

Three submissions were received in response to this PRA Notice. One commenter addressed ten documents specifically, while also generally endorsing all of his prior comments from the Section 232 2012 and 2013 PRA Notices. A second commenter made brief comments generally supportive of the first commenter's concerns, though not summarily endorsing the first commenter's voluminous individual edits. A third commenter's (comprised of a coalition of lenders involved in accounts receivable financing) submission was related exclusively to a single document, the Intercreditor Agreement, which was not addressed by the other two commenters.

Below is a summary of the comments that were submitted relative to 11 of the documents in the collection. The first commenter's comments are related to 10 of the documents and the third commenter's comments are related solely to the Inter-creditor Agreement.

1. Master Lease Subordination, Non-Disturbance and Attornment Agreement (SNDA")
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**Commenter** asked that HUD delete the financial indicators in the definitions of a "Project Operating Deficiency" in Section 3(a)(ii) of the Master Lease SNDA.

**Commenter** asked that HUD revise Sections 3(a)(iii) and (v) of the Master Lease SNDA to allow a **for a 120-day "cure period"** before a Project Operating Deficiency is deemed to have occurred.

**Commenter** asked that the Master Lease SNDA explicitly state that a Project Operating Deficiency is not an Event of Default under the Master Lease or the Sublease and provided the following language to be included at the end of Section 3(f): "Except as otherwise expressly provided in the Master Lease or Sublease, the occurrence of a Project Operating Deficiency shall not be deemed an Event of Default under the Master Lease or the Sublease."

**Commenter** requested that Section 4 (a) of the Master Lease SNDA be revised to:

- A. Eliminate the distinction between affiliated Borrowers and Operators and non-affiliated Borrowers and Operators on the basis that Owners and operators in both categories who submit their portfolio to a Master Lease financing transaction need the extended cure period.
- B. The language "no Project Operating Deficiency has occurred" in Section 4 must be deleted.
- C. The extended cure period is needed by both the Master Tenant and the Operator in order to cure those defaults for which they are responsible, which defaults can only arise under the Master Lease and Sublease. They don't need an extended cure period to cure defaults by the Borrower under the Loan Documents. They are not the ones who have caused the Borrower defaults and they do not have the power to cure Borrower defaults under the Loan Documents. That language must be changed in Section 4. [If the Master Tenant or Operator is the cause of a

Borrower default under the Loan Documents, under the provisions of this Section, there is no extended cure right for them.]

- D. HUD has previously given the Master Tenant and the Operator an extended cure period which can continue as long as 180 days, and more, if the parties are working in good faith on curing the applicable default. That time frame shall be restored to the form. Section 4(b) which is added in my revised SNDA, confirms that HUD can pull the plug on any extended cure period if there is a “Material Risk of Termination” to licenses and provider agreements.

**Commenter** asked that HUD revise the definition of “Material Risk of Termination” in Section 10(d) of the Master Lease SNDA to be made consistent with the Regulatory Agreements.

## 2. Operator Security Agreement and Rider

Commenter provided that the Operator Security Agreement was changed conceptually by HUD to provide that the Operator is granting a lien in favor of the FHA Lender and HUD on its assets to secure the obligations of its Landlord to the FHA Lender under the HUD Loan Documents rather than to secure the Operator’s obligations to its Landlord under its Lease and that getting an SNDA does not address an Operator’s concerns since the Tenant may retain its rights to possession of the Facility under the Lease in the event of a foreclosure, but it will lose its assets since they collateralize their Landlord’s loan and can be lost through foreclosure.

**Commenter** asked that Section 2(c) be revised with respect to “Collateral Location” to reflect the reality that Books and Records of an Operator may be located at its chief executive office or at the Master Tenant’s office, rather than at the Facility.

**Commenter** asked that Section 2(h) should be changed because a Deposit Account Control Agreement (DACA) is not required by HUD on payroll of an Operator. A DACA is only required on an account which receives disbursements from a Governmental Receivables Account or other fundings from payors.

**Commenter** asked that Section 8(g) be modified to include at the end of the provision the following bracketed language, “[and except for Permitted Liens],” as a reminder that there may be waiver requests by a Mortgagor or Operator to reflect specific liens for which HUD’s permission is requested, such as pledges of membership interests in Operators to secure AR Loans, pledge of membership interests in Operator to secure a Master Tenant’s obligations under Master Leases, a Landlord’s subordinated lien in the assets of the Tenant, and the like.

**Commenter** asked that Section 23(b) (addressing instances in which Lender consent is required), be revised to cover the situation where this Security Agreement obligates a Lender not to unreasonably withhold consent.

**Commenter** added a new Section 25 so as to appropriately indicate whether the Security Agreement includes a Rider.

**Commenter** noted that The Rider to Operator Security Agreement published by HUD in September 2013 includes the term “Material Risk of Termination” but that term is not defined in the Security Agreement or in the Rider.

