



## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5623-N-03]

### **HUD Healthcare Facility Documents: Notice Announcing Final Approved Documents and Assignment of OMB Control Number**

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

**ACTION:** Notice.

**SUMMARY:** This notice announces that the healthcare facility documents have completed the notice and comment processes and review by the Office of Management and Budget (OMB) as required by the Paperwork Reduction Act, and that OMB has assigned a control number to the documents. The final versions of the documents can be found on HUD's website at [www.hud.gov/232forms](http://www.hud.gov/232forms). Additionally, this notice highlights some of the changes made by HUD to the documents based upon its review of the comments submitted in response to a November 21, 2012 notice.

**FOR FURTHER INFORMATION CONTACT:** Roger Miller, Deputy Assistant Secretary, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 6264, Washington, DC 20410-0500; telephone number 202-708-0599 (this is not a toll-free number). Persons with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

### **SUPPLEMENTARY INFORMATION:**

#### **I. Background**

On May 3, 2012 (77 FR 26304) and consistent with the Paperwork Reduction Act of 1995 (PRA), HUD published for public comment, for a period of 60 days, a notice (60-day

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 followed adoption of updates and revisions to documents used for FHA's multifamily programs, and initiated the public review process for obtaining approval of changes to these specific healthcare facility documents under the PRA. 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).

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 program 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 received on the proposed rule, was published on September 7, 2012, at 77 FR 55120 (2012 Final 232 Rule).

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 website 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) website 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 the revised

documents which were published on November 21, 2012 (77 FR 69870), and for which, consistent with the PRA, comment was solicited for an additional 30 days.

In the 30-day PRA notice published on November 21, 2012 (77 FR 69870) (30-day Notice) HUD identified substantive changes that were made to the healthcare facility documents in response to public comments submitted on the 60-day Notice, responded to significant issues raised by the commenters, and identified proposed additional changes based on further consideration of certain issues. All the public comments submitted on the proposed updated documents were available for review on [www.regulations.gov](http://www.regulations.gov), and a HUD web page included proposed mark-ups of the documents. The documents can be found on HUD's website at: [www.hud.gov/232forms](http://www.hud.gov/232forms).

This notice published today announces that HUD has completed the notice and comment processes required by the PRA, and that OMB has completed its review and has assigned an OMB control number 2502-0605 to the documents. HUD made additional changes to the documents in response to comments submitted on the 30-day Notice. Therefore, in addition to announcing the completion of the process required by the PRA and the assignment of the OMB control number, HUD highlights some of the additional changes made to the healthcare facility documents (documents) in response to public comment as provided below.

## **II. Status of Changes to Documents**

In response to comments that were received on the 60-day Notice and the 30-day Notice, HUD made a number of revisions to the documents. The changes to these documents include both technical editorial changes and some more substantive changes.

This notice does not provide a detailed summary of all of the changes made or responses to all of the issues raised in the final set of public comments on the 30-day Notice. Rather, the

discussion in the following sections of this notice highlights certain changes which are representative of the types of changes made in response to some of the more significant issues raised by the commenters in response to the 30-day Notice and the accompanying documents posted on HUD's website. In this notice, HUD is not repeating responses to all the proposed changes or issues that were addressed in the prior notices. The final versions of the documents and the redlined versions which detail specific changes to the documents posted in connection with the 30-day Notice are available on HUD's website: [www.hud.gov/232forms](http://www.hud.gov/232forms).

Please also note that commenters have varied their references to specific provisions in the documents; sometimes the commenters referred to the provision in the healthcare facility document as sections, subsections, and paragraphs. Efforts have been made to track and maintain those references in this notice.

### **III. Selected Policy Determinations**

Some of the changes suggested to the documents by the commenters on the 30-day Notice were similar to changes suggested by commenters on the 60-day Notice, and were already addressed by HUD in the 30-day Notice. Further, the redlined and final documents posted on HUD's website in conjunction with this final notice detail all of the changes HUD made in response to the points made by the commenters. Therefore the changes discussed below highlight, in a comment and response format, a summary of areas where HUD has made significant policy or other substantive determinations.

### **IV. The Public Comments**

#### **A. The Commenters**

The public comment period for the 30-day Notice closed on December 21, 2012, and public comments were received from 5 sets of commenters (some individuals, some a group of

individuals, each set referred to in this notice as a “commenter”). Comments were submitted by associations representing surety bond insurance companies, mortgage bankers, accounts receivable (AR) lenders, lenders specializing in HUD programs, and private practice attorneys.

All comments were carefully considered by HUD prior to presentation to OMB for final approval and assignment of a control number under the Paperwork Reduction Act.

#### B. General Recommendations

This section of the summary includes summaries of “cross-cutting” issues that were emphasized in commenters’ summaries.

