

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 (comprised of a coalition of lenders involved in accounts receivable financing) provided a 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.

<b>1. Master Lease Subordination, Non-Disturbance and Attornment Agreement (SNDA")</b>
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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.

**HUD's Response - HUD-ORCF believes that revised financial indicators that are tied to the initial underwriting of the project are more appropriate and will make revisions to the form.**

**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.

**HUD's Response - HUD-ORCF recognizes that some project operating deficiencies may not be able to be promptly corrected. HUD-ORCF also believes, however, that the passage of extended time during which a deficiency is not being adequately addressed can increase risk significantly. Accordingly, HUD-ORCF is amending the language to allow additional time for situations (iii) and (v) provided that HUD finds that the operator is diligently and adequately working to address the matter.**

**Commenter** asked that HUD revise Sections 3(a) (v) of the Master Lease SNDA to add the word "proposed"

**HUD's Response - HUD agrees with this suggested revision and will make the change.**

**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.”

**HUD’s Response** – HUD agrees in concept and will revise the language accordingly. However, HUD believes more precise language is preferable. For example, HUD does not want to be precluded from calling an Event of Default if the Permits and Approvals are in substantial and imminent risk: “A Project Operating Deficiency is not necessarily an Event of Default and shall not be considered an Event of Default unless such circumstance meets the requirements for an Event of Default pursuant to the relevant Loan Document.”

**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.

**HUD’s Response** –

The commenter expresses two different concerns: one is that the cure rights set forth in the Master Lease SNDA are inappropriate because master tenants and operators do not have the ability to cure borrower defaults; the other is that operators need extended cure rights and those should be set forth in this document in lieu of the cure rights currently set forth.

HUD recognizes that in many circumstances a third party operator would have neither an interest in curing a borrower default nor the ability to cure such a default, and HUD thus understands the

Commenter's concerns in this respect. This lack of third party operator interest is particularly true in light of the third party operator protections that are now being afforded in the Section 232 documents. However, in considering the Commenter's concerns about this particular provision, HUD has considered the circumstances under which this provision was placed in the published document. Those circumstances do, in fact, relate to operators' interest in curing a borrower default. That is the intended scope of this provision, as indicated by the fact that the provision relates to the Lender giving the notice of default.

In particular, the cure rights given to master tenant and operator in the Master Lease SNDA were developed in response to concerns by operators that technical borrower defaults would put operator assets in jeopardy because of the structure of the loan documents, specifically the Operator Security Agreement. These cure rights assure operators and master tenants that should they voluntarily choose to offer a cure of borrower's default, the lender will accept such cure. There is also the possibility, although HUD finds the likelihood of such a scenario unlikely, that should a scenario arise where Lender or HUD would be in a position to foreclose upon the Borrower for such technical defaults, the operator would have the opportunity to cure the default and maintain its relationship with the borrower, rather than suffering the inherent instability of a foreclosure proceeding and change of borrower.

Nothing in the loan documents or in contract law prohibits the operator from offering cure on behalf of the borrower if the operator so chooses. Many times defaults occur because of a lack of funds – for example, the Borrower cannot pay an accountant to complete financial statements or cannot pay an insurance premium. Borrowers and operators are sophisticated parties. So long as HUD has adequate assurance that the debt service and other borrower obligations will realistically be met through the term of the loan, HUD wishes to give the borrowers and operators the freedom to arrange their relationship in their best interests, including whatever reimbursement, indemnification or other rights they deem necessary, so that each feels that its interests are being adequately met. If operator wants the opportunity to offer cure on behalf of borrower, so long as operator is not an affiliated entity essentially under the same control as borrower, HUD finds such request reasonable and is willing to provide such opportunity, including an extended cure period, as set forth in the document.

However, after the publication of the Loan Documents, HUD agreed, at the request of certain operators and other industry participants, to increase operator protections through a rider to the Operator Security Agreement. HUD believes the provisions in the rider to the Operator Security Agreement are more protective of operators than these provisions in the Master Lease SNDA. Therefore, these provisions in the Master Lease SNDA are less necessary than they were prior to the development of the rider to the operator security agreement. However, because HUD has determined that these provisions are nonetheless beneficial to operators and acceptable to HUD, HUD does not believe it is appropriate at this time to eliminate these provisions. HUD does agree, however, to delete the phrase “no Project Operating Deficiency has occurred;” HUD agrees that a project operating deficiency should not preclude an operator from curing a borrower default, in the event that the operator had an interest in doing and an ability to do so. HUD is also adding language to clarify the intended scope of defaults triggering a Master Tenant or Operator cure right under this provision.