### 3. Assignment of Leases and Rents

**Commenter** noted that the Assignment of Leases and Rents although published as **Attachment 1 to the Operator Security Agreement** is actually a stand-alone document which must be recorded in the County where the applicable Healthcare Facility is located and that Operators will find this form distressing because it constitutes an outright assignment by the Operator of its rights to payment for services it renders. Thus commenter urges that the form be eliminated in its entirety because it requires assignment of an interest to FHA Lender that is not assignable.

**Commenter** noted that this form includes a “license” for an Operator to collect its accounts receivables so long as there is not an “Event of Default”. The commenter further states that the FHA Lender has agreed in the Intercreditor Agreement not to exercise remedies with respect to accounts receivable until the AR Lender is paid in full, yet Section 2(d) empowers the FHA Lender to collect such accounts receivable, calling them “Rents”.

### 4. Master Tenant Security Agreement

**Commenter** noted that the HUD form contemplates recording, but it should not be a recordable document.

**Commenter** noted that conforming changes discussed above with respect to the Operator Security Agreement should be made to the Master Tenant Security Agreement. Further, just as the Operator needs a Rider to the Operator Security Agreement so as to preserve its rights in its assets where it has not defaulted under its Operating Lease, a Master Tenant who signs a Security Agreement needs a similar Rider to protect its assets in the event of a default by its Landlord not in any way attributable to the Master Tenant.

**Commenter** recommended clean up changes to the fifth paragraph of Section 3(j) to clarify how a Master Tenant might receive Government Payments due the Operator; that can only happen if it serves as a collection agent for an Operator.

**Commenter** referenced possible Permitted Liens in Section 9(e) as a bracketed concept to the extent it becomes relevant in a specific transaction.

**Commenter** recommended edits for clarity to Sections 2(a) and 2(c) .

**Commenter** suggested changes in Section 16. As justification for those edits, Commenter notes that if an existing Operator does not expressly assign its Provider Agreements, the Medicare Provider Agreement disappears when a successor takes over. A successor Operator needs to be able to use the old Operator’s Medicare (and Medicaid) Provider Agreements in order to get paid pending the belated formal “tie-in” of Provider Agreements to a new licensee.

#### 5. Healthcare Regulatory Agreement - Operator

**Commenter** asked that the financial indicators that comprise a Project Operating Deficiency in Section 6(a)(ii) be deleted and/or modified so that they are consistent with the modifications requested/discussed above in the Master Tenant SNDA.

**Commenter** asked that revisions to Section 8(a) with respect to the Notice of Violation be made that would dovetail with the Commenter’s analogous request in the Master Tenant SNDA. Commenter emphasized that an Operator can satisfy its lease obligations but is not responsible for borrower payments.

**Commenter** asked that a subsection (v) be added to Section 8(e) to allow an Operator to make “tax distributions” to members, partners, or shareholders upstream to pay taxes for their allocable share of taxable income of an Operator resulting from its status of a “passive” entity, such as a limited liability company, partnership, or S Corporation.

**Commenter** stated that in Section 20(d) there should be no right for HUD to require audited financial statements of the Operator for subjective reasons unless there is a continuing Event of Default.

**Commenter** asked that language be added to Section 20(h) to clarify that operational reports required under the agreement from an Operator can only be delivered to a third party engaged by HUD to review such reports. Commenter expressed concern about risk of disclosure of patient information that could trigger HIPAA violations. Commenter further suggested that HUD consider signing a Business Associates Agreement with the Operator consistent with HIPAA requirements.

#### 6. Healthcare Regulatory Agreement - Master Tenant.

**Commenter** asked that conforming changes be made to this document consistent with changes discussed with respect to the SNDA and the Operator Regulatory Agreement.

**Commenter** stated that (in Section 14(d)) an audited financial statement of the Master Tenant should only be required if there is a continuing Event of Default.

**Commenter** stated that Section 16 obligating the Master Tenant to ensure that goods and services purchased in connection with the Project are “Reasonable Operating Expenses” should be deleted.

Commenter suggested that the provision adds no protection to HUD and unnecessarily involves the Master Tenant in operations.

**Commenter** stated that Section 20 should be revised so that it will not be viewed as an option of HUD whether to grant accounts receivable financing or not. Commenter stated that HUD and the FHA Lender must grant approval to AR financing if the conditions set forth in Sections 20(i) and (ii) are met.

#### 7. Healthcare Regulatory Agreement – Borrower.

**Commenter** stated that Section 13(e) should be corrected to allow for the distribution of monies remaining in the Reserve for Replacement either to the Borrower *or to its designee*. Commenter stated that frequently an Operator is the one funding the Reserve for Replacement, and at such time as the HUD loan is repaid in full, it is the Operator who receives the refund of the Reserve for Replacement.