Comment: Treatment of Non-Profit Borrowers. One comment stated that HUD is deviating from long-standing HUD policy with respect to non-profit borrowers, and recommended that HUD reconsider revising provisions in the Healthcare Regulatory Agreement – Borrower (“Borrower’s Regulatory Agreement”) regarding non-profit borrowers. The commenter stated that under the proposed Borrower’s Regulatory Agreement, all non-profit borrowers will be required to maintain a residual receipts account that essentially amounts to a long-term debt service escrow merely because they are non-profit entities. The commenter stated that such a requirement should be waived if in all other respects, the non-profit is being treated the same as a for-profit borrower, not benefiting at all from its non-profit status. The commenter stated that it is counter to HUD's mission for HUD to treat non-profit borrowers disadvantageously solely because they are non-profit entities.

HUD Response: The commenter is not correct that the proposed Borrower’s Regulatory Agreement deviates from long-standing HUD policy. It is well-established, long-standing HUD policy in both the healthcare and multifamily programs to require non-profit borrowers to maintain residual receipts accounts rather than allowing non-profit borrowers to make

distributions of surplus cash. Although the policy for healthcare program transactions is different than the policy for multifamily program transactions, it is also long-standing HUD policy for both programs to provide some limits, waivers and exceptions to this general policy. The commenter's concerns relate to these limits, waivers and exceptions. In the healthcare program, the extent of and the conditions required for these limits, waivers, and exceptions has been evolving for many years. The healthcare program policy regarding non-profits documented in the proposed Borrower's Regulatory Agreement had been widely used prior to the publication of the 30-day Notice, but had also been frequently waived or modified, as may have been negotiated on a deal-specific basis. The proposed provisions in the Borrower's Regulatory Agreement attempted to document and standardize this policy nationwide and program-wide. Upon consideration of the commenter's comments, HUD has further clarified these provisions. For example, HUD has provided instruction in the document that where a non-profit borrower is seeking to re-finance HUD-insured debt under Section 223(a)(7), and the non-profit borrower's current regulatory agreement identifies the borrower as a for-profit borrower, HUD will continue to identify the borrower as a for-profit borrower for purposes of the borrower's regulatory agreement.

Comment: HUD should differentiate between Affiliated and Unaffiliated Operators. A commenter stated that HUD must differentiate between operators who have an "identity of interest" with the HUD borrower (an "affiliated operator") and operators who have no identity of interest with the HUD borrower (an "unaffiliated operator"). The commenter stated that a non-affiliated operator will be extraordinarily reluctant to follow HUD's requirements as set forth in the documents, as typically, an unaffiliated operator would have little, if any, incentive to subject itself and its assets to its landlord's loan liabilities. The commenter stated that these issues

would be most pronounced for the unaffiliated operators in the security agreements required of the master tenant and of the operator, the master tenant's and operator's regulatory agreements, and the Subordination, Non-Disturbance and Attornment Agreement (SNDA). The commenter recommended that FHA create a separate set of these and other form documents for unaffiliated operators.

HUD Response: HUD has considered these comments carefully, but as a policy matter at this time has decided generally to not differentiate between affiliated and unaffiliated operators. HUD has determined that the policies regarding operators in the documents reflect reasonable and sound business practices, and reasonable and necessary oversight, regardless of the affiliation, if any, between the operator and the borrower. HUD believes that most operators (whether or not affiliated with the borrower), upon careful consideration, will find the provisions reasonable, but HUD also recognizes that some unaffiliated operators may not agree with this policy choice and may choose not to participate in HUD programs as a result. However, HUD has determined that, at this time, the need to establish clearer and more direct oversight over operators outweighs this potential effect. HUD also notes that, to limit decreases in unaffiliated operator participation, unaffiliated operators have been given greater rights than affiliated operators through the SNDA, as demonstrated in the SNDA published in connection with the 30-day Notice.

Comment: Security of Obligations. Multiple commenters stated that, in various documents, the obligations secured by pledges of the operator and/or the master tenant should be limited to direct obligations of the operator and/or master tenant under documents to which each is a party, respectively, rather than the borrower's obligations under the Loan Documents.

HUD Response: HUD disagrees. HUD's approach to the healthcare programs is and has

always been holistic, to oversee and assess the entire project, not merely to provide mortgage insurance for a real estate transaction. HUD has a strong interest in the viable operation of the healthcare facility and regards all funds derived from the operation of the healthcare facility as project funds, pursuant to 24 CFR 232.1005.

