of the structure it imposed on the loan and of the conventions dictated in section 13, it is entitled to additional funds in excess of the limits that triggered the provisions of section 13 in the first place. A lender would be estopped from making such an argument.

*HUD-92414-ORCF: Latent Defects Escrow*

*Comment:* A commenter suggested that the escrow should not be applied to the indebtedness in the event of the borrower's default as these are the funds for the contractor, and should not be applied to indebtedness.

*HUD Response:* HUD agrees with the commenter and has adopted the commenter's recommendation.

*HUD-9443-ORCF: Minor Moveable Escrow*

*Comment:* A commenter stated that the Movable Equipment Escrow Agreement published for review and comment does not contain the boilerplate language and terminology used across the other proposed escrow agreements. The commenter suggested a revised form, using the proposed Escrow Agreement for Working Capital as the starting point and modifying it by inserting the substantive provisions from the proposed form of Minor Movable Equipment Escrow Agreement.

*HUD Response:* HUD agrees and accepted the commenter's recommendation.

*HUD-92266-ORCF: Application for Transfer of Physical Assets (TPA)*

*Comment:* A commenter stated that the preliminary approval instructions should be consistent with the other forms, such as the TPA submission check.

*HUD Response:* HUD agrees with the commenter and has adopted the recommendations.

*HUD-93486-ORCF: Computation of Surplus Cash*

*Comment:* A commenter requested that HUD conform the form to the borrower's regulatory agreement definition of surplus cash.

*HUD Response:* HUD adopted the commenter's recommendation and changes were made to conform to the revised definition of "Surplus Cash" in section 15 of the borrower's regulatory agreement.

*HUD-92322-ORCF: Intercreditor Agreement*

Several commenters suggested that HUD should reach out directly to accounts receivable lenders to determine mutually agreeable provisions for this document, since this is an agreement with a third-party lender, as opposed to a loan document to a party directly benefiting from the FHA-insured loan. HUD agreed with the commenters' suggestion and has reached out to members of the accounts receivable industry directly. Through both submitted written comment and direct discussions with members of the accounts receivable industry, the comments discussed below emerged as the most important to the industry.

*Comment:* Several comments were received regarding the concept of "Cut-Off Time." Several commenters stated that the proposed Cut-Off Time provisions did not give accounts receivable lenders ("AR Lenders") sufficient notice of the loss of their priority position, since the Cut-Off Time would be effective immediately upon delivery of notice of default. Many commenters stated that having the Cut-Off Time effective immediately would eliminate any incentive for AR Lenders to participate in workouts and would instead encourage AR Lenders to halt further advances. Many commenters stated that no AR Lender would accept this provision resulting in difficulty to secure accounts receivable financing for FHA-insured transactions.

*HUD Response:* HUD has substantially revised the concept of Cut-Off Time. Although HUD determined that the previously used concept of "Possession Date" provided too long a

period before the AR Lender lost priority, HUD agreed that additional notice would be beneficial. HUD revised the document to differentiate between triggering events caused by defaults of the accounts receivable financing ("AR Loan Triggering Event"), for which the AR Lender should be immediately aware if conducting appropriate oversight, and triggering events caused by defaults of the FHA-insured loan ("FHA Triggering Event"), for which the AR Lender may not be aware without notice. HUD has specified that the Cut-Off Time may be no earlier than 30 days after notice of an FHA Triggering Event and 30 days after an AR Loan Triggering Event. The Cut-Off Time Notice has also been revised to account for this distinction, and to explicitly contemplate extension of the Cut-Off Time if, for example, the parties are negotiating in hopes of a workout. In addition, the definition of "Protective Advances" has been revised to clarify that it includes any advances made after the Cut-Off Time which the AR Lender, in its discretion, deems reasonably necessary to preserve and protect its priority collateral.

*Comment:* Several commenters suggested expanding the definition of the "AR Lender Priority Collateral" to include all collateral except certain collateral carved out as priority collateral securing the FHA-insured loan. Multiple commenters stated that AR Lenders need to preserve access to the books and records and that HUD should preserve the ability of these items to serve as collateral for the accounts receivable loan.

*HUD Response:* HUD largely declined to make the suggested changes, as HUD determined that the reduced exposure resulting from changes to Cut-Off Time provided adequate additional protection to AR Lenders. Regarding books and records, HUD notes that the fact that books and records are not given the extra beneficial treatment of "AR Lender Priority Collateral" does not exclude such items from the AR Lender's collateral. AR Lenders may still take a security interest in the books and records and reserve a right to inspect those books and records as necessary. HUD did determine that adding deposit accounts to the definition of AR Loan Priority Collateral was appropriate.

*Comment:* Several commenters suggested expanding the definitions of "AR Loan Obligations" and "Priority Obligations" to incorporate interest and letters of credit.

*HUD Response:* HUD largely adopted the commenters' suggestions, provided that the "Maximum Commitment Amount" and program obligations



provide some limit to potential obligations.