The Commenter also expresses concern about cure rights with respect to an actual default of the operator. HUD agrees that reasonable cure opportunities for the Operator are necessary, and HUD has granted operators extended cure rights to cure their own defaults-- but has done so in the documents in which those defaults would be called. In other words, the Operator has been granted extended periods to cure its defaults in both the Operator Regulatory Agreement and the Operator Security Agreement. HUD does not find it appropriate to address those rights in this completely separate document. Commenter may be concerned for the circumstance of Lender or HUD stepping into the borrower's shoes after a foreclosure or analogous event. In such instance, Lender or HUD would be bound by the terms, including the cure periods, set forth in the lease. Commenter has not asserted that cure periods, sufficient for operator when the original borrower acts as lessor, are insufficient for operator if Lender or HUD is acting as lessor.

Commenter also suggests having the cure period extend 180 days. The current language in the Operator Regulatory Agreement and Operator Security Agreement is, however, not narrowly limited in time; HUD finds it better not to limit up front what can be a reasonable time to cure; the current language provides for extension so long as is reasonable, provided that operator continues to diligently pursue cure, so long as the permits and approvals are not in substantial and imminent risk of termination, and so long as the health and safety of the residents is not in imminent risk. This approach is consistent with contemporary practice in other loan documents and governmental programs.

**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.

**HUD's Response** – HUD agrees to revise the definition to make it consistent with the Regulatory Agreements. The revised definition is provided below.

"Material Risk of Termination" shall be deemed to occur when any of the applicable Permits and Approvals material to the operation of the Healthcare Facility is at substantial and imminent risk of being terminated, suspended or otherwise restricted in such a way that such termination, suspension or restriction would have a materially adverse effect on the operation of the Healthcare Facility, including without limitation, HUD's determination that there is a substantial risk that deficiencies identified by applicable state and/or federal regulatory and/or funding agencies cannot be cured in such manner and within such time periods as would avoid the loss, suspension, or diminution of any Permits and Approvals that would have a materially adverse effect on the Project.

## 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.

**HUD's Response** – On September 6, 2013, HUD resolved third party Operator's concern of losing possession of the Facility and their personal property when a Borrower defaults with the publication of the Rider to Operator Security Agreement. HUD has determined that the concerns raised by the commenter are adequately addressed by the rider.

**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.

**HUD's Response** – HUD agrees that Section 2(c) should be revised to allow the Operator to provide the location of its Books and Records.

**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.

**HUD's Response** – HUD reserves the discretion to request a DACA on additional accounts in complex cash flow scenarios and multiple facility portfolio and therefore declines to make this change.

**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.

**HUD's Response** – HUD agrees to revise Section 8(g) and will make the necessary edits.

**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.

**HUD's Response** – HUD finds this clarification acceptable.

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

**HUD's Response** – HUD disagrees that such a paragraph is needed. A more simple reference is more appropriate.

**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.

**HUD's Response** – HUD agrees that the definition should be added. The revised definition is provided below.

“Material Risk of Termination” shall be deemed to occur when any of the applicable Permits and Approvals material to the operation of the Healthcare Facility is at substantial and imminent risk of being terminated, suspended or otherwise restricted in such a way that such termination, suspension or restriction would have a materially adverse effect on the operation of the Healthcare Facility, including without limitation, HUD’s determination that there is a substantial risk that deficiencies identified by applicable state and/or federal regulatory and/or funding agencies cannot be cured in such manner and within such time periods as would avoid the loss, suspension, or diminution of any Permits and Approvals that would have a materially adverse effect on the Project.

### 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.

**HUD's Response** – This attachment is very closely related to the Operator’s Security Agreement and is applicable in those scenarios when a facility collects rents, rather than merely service fees. HUD reminds the commenter that the 232 program services a very wide variety of potential deal structures. This form assignment is appropriately set up as an attachment to the document, to be recorded separately, when this particular assignment is applicable.

**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”.

**HUD’s Response** – HUD disagrees with commenter. Filing this form in the County where the facility is located does not affect AR lenders interests in the assets of the Operator.

**Commenter** noted that the Assignment of Leases and Rents document (if it is used notwithstanding the reasons stated above) needs to recognize the rights granted an Operator in the Rider to Operator Security Agreement, which provides that if there is a default under the Loan Documents, but not a default by the Operator under its Lease, that it retains the right to collect all payments of its accounts receivable.

**HUD’s Response** – HUD believes that the proposed change is not necessary. When applicable, the Rider to the Security Agreement is incorporated into the Security Agreement by reference and made a part of the Security Agreement. The Assignment of Leases and Rents references the Operator Security Agreement and explicitly states that “To the extent allowable by law, any provision of the Security Agreement not in conflict with the provisions set forth herein shall be deemed to apply to this Agreement.” However, because HUD’s intent was to have the Rider apply, HUD will add a clarifying statement: “If there is a Rider to Operator Security Agreement, the terms of that rider apply to this document as well.”

<b>4. Master Tenant Security Agreement</b>
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**Commenter** noted that the HUD form contemplates recording, but it should not be a recordable document.