Comment: Project Operating Deficiencies must be revised and must not be deemed “Events of Default”. A commenter stated that HUD should revise its definition of “project operating deficiencies” in various documents, including regulatory agreements and the SNDA, and that HUD should clarify that project operating deficiencies shall not be deemed an “event of default” under those documents. The commenter also stated that operators have already objected to the “project operating deficiencies” provisions included in the SNDA form currently in use, and that well-established operators will be unwilling to subject themselves to these provisions only to cooperate with their landlords in obtaining HUD-insured financing. The commenter stated that this is the case for both affiliated and unaffiliated operators. The commenter stated that there should be no subjective determinants of what constitutes a project operating deficiency and that the occurrence of a project operating deficiency should not constitute an event of default entitling HUD or the lender to terminate an operator’s lease or replace the operator. The commenter recommended that HUD allow an operator that is otherwise paying rent under the lease, for so long as there is no material risk of termination of the operator’s necessary permits and approvals, to continue to operate and address its problems.

HUD Response: HUD agrees with the commenter in part and disagrees in part. HUD agrees that the criteria for what constitutes a project operating deficiency should not be subjective, and has determined that the criteria are objective, fair, and reasonable. HUD also agrees that the purpose of recognizing a project operating deficiency is to identify a struggling

project before the project fails and an event of default is declared, and to consider the use of a consultant as one *potential* tool to avert an event of default. Therefore, HUD agrees that the occurrence of a project operating deficiency, in and of itself, does not constitute an event of default and believes nothing in the documents indicates otherwise. Moreover, HUD notes that, as a mortgage insurer, HUD's incentives are not aligned with calling a default on either the operator or the borrower when doing so could prompt an otherwise avoidable claim.

Comment: Revise Timeframes for Cure Rights and Cure Periods. A commenter recommended that HUD allow reasonable timeframes for curing events of default under the documents. The commenter stated that where a borrower or operator is granted a 30-day cure period, as a matter of course, that 30-day cure period should be extended so long as the defaulting party commences to cure within 30 days and diligently pursues the cure to completion. The commenter stated that a limitation on that extended cure period during material risks of termination of necessary permits and approvals or payment defaults, however, is reasonable.

HUD Response: HUD has carefully considered this comment and has determined that, although most cure period provisions set forth in the documents are appropriate and include extensions where appropriate, the cure period in the operator's security agreement should include an extension similar to the cure period in the operator's regulatory agreement, and has revised the document to include such extension.

Comment: Make the Lender a Third-Party Beneficiary to the Regulatory Agreements. A commenter stated that the FHA lender should be a third-party beneficiary of borrowers', master tenants', and operators' obligations under their respective regulatory agreements. The commenter stated that the lender's ability to exercise HUD's rights in those documents benefits

HUD because it gives the lender an alternative recovery source other than assigning the loan to HUD.

HUD Response: HUD has determined that it is not appropriate for the lender to be a third-party beneficiary to the regulatory agreements. The lender's rights with respect to the borrower are set forth in the other loan documents and the lender has adequate ability pursuant to the loan documents to pursue the borrower for violations of its covenants and of program obligations.

Comment: Regulatory Agreement Defaults should be Defaults under the Security Agreements. A commenter stated that any default of either the regulatory agreements should result in a default of the respective security agreement or security instrument, without the separate need for HUD consent to such treatment. The commenter stated that this revision would provide lenders with increased ability to remedy defaults without assigning loans to HUD.

HUD Response: Consistent with the determinations HUD made with regard to the multifamily program, HUD has determined that defaults of the regulatory agreements should not constitute defaults under the other loan documents without HUD's consent. While the other loan documents set forth the lenders' rights with respect to the borrower, the regulatory agreement is a HUD-driven document. Contrary to the commenter's assertions, HUD has determined that allowing the lender to call an event of default under the other loan documents for regulatory agreement defaults without HUD consent increases and facilitates the lenders' ability to assign the defaulting loan to HUD, increasing HUD's risk and exposure.

#### C. Document Specific Comments

This section of the summary contains the comments related to specific documents.

### Lender Narratives

A commenter made several comments to the Lender Narratives to clarify requirements and refine the questions. Changes made in response to these comments can be seen in the published redlined versions of the documents.

### Production Certifications – Consolidated Certifications

Comment: Allow Electronic Filing of Form 2530. A commenter suggested that the consolidated certification forms be revised to allow for electronic filing of HUD Form 2530 Previous Participation Certificates, instead of requiring paper submissions.

HUD Response: HUD agrees and has revised the language in the consolidated certifications to better clarify that where electronic submissions have been made, paper filings are not required.

### Performance Bond – Dual Obligatee (HUD 92452-ORCF)

#### Payment Bond (HUD 92452-ORCF)

#### Offsite Bond: Dual Obligatee (HUD 92479-ORCF)

Comment: Cap automatic increases of the penal sum. A commenter stated that Paragraph 3 of the Performance Bond states that the obligation of the obligors is increased by any approved increase in the contract price, but that this provision is problematic if it refers to increases of the penal sum, or penalty amount, of the bond. Namely, the commenter stated concern that Federal regulations limit the risk a surety insurer can accept on a single bond written to the federal government, after crediting reinsurance and collateral, to 10% of its policy holder surplus (31 CFR 223.10 Limitation of risk). The commenter stated that if HUD desires that the penal sum be increased commensurate with change orders, automatic increases should be capped. The commenter stated that the form could include, for example, a provision that permits an increase

of the penal sum, without consent of the surety, to account for an aggregate increase of 15% of the original contract price. The commenter stated that increases above this threshold would require surety consent.