*Comment:* Several commenters questioned how this form would work in a portfolio transaction with many healthcare facilities.

*HUD Response:* HUD contemplates that a distinct Intercreditor Agreement will be executed for each FHA-insured loan. To clarify requirements, HUD revised the agreement to include a definition of "Other Facilities," and added section 2.2(c) to disclaim prioritization among FHA-insured lenders. HUD also revised the definition of Cut-Off Time to provide that AR Loan Triggering Events that relate to one accounts receivable line of credit would be considered triggering events for the other facilities financed by that line of credit. In contrast, since each Intercreditor Agreement sets forth the relationship of its respective FHA-insured lender vis-à-vis the AR Lender, a similar provision for an FHA Triggering Event would not be appropriate.

*Comment:* A commenter suggested consolidating the various options for section 3.4 (relating to lock-box and other account agreements).

*HUD Response:* HUD declines to make the suggested changes. HUD determined that retaining the three possible versions is necessary to allow several appropriate options.

*Comment:* A commenter stated that the Intercreditor Agreement no longer permits cross-defaults between FHA and non-FHA lines of credit, and that this will discourage large portfolio owners from utilizing FHA-Insured financing. The commenter stated that it frequently finds AR Lenders are willing to allow FHA and non-FHA facilities to be segregated as collateral but are requiring them to be cross-defaulted as permitted under the current Notice H 08-09: Accounts Receivable ("AR") Financing.

*HUD Response:* Each facility will have its own Intercreditor Agreement and the document includes a definition of "Other Facilities" that means any other healthcare facility financed by a mortgage loan made by a HUD-approved lender or held by HUD. Section 3.6 was revised to require the AR Lender and operator to certify and agree that any and all cross-default provisions have been disclosed to and approved in writing by HUD. HUD determined that these provisions were necessary to meet its oversight obligations.

#### *HUD-92323-ORCF: Operator Security Agreement*

*Comment:* A commenter stated that a separate form of security agreement should be developed for use when the

operator does not share an identify of interest ("IOI") with the borrower because a non-IOI operator will generally not be willing to grant a security interest in its assets as security for a loan being obtained by an unrelated borrower.

*HUD Response:* HUD declines to differentiate between IOI and non-IOI operators at this stage. HUD has determined that proper oversight of the projects requires a direct security interest in the operator's interests in the healthcare facility.

*Comment:* Multiple commenters expressed concern with recording this document, as Exhibit C sets forth sensitive deposit account information that the operator would not want included in a recorded document.

*HUD Response:* HUD determined that the inclusion of the deposit account information is necessary. However, HUD acknowledged the concern with recording sensitive information. Because only the assignment of leases portion of the document would need to be recorded to perfect the security interest it purports to grant, the assignment of leases portions of this document have been separated into an attachment. In this way, the assignment of leases provisions may be separated and recorded without recording the rest of the document.

*Comment:* With respect to sections 2(a) and 2(b), Representations and General Covenants, a commenter proposed the addition of a concept of permitted liens encompassing both the security interest in favor of the secured party and any liens approved in writing by the secured party and HUD, which are allowable liens against the collateral.

*HUD Response:* HUD accepts the concept of permitted liens, and the document has been revised accordingly.

*Comment:* A commenter proposed language in section 2(b) that obligates the operator to ensure necessary UCC terminations are filed and to provide the secured party with search results evidencing the same. A commenter also proposed use of the operator's location (rather than the chief executive's office), as this term is used in the UCC, under which secured parties must file a UCC-1.

*HUD Response:* HUD partially accepts the commenter's recommendation. HUD has included language in the "Further Assurances" section obligating the operator to provide UCC searches showing HUD filings and no other filings on request or in any event within 45 days. Additionally, HUD has added the operator's location as used in the UCC.

*Comment:* A commenter requested that HUD revise section 8(a), relating to an Event of Default, to clarify that if the obligations are not paid when due (regardless of which entity pays them) it constitutes an Event of Default.

*HUD Response:* HUD agrees with the commenter's recommendation.

*Comment:* Several commenters found provisions relating to government receivables accounts, deposit account control agreements, deposit account instructions and service agreements, and related concepts, lacking and provided suggestions for clarifying requirements.

*HUD Response:* HUD largely agreed with the suggested revisions. Such changes are reflected in the redlined/strikeout version of this document posted on HUD's Web site at the address set forth in the introduction to this notice.

#### *HUD-92211-ORCF: Master Lease Addendum*

*Comment:* A commenter stated that subordination, non-disturbance and/or attornment language should be incorporated into the Master Lease Addendum, negating the need for separate subordination agreements.

*HUD Response:* HUD disagrees with this recommendation. The lender needs privity of contract with the lessee and this addendum to the master lease does not establish that.

*Comment:* A commenter stated that as drafted, section 9, relating to ownership of bed authority, conflicts with licensing requirements and similar sections of the Operating Lease Addendum. A commenter stated that if the landlord owns the bed authority the operator would not be able to obtain and maintain the provider agreements. The commenter suggested removing that requirement from the Master Lease Addendum.