**Commenter** stated that Section 23, dealing with contracts for good and services, must be deleted in its entirety. Commenter stated that the Borrower does not operate the Facility and therefore the Borrower should not have any responsibility for contracts for goods, materials, supplies, and services used as the Project.

**Commenter** stated that Section 25(d) should either be stricken or, if retained, should be amended to limit the scope of a borrower's obligation to provide HUD and Lender with notices received by the borrower of violations of Permits and Approvals or of other government requirements. Commenter stated that only notices of *material* violations or *material* civil money penalties should be required to be provided.

**Commenter** stated that the language in Section 26(e) is severely problematic to a Borrower, an Operator, or a Master Tenant. That provision states that (without HUD approval) neither Master Tenant nor an Operator may be granted a "bargain purchase option." Commenter suggested that language be added explicitly permitting arms-length negotiated purchase options provided the transfer is subject to applicable Program Obligations.

**Commenter** stated that Section 34(n) (limiting lease or other contract amendments absent HUD approval) should allow the parties to make amendments to *increase* lease payments from its Operator.

#### 8. Security Instrument/Mortgage/Deed of Trust.

**Commenter** stated that the definition of "Event of Default" should be changed to make clear that an event will not be an Event of Default unless it is not cured within applicable cure periods provided in the applicable documents.

**Commenter** stated that the definition of “Operator Lease” needs to include both the Lease by the Borrower or the Sublease by a Master Tenant.

**Commenter** suggested that HUD revised Section 4, the “Assignment of Leases” provision, to cover the possibility that the Borrower may be holding a security deposit which should be assigned to the Lender as additional collateral.

**Commenter** noted that in Section 4(b), HUD licenses a Borrower to collect rent as long as there is no Event of Default. Commenter stated that, should an Event of Default be subsequently cured, then Borrower’s right to collect rent should be reinstated.

**Commenter** proposed numerous edits (e.g., in Section 7(a)) in instances where the document directs the Borrower to take an action—edits so that the Borrower would be directed to take “or cause the Operator to take” the action. Commenter stated that, under triple net leases, , generally all actions that the Security Instrument might call for, with respect to deposit of funds, payment of insurance, payment of taxes, etc., are implemented by the Operator, rather than by the Borrower.

**Commenter** proposed that a “reasonableness” standard be explicitly added to the Section 19(c) language allowing a lender to impose various requirements for the maintenance of insurance.

**Commenter** proposed that Section 22(b)(3) be revised to allow for an extension of the 30-day cure period where the Borrower commences to cure and diligently pursues the cure to completion. Commenter stated that this change was previously requested (in a response to a prior PRA Notice), was made in other documents, and was apparently not made in this particular document due to an oversight.

**Commenter** proposed revising Section 42 (which states that the Lender is not HUD’s agent) to add the words “unless HUD has so designated Lender and gives written notice to Borrower of such agent designation.” Commenter suggested that there may be circumstances in which HUD would find it advantageous to designate a Lender as its agent.

#### 9. Master Lease Addendum.

**Commenter** suggested adding a new provision setting forth a receivership remedy, and set forth specific language doing so. Commenter stated that it is critical when transitioning operations of a skilled nursing facility that the existing Operator cooperate in the transfer of the license and provider agreements and that, in a default situation, the existing Operator may be unwilling to do so. Commenter also stated that, since the FHA lender would be getting an assignment of the lease, it too would need a strong receivership remedy.

#### 10. Addendum to Operating Lease.

**Commenter** proposed adding a receivership remedy similar to that which Commenter proposed to be inserted in the Master Lease Addendum (discussed above) for the same reasons previously stated.

11. Intercreditor Agreement
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**Commenter**, a coalition of accounts receivable (“AR”) lenders, expressed concern about Section 2.3(a) (the “standstill provision”). As currently written, commenter is concerned that the FHA Lender would attempt to notify account debtors and/or change remittance instructions to residents and/or third party payors before the AR Lender has been paid in full. Commenter has proposed language to make it clear that the FHA Lender could not contact account debtors or seek to change the remittance instructions as to where proceeds of accounts receivable should be paid prior to the AR Lender’s loan being paid in full. Also, commenter has added language to provide comfort to the FHA Lender and HUD that the standstill provision would not in any way hamper the FHA Lender’s abilities to exercise remedies to which it may be entitled or to transition the operation of the facility to a new operator or to seek all related licenses, permits and provider agreements.

**Commenter** also proposed a minor corrective change. The change would reflect the concept that there will be ONE agreement for EACH facility, rather than MULTIPLE facilities referenced in ONE agreement.