HUD Response: HUD has reviewed these provisions and has found them to be in compliance with all applicable regulations. HUD notes that these provisions are the same as those currently in effect in the multifamily program and that their inclusion has not proven problematic in the multifamily program context.

Addendum to Operating Lease (HUD-91116-ORCF)

Comment: Make Operating Lease Addendum Consistent with Master Lease Addendum.

The commenter suggested adding several provisions similar to provisions in the addendum to the master lease, as also being appropriate for this lease addendum.

HUD Response: HUD agrees in part and has revised the document accordingly.

Healthcare Facility Note (HUD 94001-ORCF)

Comment: Revise the Late Charge Requirements. The commenter stated that although 24 CFR 200.88 was revised in 2011 to change the time for assessing late charges from 15 days to 10 days for multifamily housing, the change does not apply to mortgages insured under section 232. Since the 2012 Final 232 Rule did not address late charges, pursuant to 24 CFR 200.88(a)(2), late charges may be assessed on section 232 mortgages only if a payment is more than 15 days in arrears.

HUD Response: HUD agrees. It is HUD's intention to maintain the 15 day time frame for section 232 transactions and the note has been revised accordingly.

Healthcare Regulatory Agreement – Borrower (HUD 92466-ORCF)

Comment: Distributions Provisions Should Limit Obligation to Restore Negative Surplus

Cash. With respect to section 16(d), a commenter recommended that the obligation to restore a negative surplus cash situation be limited to the amount required to eliminate the deficiency (e.g., if \$100.00 is distributed and a \$1.00 negative surplus cash position results, then a \$1.00 payment should rectify the situation).

HUD Response: HUD agrees with the comment, but has determined that the language in the document already limits such required restoration to the extent that surplus cash is negative and no revision to the document is necessary.

Comment: Eliminate HUD's ability to Mandate a Different Operator. A commenter recommended that section 26(d) be revised by deleting the sub-clause that entitles HUD to mandate a different operator if HUD determines "the financial viability of the Healthcare Facility is in substantial and imminent risk." The commenter stated that this is a subjective determination and should be deleted. The commenter stated that if the borrower is paying its loan obligations, and the permits and approvals are not at material risk, then the borrower's rights to continue to operate the project should continue.

HUD Response: HUD disagrees with the commenter and has determined that appropriate oversight requires the ability to take action if the project is in substantial and imminent financial risk, even if the borrower or its affiliates are able to continue making loan payments at such time.

Comment: Permit Operator to Purchase a Facility. A commenter objected to section 26(e) of the operator's regulatory agreement and suggested that there may be circumstances where HUD may consent to the operator's purchase of a facility. The commenter stated that this could be an important inducement for an operator to take over a struggling facility.

HUD Response: HUD agrees that there may be circumstances where it is appropriate to allow the operator to purchase the facility. Nothing in the regulatory agreement prohibits this

kind of transfer, with HUD's consent. HUD notes, however, that according to the Financial Accounting Standards Board (FASB) certain provisions in a lease may cause the lease to be classified as a "capital lease" which has undesirable accounting consequences. HUD has revised section 26(e) to address the commenter's concerns.

Healthcare Regulatory Agreement – Operator (HUD 92466A)

Comment: Termination of Minor Permits Should Not Trigger a Project Operating Deficiency. The commenter stated that the termination of a permit not needed to operate a project (e.g., loss of a curb cut permit where there are other acceptable access points) should not be treated as a Project Operating Deficiency pursuant to section 6(a) of the operator's regulatory agreement.

HUD Response: HUD agrees with the commenter's concern and notes the document uses a defined term when referring to "permits and approvals." The defined term "permits and approvals" is used in the project operating deficiencies provisions and other provisions referring to "permits and approvals." The defined term is already limited to include only those permits and approvals reasonably necessary to operate or fund operation of the healthcare facility, so further limitation is not necessary.

HUD also notes that in reviewing the commenter's concerns regarding permits and approvals, HUD determined that the provisions requiring operators to provide notice to HUD and lender if the Project is or may be in violation of any of the permits and approvals or any governmental requirements applicable to the operation of the Healthcare Facility were too broad and required clarification. HUD has revised these provisions in the operator's regulatory agreement, the borrower's regulatory agreement, and the management certification. The revisions are shown in the redlined drafts of these documents posted on HUD's website.