*HUD Response:* HUD agreed with the commenter and accepted the recommendation.

*Comment:* A commenter suggested adding to section 13 (now section 11, Subletting and Assignment) a clause clarifying that in the case of a transfer to an affiliate, the transferee must submit a form HUD-2530 for previous participation clearance, and receive prior HUD approval.

*HUD Response:* HUD determined that this provision is not necessary given the existing language in this section that requires HUD approval of any transfer.

*Comment:* A commenter suggested several additional provisions to expand the scope of the Master Lease Addendum.

*HUD Response:* Most of these provisions were duplicative of provisions in other documents, such as the master tenant's regulatory agreement. Since HUD is not a party to the Master Lease Addendum, HUD determined it would set forth its oversight requirements for the master tenant in the master tenant regulatory agreement.

*HUD-92331-ORCF: Cross-Default Guaranty of Subtenants*

*Comment:* A commenter recommended adding new provisions for a "waiver of subrogation" in section 6, or as a new section 26.

*HUD Response:* A waiver of subrogation is already in the first sentence of section 10 of this document.

*HUD-92333-ORCF: Master Lease Subordination Non-Disturbance and Attornment Agreement (SNDA)*

*Comment:* A commenter stated that the Agreement should be limited to a subordination agreement, and that HUD should move all regulatory and oversight provisions to the operator or master tenant regulatory agreement and retain necessary SNDA provisions, if applicable. Another commenter recommended moving the necessary SNDA provisions to the Master Lease Addendum to avoid introducing conflicting agreements. The commenter expressed concern that tremendous efforts will be needed at each closing to make the subordination agreements consistent with the regulatory agreements and the Master Lease Addendum. The commenter further stated that the Master Lease Addendum could be structured so that the lender acknowledges the subordination provisions and a separate agreement can be eliminated.

*HUD Response:* HUD agrees with the commenter's approach of limiting the provisions in the SNDA to subordination and related provisions and placing regulatory and oversight provisions in the master tenant regulatory agreement, and has revised the document accordingly. However, HUD disagrees with the comments regarding incorporating the SNDA provisions into the Master Lease Addendum and has determined that the SNDA is appropriate as a separate and recordable document.

*Comment:* A commenter stated that the provisions in this document and the operator regulatory agreement document requiring the master tenant and/or operator to hire a consultant if a deficiency occurs should be made consistent. The commenter stated that unlike the operator regulatory

agreement, this document's "bright line" provisions for when a consultant must be hired is a better method than the ambiguity created in the operator's regulatory agreement, but that the current trigger for such requirement, a project operating deficiency, is unacceptable to the industry.

*HUD Response:* HUD has revised the cited provisions in this document and in the operator's regulatory agreement to be consistent and has revised the concept of a project operating deficiency in response to comments from the industry.

*Comment:* Multiple commenters stated the provisions in section 6, regarding a master tenant's and operator's right to cure defaults, should be revised and clarified. One commenter suggested that the rights to cure and the extensions of cure periods should not be limited to instances where no project operating deficiency exists. Another commenter also recommended further extending the cure period extensions.

*HUD Response:* HUD acknowledges the commenters' concerns but has determined that the revised definition of project operating deficiency adequately addresses the concerns regarding the limitation on the cure rights. HUD has also determined that the extension periods provided are sufficient. These provisions attempt to balance the rights of the lender with the borrower and operator's rights.

*HUD-92337-ORCF: Healthcare Regulatory Agreement—Master Tenant*

*Comment:* A commenter objected to provisions giving HUD rights, if HUD determines there is a substantial risk of termination, suspension, or restriction with respect to any permit or approval, to declare an Event of Default without further notice. The commenter stated that: (i) HUD's unilateral right to require replacement of the operator is based upon a subjective determination, (ii) the extensive obligations set forth in the various regulatory agreements, security instrument and other program obligations provide HUD with more than adequate protections, (iii) HUD's ability to declare a default due to a "restriction" on a permit or approval could result in unreasonable outcomes. The commenter recommended that these provisions be revised to permit HUD to act in those situations when the risk would prevent the project from being operated for its "Approved Use" and would have a material adverse effect on the value of the Mortgaged Property.

*HUD Response:* HUD acknowledges the commenter's concerns and has revised the document accordingly. The

definition of "Permits and Approvals" has been limited to those reasonably necessary to operate and/or fund the project for its approved use, and the restrictions on permits and/or approvals triggering HUD's rights have been limited to such restrictions that would have a materially adverse effect on the project.

*Comment:* The commenter recommended that the document be revised so the operator is not required to have a risk management program that meets the requirements of the section unless HUD requires the operator to do so.

*HUD Response:* HUD acknowledges the commenter's concern but has determined that a risk management program is vital to managing the risks inherent in operating healthcare facilities. HUD has determined that the requirements for the risk management program are flexible and are not overly burdensome, and HUD will provide additional details as necessary.