Comment: Audited Financials Should be Required Only in an Event of Default. A commenter stated that section 20 should be revised to limit HUD's ability to require audited financials at the operator's expense only in an event of default.

HUD Response: HUD disagrees and has determined that, given the other oversight provisions in the documents, proper oversight of operators does not require audited financials in the normal course, but that, as the document reflects, if HUD has reason to believe that an operator's self-certified financial statements are unreliable or otherwise not compliant with program obligations, proper oversight does require HUD to request audited financial statements.

Comment: Revise the Definition of Healthcare Facility Working Capital. The commenter suggested revising the definition of healthcare facility working capital. The commenter stated that under Generally Accepted Accounting Principles (GAAP), the portion of the principal of any loan that is due within one year is treated as a current liability. The commenter stated that, therefore, twelve total yearly principal payments on the HUD-insured loan and, in many cases, all or a substantial portion of any accounts receivable financing, would be treated as a current liability, creating an unintended result. The commenter proposed to exclude principal from the calculation unless the principal is past due.

HUD Response: HUD is not persuaded that (a) current liabilities related to accounts receivable financing are not appropriately offset by current assets (e.g., cash from the accounts receivable lender as well as accounts receivable themselves) and therefore properly included in calculating working capital, or that (b) it is inappropriate to include the principal portion of other current debt payment obligations (e.g., the insured mortgage payments) in calculating working capital (as GAAP would prescribe). However, HUD notes that the operator's regulatory agreement, consistent with the 2012 Final 232 Rule, states that program obligations will provide

further clarification and details on the required financial calculations, as the need arises.

Healthcare Security Instrument (HUD-94000-ORCF)

Comment: Require the FHA Lender to sign the agreements. A commenter stated that in order to enforce affirmative obligations against a party (such as the FHA lender or HUD), such party must execute the loan document in question. The commenter mentioned the security instrument as an example, stating that the lender should be required to execute the security instrument.

HUD Response: HUD agrees, in part. With regard to the security instrument, HUD neither requires nor prohibits lender execution of this document. HUD notes that, while legal conventions and requirements vary from state to state, in most instances it is not necessary for the lender to execute a mortgage in order to enforce it. To the extent the document limits a lender's right to enforce certain provisions by establishing certain process requirements or other limitations, such as notice provisions, such provisions do not require the lender to execute the document in order to be in force. The borrower simply limits the rights it is granting to the lender to the extent set forth in the document. Nonetheless, HUD recognizes that state-specific conventions or party-specific negotiations may favor lender execution of this document.

Operator Security Agreement (HUD-92323-ORCF)

Comment: Revise Account Control Agreement Requirements. Commenters stated that provisions in paragraph 2(h) relating to required control agreements on deposit accounts are overly broad. The commenter suggested clarifications and limits on these provisions.

HUD Response: HUD has reviewed these comments and has accepted some comments, but has determined that other changes are too broad. The published redlined version of the document reflects the revised language.

Comment: Do Not Record Account Information. A commenter stated that the operator's cash management structure attached as an exhibit to the operator's security agreement contains sensitive information and should not be recorded.

HUD Response: HUD agrees. The Operator Security Agreement is not set up for recording. Only the assignment of rents, included as an attachment to this form document, should be recorded. The cash flow exhibit should not be recorded.

Comment: Require the Lender to sign the Security Agreement: The commenter stated that the penultimate sentence of paragraph (h) includes an affirmative covenant of the lender that "unless a default exists under this Agreement or the Loan Documents, lender will not provide notice under a DACA to the depository bank...that lender is exercising rights of control in the deposit accounts." The commenter stated that for that covenant to be effective, the lender must be a signatory to the Security Agreement.

HUD Response: HUD agrees. The document is already set up for the lender to sign.

Comment: Delete Syndication Provisions. A commenter stated that provisions in section 20(b)(vi) of the operator's security agreement, relating to the syndication of an accounts receivable loan, should be deleted as an operator has no control over when or whether its AR loan is syndicated.

HUD Response: HUD has revised this provision to clarify that HUD is not imposing syndication requirements, but recognizing that syndicated accounts receivable loans could run afoul of HUD's other requirements unless an exception is provided in this section.

#### Intercreditor Agreement (for AR Financed Projects) (HUD-92322-ORCF)

Comment: Publish the Intercreditor Agreement as a "Guide" Document Only. A commenter stated that given the unique requirements of each transaction, the Intercreditor

Agreement (ICA) should be published in final form as a “guide” only, not a required form.

HUD Response: Although HUD recognizes the need for flexibility to respond to deal-specific requirements, HUD also recognizes the need for increased standardization in the healthcare program. HUD has determined that the form ICA allows for sufficient flexibility to address deal-specific concerns while also providing standardized and reasonable requirements.

Comment: Define the ICA as an “AR Loan Document.” A commenter stated that they do not understand why the ICA is not considered an AR Loan Document for purposes of the ICA. The commenter stated that most AR lenders’ loan documents will provide that the ICA is actually a crucial loan document, borrowers’ adherence to which is key for the AR lender’s continued funding of the AR loan. The commenter recommended that the ICA be considered a “HUD Loan Document” for those same reasons.

HUD Response: HUD disagrees with the commenter. Nothing in the ICA prohibits an accounts receivable lender from receiving appropriate covenants and representations from its borrowers in its loan documents or enforcing those covenants and representations. HUD is concerned with the circular enforceability of making the ICA a “loan document” for purposes of its own provisions. The ICA is meant to clarify the rights and responsibilities between the accounts receivable lender and the FHA lender.

Comment: Allow Additional AR Loan Obligations. A commenter stated that they do not understand why an AR lender may not have a lien, even if subordinate, on collateral other than the collateral as defined in the AR Lender Priority Collateral. The commenter stated that many AR lenders lend on the strength of a package of collateral that is much more inclusive than that set forth in the AR “Lender Priority Collateral” definition, even if they must take subordinate positions on such collateral. The commenter stated that if an accounts receivable lender is

willing to accept the terms of the intercreditor agreement and take a subordinate position on such collateral, it is unclear why HUD would not permit the same. The commenter stated that allowing an AR lender to take a subordinate position on such collateral does not harm HUD or the HUD lender's position with regard to the project or its operations.

HUD Response: HUD recognizes the commenter's concern but has determined that negative experiences in past practice require a limitation on what obligations the project collateral may secure. To address the commenter's concerns, HUD has provided bracketed alternative language to this definition that may allow additional obligations to be secured by project collateral with HUD consent.

Comment: Terms of AR Loan Advances and Applications of Payment Need Revision.

A commenter suggested that the terms and provisions of section 3.4 relating to the terms of AR loan advances and how funds received are applied should be revised to more accurately reflect contemporary arrangements and HUD requirements and provide flexibility for deal-specifics.

HUD Response: HUD agrees and the Intercreditor Agreement has been revised to clarify the provisions, provide alternate language and make this section revisable on a deal-specific basis.

Master Lease Addendum (HUD 92221-ORCF)

Comment: Specify the Healthcare Facility Ownership of FF&E, and Transfer of Personal Payments. A commenter suggested that revisions are necessary to the provisions regarding fixtures, furnishings, and equipment in section 9 of the addendum to the master lease in order to make this document consistent with the addendum to the operating lease.

HUD Response: HUD agrees and has revised this document accordingly.

Master Lease Subordination, Non-Disturbance and Attornment Agreement. (HUD-92333-

ORCF)

Comment: Restore Recitals and Execute Separate Subordination Documents. A commenter stated that there is a conceptual problem with this document as drafted. The commenter stated that accepted practice to date, and a practice that the commenter suggested continue, is that a separate Master Lease Subordination, Non-Disturbance and Attornment Agreement (“SNDA”) be executed by the lender, the Master Tenant, the applicable borrower who owns the facility which is securing the subject HUD Loan, and by the Subtenant/Operator who operates that facility, on a loan by loan basis. The draft document contemplates all Borrowers/Landlords and all Subtenants/Operators execute the same SNDA. That rarely, if ever, happens in practice because most HUD portfolio loans close over an extended period of time, with borrowers added to a Master Lease as the loan to each such borrower closes, with each borrower, operator and the Master Tenant then signing a separate SNDA, as stated above. The commenter stated that this proposed form will not work in practice so the commenter strongly urged the restoration of the prior recitals referencing “Other HUD Borrowers”, “Other Subleases,” “Other Operators,” and “Other Mortgage Loans.”

HUD Response: HUD recognizes the commenter’s concerns but has determined that the document works as drafted. Since this addendum is an addendum to the one master lease, there should only be one addendum containing the required provisions, and additional parties can be added as necessary.

Guide for Opinion of Borrower’s Counsel (HUD-91725-ORCF)

Guide for Opinion of Operator’s Counsel- Certification (HUD-92325-ORCF)

Guide for Opinion of Master Tenants Counsel Certification (HUD-92225-ORCF)

Comment: Technical Revisions. A commenter suggested several technical revisions to these documents.

HUD Response: HUD agrees in part and appropriate revisions are reflected in the published redlined versions of the documents.

As noted previously, these and all other changes made in response to comment are displayed in redline format on HUD's webpage, <http://www.hud.gov/232forms>.