*Comment:* A commenter objected to the provisions in section 14 regarding the segregation of project accounts. The commenter stated that the master tenant will not be operating the facility and will likely have an account into which rents paid under all of the subleases of projects covered by the master lease are deposited.

*HUD Response:* HUD revised the language to be consistent with the 2012 Final 232 Rule to allow for the use of a general collection account, provided deposits can be readily and reliably traced to each applicable facility.

*Comment:* Multiple commenters commented on the financial reporting and covenants provisions in section 14. One commenter stated that HUD does not have an interest in the financial reports of the master tenant. Another commenter stated that section 14, paragraph (e), requiring the master tenant to cause the healthcare facility to maintain positive working capital is unworkable for master lease transactions.

*HUD Response:* HUD maintains its interests in the financial reports of all parties involved in the transaction, but has clarified the reporting provisions to indicate that consolidated reports may be appropriate. Consistent with the 2012 Final 232 Rule, HUD has removed the requirement to maintain positive healthcare facility working capital.

*HUD-92340-ORCF: Master Tenant Security Agreement*

*Comment:* A commenter stated that as published, the master tenant security agreement appears to contemplate that it will be a recorded instrument. The

commenter further stated that if the security interests in the master tenant security agreement are adequately perfected through filing of the UCC financing statements, there would be no need to also record the master tenant security agreement.

**HUD Response:** HUD declined to adopt the commenter's recommendation because this document includes assignments of rents and leases which are typically required to be recorded. The master tenant's assignment of its subleases is the primary collateral it is pledging as security for the obligations set forth in the loan documents. HUD notes, however, the reluctance to record sensitive information and has indicated that Exhibit C, which includes sensitive information, should not be recorded.

**Comment:** A commenter recommended that separate forms of the security agreement should be developed for use when the operator and/or master tenant does not share an identity of interest with the borrower. The commenter recommended that a non-identity of interest operator and/or master tenant should not be required to grant a security interest in favor of both the lender and the borrower in its assets as security for payment and performance of its obligations under the lease and the obligations of the operator or master tenant under those loan documents to which the operator or master tenant is a party.

**HUD Response:** HUD has determined at this time to maintain a uniform set of requirements for both identity of interest and non identity of interest transactions.

**HUD-91725-INST-ORCF: Instructions for Guide to Opinion of Borrower's and Operator's Counsel**

**Comment:** A commenter stated that separate forms and instructions should be promulgated with respect to both a guide for opinion of operator's counsel and a guide for opinion of master tenant's counsel.

**HUD Response:** HUD determined that the instructions to the borrower's counsel's opinion were sufficiently encompassing to apply to both the guide to the borrower's counsel's opinion and the guide to the operator's counsel's opinion. HUD determined that a separate set of instructions for the master tenant's counsel's opinion was not necessary at this time.

**HUD-91725-ORCF: Guide for Opinion of Borrower's Counsel**

**Comment:** A commenter suggested having a description of the docket searches attached to the opinion as an exhibit.

**HUD Response:** HUD has determined that because the searches are submitted at a prior stage in processing, a description of the searches need not be attached to the opinion.

**Comment:** A commenter suggested that HUD add an assumption that formerly was included in the multifamily program's opinion of borrower's counsel, as follows: "The Mortgagor has title or other interest in each item of (i) real and (ii) tangible and intangible personal property ("Personalty") comprising the Property in which a security interest is purported to be granted under the Loan Documents."

**HUD Response:** HUD declines to adopt this change. As noted by the commenter, it is no longer a provision in the multifamily rental project documents and is not appropriate for inclusion in the healthcare facility documents.

**Comment:** Several commenters suggested revisions to the list of documents so that documents are listed appropriately for the opinions to which they relate and so that inappropriate documents are not listed.

**HUD Response:** HUD generally agreed with these comments and appropriate changes are reflected in the redlined documents posted on HUD's Web site at the address set forth in the introduction to this notice. However, HUD also determined that where certain changes were not accepted, consistency with the opinion required for multifamily program was an overriding consideration.

#### IV. Findings and Certifications

##### Paperwork Reduction Act

The proposed new information collection requirements contained in this notice have been submitted to OMB for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public reporting burden for this new collection of information is estimated to include:

New form number	Form name	Number of respondents	Freq. of resp.	Resp. per annum	Avg. burden per hour per resp.	Annual burden hours	Avg. hourly cost per resp.	Annual cost
<b>Lender Narratives</b>								
HUD-9001-ORCF .....	Lender Narrative 223a7—Main .....	30	2.5	75	22.00	1650	\$75	\$123,750
HUD-9001a-ORCF .....	Lender Narrative 223a7—Addenda—PCNA .....	30	2.5	75	1.50	113	75	8,438
HUD-9001b-ORCF .....	Lender Narrative 223a7.223d.232i—Addendum—ALTA/ACSM Land Title Survey.	30	2.5	75	0.25	19	75	1,406
HUD-9001c-ORCF .....	Lender Narrative 223a7—Addendum—Environmental.	30	2.5	75	0.25	19	75	1,406
HUD-9001d-ORCF .....	Lender Narrative 223a7—Addendum—Other Existing Eligible Indebtedness.	30	2.5	75	0.25	19	75	1,406
HUD-9001e-ORCF .....	Lender Narrative 223a7.223d.232i—Addendum—Principal of Borrower.	30	2.5	75	0.50	38	75	2,813
HUD-9001f-ORCF .....	Lender Narrative 223a7.223d.232i—Addendum—Operator.	20	2.5	50	0.50	25	75	1,875
HUD-9001g-ORCF .....	Lender Narrative 223a7.223d.232i—Addendum—Management Agent.	12	2.5	30	0.50	15	75	1,125
HUD-9001h-ORCF .....	Lender Narrative 223a7.223d.232i—Addendum—Transfer of Physical Assets.	30	2.5	75	0.50	38	75	2,813
HUD-9001i-ORCF .....	Lender Narrative 223a7.223d.232i—Addendum—AR Financing.	30	2.5	75	0.25	19	75	1,406
HUD-9002-ORCF .....	Lender Narrative 223f .....	30	7.5	225	70.00	15750	75	1,181,250
HUD-9003-ORCF .....	Lender Narrative 241a .....	4	1	4	73.33	293	75	22,000
HUD-9004-ORCF .....	Lender Narrative—New Construction—Single Stage.	10	2	20	86.67	1733	75	130,000
HUD-9005-ORCF .....	Lender Narrative—New Construction—2 Stage Initial Submittal.	10	2	20	63.33	1267	75	95,000

New form number	Form name	Number of respondents	Freq. of resp.	Resp. per annum	Avg. burden per hour per resp.	Annual burden hours	Avg. hourly cost per resp.	Annual cost
HUD-9005a-ORCF .....	Lender Narrative—New Construction—2 Stage Final Submittal.	10	2	20	53.33	1067	75	80,000
HUD-9006-ORCF .....	Lender Narrative—Substantial Rehabilitation—Single Stage.	4	1	4	93.33	373	75	28,000
HUD-9007-ORCF .....	Lender Narrative—Substantial Rehabilitation—2 Stage Initial Submittal.	4	1	4	70.00	280	75	21,000
HUD-9007a-ORCF .....	Lender Narrative—Substantial Rehabilitation—2 Stage Final Submittal.	4	1	4	70.00	280	75	21,000
HUD-9008-ORCF .....	Lender Narrative—Blended Rate—Single Stage	4	1	4	70.00	280	62	17,267
HUD-90025-ORCF .....	Lender Narrative—Blended Rate—2 Stage Initial Submittal.	4	1	4	70.00	280	75	21,000
HUD-90025a-ORCF .....	Lender Narrative—Blended Rate—2 Stage Final Submittal.	4	1	4	70.00	280	75	21,000
HUD-9009-ORCF .....	Lender Narrative 232(i)—Fire Safety Equipment Installation, without Existing HUD Insured Mortgage.	5	2	10	0.67	7	62	411
HUD-90010-ORCF .....	Lender Narrative 232(i)—Fire Safety Equipment Installation, with Existing HUD Insured Mortgage.	5	2	10	0.67	7	62	411
HUD-90011-ORCF .....	Lender Narrative 223(d)—Operating Loss Loan	1	2	2	0.67	1	62	82
HUD-9444-ORCF .....	Lender Narrative Cost Certification Supplement	2	2	4	6.67	27	75	2,000

## Production Certifications

HUD-90012-ORCF .....	Consolidated Certification—Lender .....	30	2.5	75	0.58	44	\$67	\$2,917
HUD-90013-ORCF .....	Consolidated Certification—Borrower .....	77	1	77	1.33	103	75	7,700
HUD-90014-ORCF .....	Consolidated Certification—Principal of the Borrower.	38	2	76	1.33	101	75	7,600
HUD-90015-ORCF .....	Consolidated Certification—Operator .....	35	2	70	1.33	93	75	7,000
HUD-90016-ORCF .....	Consolidated Certification—Parent of Operator	35	2	70	1.33	93	75	7,000
HUD-90017-ORCF .....	Consolidated Certification—Management Agent	35	2	70	1.33	93	75	7,000
HUD-90018-ORCF .....	Consolidated Certification—Contractors .....	4	1	4	1.33	5	75	400
HUD-90019-ORCF .....	Auditor Certification .....	3	1	3	0.58	2	67	117
HUD-90022-ORCF .....	Certification for Electronic Submittal .....	35	10	350	0.28	99	67	6,611
HUD-9445-ORCF .....	Certification of Outstanding Obligations .....	35	10	350	1.25	438	83	36,458
HUD-91118-ORCF .....	Borrower's Certification—Completion of Critical Repairs.	240	1	240	0.58	140	75	10,500
HUD-92434-ORCF .....	Lender Certification .....	35	10	350	0.75	263	75	19,688
HUD-91130-ORCF .....	Building Code Certification .....	26	2	52	0.33	17	83	1,444

## Construction Documents

HUD-91123-ORCF .....	Design Professional's Certification of Liability Insurance.	26	2	52	0.33	17	\$83	\$1,444
HUD-91124-ORCF .....	Design Architect Certification .....	26	2	52	0.33	17	83	1,444
HUD-91127-ORCF .....	Financial Statement Certification GC .....	26	2	52	0.37	19	67	1,271
HUD-92408-ORCF .....	HUD Amendment to B108 .....	26	2	52	0.28	15	75	1,105
HUD-95379-ORCF .....	HUD Representative's Trip Report .....	26	28	728	0.83	607	75	45,500
HUD-91129-ORCF .....	Lender Certification for New Construction Cost Certifications.	10	5.2	52	3.33	173	75	13,000
HUD-9442-ORCF .....	Memo for Post-Commitment Early Start of Construction Request.	3	2	6	0.70	4	75	315
HUD-92415-ORCF .....	Request for Permission to Commence Construction Prior to Initial Endorsement for Mortgage Insurance (Post-Commitment Early Start of Construction).	3	2	6	0.30	2	83	150
HUD-93305-ORCF .....	Agreement and Certification .....	10	5.2	52	0.50	26	75	1,950
HUD-92441-ORCF .....	Building Loan Agreement .....	10	5.2	52	1.00	52	75	3,900
HUD-92441a-ORCF .....	Building Loan Agreement Supplemental .....	10	5.2	52	1.00	52	75	3,900
HUD-92450-ORCF .....	Completion Assurance .....	10	5.2	52	0.50	26	75	1,950
HUD-92442-ORCF .....	Construction Contract .....	10	5.2	52	1.00	52	75	3,900
HUD-92554-ORCF .....	Supplementary Conditions of the Contract for Construction.	10	5.2	52	0.20	10	217	2,253
HUD-92456-ORCF .....	Escrow Agreement for Incomplete Construction	3	2	6	0.50	3	75	225
HUD-92479-ORCF .....	Offsite Bond—Dual Obligor .....	5	3	15	0.50	8	75	563
HUD-92452A-ORCF .....	Payment Bond .....	5	5.2	26	0.50	13	75	975
HUD-92452-ORCF .....	Performance Bond—Dual Obligor .....	5	5.2	26	0.50	13	217	2,817
HUD-92455-ORCF .....	Request for Endorsement .....	10	5.2	52	0.75	39	75	2,925
HUD-92023-ORCF .....	Request for Final Endorsement .....	10	5.2	52	1.00	52	75	3,900
HUD-92412-ORCF .....	Working Capital Escrow .....	10	5.2	52	0.50	26	75	1,950
HUD-91125-ORCF .....	Staffing Schedule .....	30	5.83	175	1.00	175	62	10,792

## Additional ORCF Documents

HUD-91708-ORCF .....	Agreement for Payment of Real Property Taxes	1	1	1	0.67	1	\$83	\$56
HUD-92576A-ORCF .....	Certificate of Need for Health Facility .....	3	2	6	0.30	2	83	150
HUD-90024-ORCF .....	Contact Sheet .....	35	10	350	0.67	233	67	15,556
HUD-91126-ORCF .....	Financial Statement Certification .....	150	7	1050	0.37	385	67	25,667
HUD-91116-ORCF .....	Addendum to Operating Lease .....	30	6.5	195	0.50	98	217	21,125
HUD-941-ORCF .....	Lenders FHA Number Request Form .....	30	11.7	351	0.37	129	62	7,937
HUD-92264a-ORCF .....	Maximum Insurable Loan Calculation .....	30	11.7	351	1.25	439	83	36,562.5