## V. TRANSITION.

Use of the final approved documents shall be implemented to correspond with the applicability of the 2012 Final 232 Rule published in the Federal Register on September 7, 2012 (FR 55120). As such, the following documents (typically executed at the closing stage of a transaction) shall be submitted for any transaction that receives a firm commitment on or after April 9, 2013:

<b>Additional ORCF Documents</b>	
HUD-91112-ORCF	Request of Overpayment of Firm Application Exam Fee
HUD-92466-ORCF	Healthcare Regulatory Agreement - Borrower
HUD-92466A-ORCF	Healthcare Regulatory Agreement - Operator
HUD-94000-ORCF	Security Instrument/Mortgage/Deed of Trust
HUD-94001-ORCF	Healthcare Facility Note
HUD-91710-ORCF	Residual Receipts Note - Non Profit Mortgagor
HUD-92223-ORCF	Surplus Cash Note
HUD-91110-ORCF	Subordination, Non-Disturbance and Attornment Agreement of Operating Lease (SNDA)
HUD-92420-ORCF	Subordination Agreement - Financing
HUD-2205A-ORCF	Borrower's Certificate of Actual Cost
HUD-92323-ORCF	Operator Security Agreement
HUD-91116-ORCF	Addendum to Operating Lease
HUD-9839-ORCF	Management Certification—Residential Care Facility
<b>Production Certifications</b>	
HUD-91118-ORCF	Borrower's Certification – Completion of Critical Repairs
HUD-92434-ORCF	Lender Certification
<b>Additional Legal Documents</b>	
HUD-91117-ORCF	Operator Estoppel Certificate
HUD-91725-INST-	Instructions to Guide for Opinion of Borrower's and Operator's Counsel

ORCF	
HUD-91725-CERT-ORCF	Exhibit A to Opinion of Borrower's Counsel - Certification
HUD-91725-ORCF	Guide for Opinion of Borrower's Counsel
HUD-92325-ORCF	Guide for Opinion of Operator's Counsel and Certification
<b>Escrow Documents</b>	
HUD-91128-ORCF	Initial Operating Deficit Escrow Calculation Template
HUD-92414-ORCF	Latent Defects Escrow
HUD-9443-ORCF	Minor Moveable Escrow
HUD-92476-ORCF	Escrow Agreement Noncritical Deferred Repairs
HUD-92476B-ORCF	Escrow Agreement for Operating Deficits
<b>Construction Documents</b>	
HUD-91123-ORCF	Design Professional's Certification of Liability Insurance
HUD-93305-ORCF	Agreement and Certification
HUD-92441-ORCF	Building Loan Agreement
HUD-92441a-ORCF	Building Loan Agreement Supplemental
HUD-92450-ORCF	Completion Assurance
HUD-92442-ORCF	Construction Contract
HUD-92554-ORCF	Supplementary Conditions of the Contract for Construction
HUD-92479-ORCF	Offsite Bond - Dual Obligee
HUD-92452-ORCF	Performance Bond - Dual Obligee
HUD-92452A-ORCF	Payment Bond
HUD-92455-ORCF	Request for Endorsement
HUD-92412-ORCF	Working Capital Escrow
HUD-9442-ORCF	Memo for Post-Commitment Early Start of Construction Request
HUD-92415-ORCF	Request for Permission to Commence Construction Prior to Initial Endorsement for Mortgage Insurance (Post-Commitment Early Start of Construction)
<b>Accounts Receivable Documents</b>	
HUD-90020-ORCF	A/R Financing Certification
HUD-92322-ORCF	Intercreditor Agreement (for AR Financed Projects)
<b>Master Lease Documents</b>	
HUD-92211-ORCF	Master Lease Addendum
HUD-92331-ORCF	Cross-Default Guaranty of Subtenants
HUD-92333-ORCF	Master Lease SNDA
HUD-92335-ORCF	Guide for Opinion of Master Tenant's Counsel
HUD-92337-ORCF	Healthcare Regulatory Agreement - Master Tenant
HUD-92339-ORCF	Master Lease Estoppel Agreement
HUD-92340-ORCF	Master Tenant Security Agreement

The other final approved documents, as and when required, shall be used beginning **[insert 120 days after date of Federal Register publication]**. These documents include the following:

<b>Lender Narratives</b>	
HUD-9001-ORCF	Lender Narrative 223a7 - Main
HUD-9001a-ORCF	Lender Narrative 223a7 - Addenda - PCNA
HUD-9001b-ORCF	Lender Narrative 223a7.223d.232i - Addendum – ALTA/ACSM Land Title Survey
HUD-9001c-ORCF	Lender Narrative 223a7 - Addendum - Environmental
HUD-9001d-ORCF	Lender Narrative 223a7 - Addendum – Other Existing Eligible Indebtedness
HUD-9001e-ORCF	Lender Narrative 223a7.223d.232i - Addendum - Principal of Borrower
HUD-9001f-ORCF	Lender Narrative 223a7.223d.232i - Addendum - Operator
HUD-9001g-ORCF	Lender Narrative 223a7.223d.232i - Addendum - Management Agent
HUD-9001h-ORCF	Lender Narrative 223a7.223d.232i - Addendum - Transfer of Physical Assets
HUD-9001i-ORCF	Lender Narrative 223a7.223d.232i - Addendum - AR Financing
HUD-9002-ORCF	Lender Narrative 223f
HUD-9003-ORCF	Lender Narrative 241a
HUD-9004-ORCF	Lender Narrative - New Construction - Single Stage
HUD-9005-ORCF	Lender Narrative - New Construction - 2 Stage Initial Submittal
HUD-9005a-ORCF	Lender Narrative - New Construction - 2 Stage Final Submittal
HUD-9006-ORCF	Lender Narrative - Substantial Rehabilitation - Single Stage
HUD-9007-ORCF	Lender Narrative - Substantial Rehabilitation - 2 Stage Initial Submittal
HUD-9007a-ORCF	Lender Narrative - Substantial Rehabilitation - 2 Stage Final Submittal
HUD-9008-ORCF	Lender Narrative - Blended Rate - Single Stage
HUD-90025-ORCF	Lender Narrative - Blended Rate - 2 Stage - Initial Submittal
HUD-90025a-ORCF	Lender Narrative - Blended Rate - 2 Stage - Final Submittal
HUD-9009-ORCF	Lender Narrative 232(i) - Fire Safety Equipment Installation, without Existing HUD Insured Mortgage
HUD-90010-ORCF	Lender Narrative 232(i) -Fire Safety Equipment Installation, with Existing HUD Insured Mortgage
HUD-90011-ORCF	Lender Narrative 223(d) - Operating Loss Loan
HUD-9444-ORCF	Lender Narrative Cost Certification Supplement
<b>Production Certifications</b>	
HUD-90012-ORCF	Consolidated Certification - Lender
HUD-90013-ORCF	Consolidated Certification - Borrower
HUD-90014-ORCF	Consolidated Certification - Principal of the Borrower

HUD-90015-ORCF	Consolidated Certification - Operator
HUD-90016-ORCF	Consolidated Certification - Parent of Operator
HUD-90017-ORCF	Consolidated Certification - Management Agent
HUD-90018-ORCF	Consolidated Certification - Contractors
HUD-90019-ORCF	Auditor Certification
HUD-90022-ORCF	Certification for Electronic Submittal
HUD-91130-ORCF	Building Code Certification
HUD-9445-ORCF	Certification of Outstanding Obligations
<b>Additional ORCF Documents</b>	
HUD-91708-ORCF	Agreement for Payment of Real Property Taxes
HUD-92576A-ORCF	Certificate of Need for Health Facility
HUD-90024-ORCF	Contact Sheet
HUD-91126-ORCF	Financial Statement Certification
HUD-941-ORCF	Lenders FHA Number Request Form
HUD-92264a-ORCF	Maximum Insurable Loan Calculation
HUD-2-ORCF	Request for Waiver of Housing Directive
HUD-91119-ORCF	Schedule of Facilities Owned Operated or Managed
HUD-91111-ORCF	Survey Instructions and Borrower's Certification
HUD-92070-ORCF	Lease Addendum
<b>Escrow Documents</b>	
HUD-92464-ORCF	Request Approval Advance of Escrow Funds
<b>Construction Documents</b>	
HUD-91124-ORCF	Design Architect Certification
HUD-91127-ORCF	Financial Statement Certification - General Contractor
HUD-92408-ORCF	HUD Amendment to B108
HUD-91125-ORCF	Staffing Schedule
HUD-95379-ORCF	HUD Representative's Trip Report
HUD-91129-ORCF	Lender Certification for New Construction Cost Certifications
HUD-92456-ORCF	Escrow Agreement for Incomplete Construction
HUD-92023-ORCF	Request for Final Endorsement
<b>Asset Management Documents</b>	
HUD-92266-ORCF	Application for Transfer of Physical Assets (TPA)
HUD-93332-ORCF	Certification of Exigent Health & Safety (EH&S) Issues
HUD-93333-ORCF	Certification Physical Condition in Compliance
HUD-93486-ORCF	Computation of Surplus Cash
HUD-9250-ORCF	Funds Authorizations
HUD-9250A-ORCF	Borrower Certification and Request Detail

HUD-92228-ORCF	Model Form Bill of Sale and Assignment
HUD-92117-ORCF	Borrower's Certification – Completion of Non-Critical Repairs
HUD-92417-ORCF	Personal Financial and Credit Statement
HUD-93479-ORCF	Monthly Report for Establishing Net Income
HUD-93480-ORCF	Schedule of Disbursements
HUD-93481-ORCF	Schedule of Accounts Payable

Date: March 8, 2013

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