New form number	Form name	Number of respondents	Freq. of resp.	Resp. per annum	Avg. burden per hour per resp.	Annual burden hours	Avg. hourly cost per resp.	Annual cost
HUD-2-ORCF .....	Request for Waiver of Housing Directive .....	20	8	160	1.00	160	75	12,000
HUD-91119-ORCF .....	Schedule of Facilities Owned Operated or Managed.	35	10	350	1.33	467	75	35,000
HUD-91110-ORCF .....	Subordination, Non-Disturbance and Attornment Agreement of Operating Lease (SNDA).	30	11.7	351	2.33	819	233	191,100
HUD-91111-ORCF .....	Survey Instructions and Borrower's Certification	180	1.5	270	0.53	144	83	12,000
HUD-91112-ORCF .....	Request of Overpayment of Firm Application Exam Fee.	15	5.13	76.95	0.50	38	67	2,565
HUD-9839-ORCF .....	Management Certification—Residential Care Facility.	5	1	5	0.50	3	75	188
HUD-92466-ORCF .....	Healthcare Regulatory Agreement—Borrower ...	35	10	350	0.83	292	217	63,194
HUD-92466A-ORCF .....	Healthcare Regulatory Agreement—Operator ...	10	2	20	0.83	17	217	3,611
HUD-94000-ORCF .....	Security Instrument/Mortgage/Deed of Trust ....	35	10	350	1.00	350	217	75,833
HUD-92070-ORCF .....	Lease Addendum .....	2	1	2	0.50	1	217	217
HUD-94001-ORCF .....	Healthcare Facility Note .....	35	10	350	1.00	350	75	26,250
HUD-91710-ORCF .....	Residual Receipts Note—Non Profit Mortgagor	5	2	10	0.50	5	75	375
HUD-92420-ORCF .....	Subordination Agreement—Financing .....	7	2	14	0.50	7	217	1,517
HUD-92223-ORCF .....	Surplus Cash Note .....	7	2	14	0.50	7	75	525
HUD-2205A-ORCF .....	Borrower's Certificate of Actual Cost .....	30	7.5	225	3.5	788	75	59,100
HUD-92323-ORCF .....	Operator Security Agreement .....	30	6.5	195	2.00	390	200	78,000
<b>Escrow Documents</b>								
HUD-91128-ORCF .....	Initial Operating Deficit Escrow Calculation Template.	11	5	55	1.25	69	\$83	\$5,729
HUD-92414-ORCF .....	Latent Defects Escrow .....	20	12	240	0.50	120	75	9,000
HUD-9443-ORCF .....	Minor Moveable Escrow .....	26	2	52	0.92	48	83	3,972
HUD-92476-ORCF .....	Escrow Agreement Noncritical Deferred Repairs	20	12	240	0.50	120	75	9,000
HUD-92476B-ORCF .....	Escrow Agreement for Operating Deficits .....	12	4.8	57.6	0.50	29	75	2,160
HUD-92464-ORCF .....	Request Approval Advance of Escrow Funds ....	35	15	525	1.00	525	75	39,375
<b>Asset Management Documents</b>								
HUD-92266-ORCF .....	Application for Transfer of Physical Assets (TPA).	25	2	50	1.17	58	\$83	\$4,861
HUD-93332-ORCF .....	Certification of Exigent Health & Safety (EH&S) Issues.	456	1	456	0.75	342	75	25,650
HUD-93333-ORCF .....	Certification Physical Condition in Compliance ..	208	1	208	0.50	104	83	8,667
HUD-93486-ORCF .....	Computation of Surplus Cash .....	70	1	10	0.25	18	62	1,085
HUD-9250-ORCF .....	Funds Authorizations .....	500	5.6	2800	1.00	2800	75	210,000
HUD-9250A-ORCF .....	Mortgagor Certification and Request Detail .....	15	2	30	1.00	30	75	2,250
HUD-92228-ORCF .....	Model Form Bill of Sale and Assignment .....	20	2	40	0.67	27	83	2,222
HUD-92117-ORCF .....	Borrower's Certification—Completion of Non-Critical Repairs.	250	2	500	0.58	292	75	21,875
HUD-92417-ORCF .....	Personal Financial and Credit Statement .....	175	6	1050	3.50	3675	83	306,250
HUD-93479-ORCF .....	Monthly Report for Establishing Net Income .....	60	2	120	1.17	140	75	10,500
HUD-93479A-ORCF .....	Schedule of Disbursements .....	60	12	720	1.00	720	75	54,000
HUD-93479B-ORCF .....	Schedule of Accounts Payable .....	60	12	720	1.00	720	75	54,000
<b>Accounts Receivable Documents</b>								
HUD-90020-ORCF .....	A/R Financing Certification .....	50	3	150	0.67	100	\$217	\$21,667
HUD-92322-ORCF .....	Intercreditor Agreement (for AR Financed Projects).	30	5	150	2.00	300	200	60,000
<b>Master Lease Documents</b>								
HUD-92211-ORCF .....	Master Lease Addendum .....	5	5	25	1.00	25	\$217	\$5,417
HUD-92331-ORCF .....	Cross-Default Guaranty of Subtenants .....	30	5.83	175	1.00	175	217	37,895
HUD-92333-ORCF .....	Master Lease SNDA .....	30	5.83	175	1.00	175	217	37,895
HUD-92335-ORCF .....	Guide for Opinion of Master Tenant's Counsel ..	30	5.83	175	1.00	175	217	37,895
HUD-92337-ORCF .....	Healthcare Regulatory Agreement—master tenant.	30	5.83	175	2.00	350	217	75,790
HUD-92339-ORCF .....	Master Lease Estoppel Agreement .....	30	5.83	175	0.50	87	217	18,948
HUD-92340-ORCF .....	Master Tenant Security Agreement .....	30	5.83	175	1.00	175	217	37,895
<b>Additional Legal Documents</b>								
HUD-91117-ORCF .....	Operator Estoppel Certificate .....	100	2	200	0.75	150	\$275	\$41,250
HUD-91725-INST-ORCF ...	Instructions to Guide for Opinion of Borrower's and Operator's Counsel.	35	10	350	2.00	700	217	151,667
HUD-91725-CERT-ORCF	Exhibit A to Opinion of Borrower's Counsel—Certification.	35	10	350	2.00	700	217	151,667
HUD-91725-ORCF .....	Guide for Opinion of Borrower's Counsel .....	35	10	350	2.00	700	217	151,667
HUD-92325-ORCF .....	Guide for Opinion of Operator's Counsel and Certification.	30	6.5	195	3.00	585	200	117,000
Totals .....	.....	4,568	539	20,263	8	46,131	105	4,393,301

The hourly rate is an estimate based on average annual salaries for lenders and attorneys.

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

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

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

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

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

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received by *December 21, 2012*.

Comments must refer to the proposal by name and docket number (FR-5354-N-02) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: (202) 395-6947, and

Paperwork Reduction Act Program Manager, Office of the Chief Information Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4178, Washington, DC 20410.

Dated: November 15, 2012.

**Carol J. Galante,**

*Acting Assistant Secretary for Housing—  
Federal Housing Commissioner.*

[FR Doc. 2012-28308 Filed 11-20-12; 8:45 am]

**BILLING CODE 4210-67-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[FWS-R2-ES-2012-N249;  
FXES11130200000-134-FF02ENEH00]

### Endangered and Threatened Species Permit Applications

**AGENCY:** Fish and Wildlife Service,  
Interior.

**ACTION:** Notice of receipt of applications;  
request for public comment.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered or threatened species. The Endangered Species Act of 1973, as amended (Act), prohibits activities with endangered and threatened species unless a Federal permit allows such activities. The Act and the National Environmental Policy Act also require that we invite public comment before issuing these permits.

**DATES:** To ensure consideration, written comments must be received on or before December 21, 2012.

**ADDRESSES:** Marty Tugel, Section 10 Coordinator, by U.S. mail at Division of Endangered Species, U.S. Fish and Wildlife Service, P.O. Box 1306, Room 6034, Albuquerque, NM at (505) 248-6920. Please refer to the respective permit number for each application when submitting comments.

#### FOR FURTHER INFORMATION CONTACT:

Susan Jacobsen, Chief, Endangered Species Division, P.O. Box 1306, Albuquerque, NM 87103; (505) 248-6651.

#### SUPPLEMENTARY INFORMATION:

##### Public Availability of Comments

The Act (16 U.S.C. 1531 et seq.) prohibits activities with endangered and threatened species unless a Federal permit allows such activities. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for permits, and requires that we invite public comment before issuing these permits. A permit granted by us under section 10(a)(1)(A) of the Act authorizes applicants to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of survival or propagation, or interstate commerce. Our regulations regarding implementation of section 10(a)(1)(A) permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

##### Applications Available for Review and Comment

We invite local, State, Tribal, and Federal agencies, and the public to comment on the following applications. Please refer to the appropriate permit number (e.g., Permit No. TE-123456) when requesting application documents and when submitting comments.

Documents and other information the applicants have submitted with these applications are available for review,

subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

#### Permit TE-85077A

*Applicant:* ZARA Environmental, Inc., Manchaca, Texas.

Applicant requests a new permit for research and recovery purposes to conduct presence/absence surveys of the following species within Texas:

- Barton Springs salamander (*Eurycea sosorum*)
- Bee Creek Cave harvestman (*Texella reddeni*)
- Black-capped vireo (*Vireo atricapilla*)
- Bone Cave harvestman (*Texella reyesi*)
- Braken Bat Cave meshweaver (*Cicurina venii*)
- Coffin Cave mold beetle (*Batrisesodes texanus*)
- Cokendolpher Cave harvestman (*Texella cokendolpheri*)
- Comal Springs dryopid beetle (*Stygoparnus comalensis*)
- Comal Springs riffle beetle (*Heterelmis comalensis*)
- Golden-cheeked warbler (*Dendroica chrysoparia*)
- Government Canyon Bat Cave meshweaver (*Cicurina vespera*)
- Government Canyon Bat Cave spider (*Neoleptoneta microps*)
- Ground beetle (*Rhadine exilis*)
- Ground beetle (*Rhadine infernalis*)
- Helotes mold beetle (*Batrisesodes ventyivi*)
- Kretschmarr Cave mold beetle (*Texamaurops reddeni*)
- Madla Cave meshweaver (*Cicurina madla*)
- Peck's Cave amphipod (*Stygobromus pecki*)
- Robber Baron Cave meshweaver (*Cicurina baronia*)
- San Marcos salamander (*Eurycea nana*)
- Texas blind salamander (*Typhlomolge rathbuni*)
- Tooth Cave ground beetle (*Rhadine persephone*)
- Tooth Cave pseudoscorpion (*Tartarocreagris texana*)
- Tooth Cave spider (*Neoleptoneta (=Leptoneta) myopica*)

#### Permit TE-103076

*Applicant:* Transcon Environmental, Mesa, Arizona.

Applicant requests an amendment to a current permit for research and recovery purposes to conduct presence/absence surveys of southwestern willow flycatcher (*Empidonax traillii extimus*) within California, Colorado, Nevada, New Mexico, and Texas.