**HUD’s Response** --HUD expects that this form be recorded with the exception of Exhibit “C.” HUD will not accept suggested edits deleting recording information request and edit to Exhibit C. HUD notes that although the Master Tenant Security Agreement and the Operator Security Agreement appear similar, because of the differences in roles of the Master Tenant and Operator, the documents provide different functions. The Operator has many assets necessary to the operation of the healthcare facility and is pledging many assets to the Lender. Further, in most cases, although HUD reminds the commenter that the 232 program services a very wide variety of potential deal structures, the operator will have few “leases” and “rents” to pledge. The primary function of the Operator Security Agreement is therefore as a UCC security agreement, which need not be recorded and for which a financing statement may be filed to perfect security. A secondary purpose is the assignment of lease of and rents which is easily separable to record when applicable. Having the assignment of leases and rents be an attachment to the operator’s security agreement thus ensures that it is not overlooked but allows the parties to save on recording costs and protect any potentially sensitive information in the rest of the document from

being recorded. In contrast, in most cases, although again the 232 program services a very wide variety of potential deal structures, the Master Tenant will have no or almost no assets apart from the sub-lease of the facility to the operator. The primary security contemplated by this document is an assignment of the leases and rents to the Master Tenant (ie, the operator's sub-lease). Therefore, the document must be recorded to perfect the security in the leases and rents and it does not make sense to separate out such assignment from any other potential assignment as in the Operator's Security Agreement.

**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.

**HUD's Response** - HUD agrees and will provide a Rider for the Master Tenant Security Agreement.

**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.

**HUD's Response** - HUD agrees with the revision.

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

**HUD's Response** - HUD agrees with the revision.

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

**HUD's Response** - HUD agrees with the revision.

**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.



**HUD's Response** – HUD agrees with the revisions.

#### 5. Healthcare Regulatory Agreement – Operator

**Commenter** asked that HUD add the word “reasonable” to Section 3(e) of the Operator Regulatory Agreement.

**HUD's Response** – HUD declines to make such a revision because it adds subjectivity and vagueness to the document.

**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.

**HUD's Response** – Please see the discussion relating to this same comment to the Master Lease 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.

**HUD's Response** – HUD finds these requested revisions acceptable.

**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.

**HUD's Response** -If the operator is prohibited from making distributions because it has not demonstrated positive working capital, HUD does not see a reason to distinguish among any potential private uses for such distributions.

**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.

**HUD's Response** – HUD disagrees with commenter. Request for audited financial statements should not be conditioned on a continuing event of default. HUD is not exerting an oversight right to audited financial statements as long as the operator certified financial statements are deemed reliable. If HUD has reason to believe the self-certified statements are unreliable, HUD must be able to require an audited financial statement.

**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.

**HUD's Response** – HUD agrees in part and will revise Section 20(h) to include “as directed by lender or HUD to review such report(s)” to address Commenter’s concern.

## **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.

**HUD's Response** - For changes that were accepted by HUD, consistent changes will be made throughout the document.

**Commenter** suggested revisions to Section 2(c) for consistency and clarification purposes.

**HUD's Response** – HUD agrees to the revision.

**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.

**HUD's Response** – HUD disagrees with Commenter and revision is rejected, as discussed above for the same comment to the Healthcare Regulatory Agreement – Operator.

**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.

**HUD's Response** - HUD agrees that this provision may be more broad than necessary to protect HUD's interests. In the general course of business, HUD realizes that the operator is usually the entity making purchases for the facility. However, HUD reminds the commenter that the 232 program services a very wide variety of potential deal structures. In the event the master tenant is making purchases for the facility, such purchases of goods and services from project funds should be reasonable and necessary. HUD will revise this provision to limit the terms to goods and services, if any, purchased or acquired by the Master Tenant.

**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.

**HUD's Response** - HUD disagrees with this comment. HUD does significant underwriting and review of accounts receivable financing and HUD's consent is not granted merely because an accounts receivable lender agrees to enter into an intercreditor agreement.

#### **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.

**HUD's Response** - HUD has no objection to this revision.

**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.

**HUD's Response** -- HUD agrees that this provision may be more broad than necessary to protect HUD's interests. In the general course of business, HUD realizes that the operator is usually the entity making purchases for the facility. However, HUD reminds the commenter that the 232 program services a very wide variety of potential deal structures. In the event the borrower is making purchases for the facility, such purchases of goods and services from project funds should be reasonable and necessary. HUD will revise this provision to limit the terms to goods and services, if any, purchased or acquired by the borrower.

**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.

**HUD's Response** – HUD disagrees with this change as unnecessary. HUD notes, however, that 25(d) does set limits on the scope of reports that need be submitted, and HUD can further narrow the scope of the expected submissions (via Program Obligations) if program experience indicates that doing so is appropriate.

**Commenter** suggested changes to Section 26(a) are for clarification.

**HUD's Response** – HUD disagrees with this change as incorrect – when there is a Master Lease, pursuant to the document's definitions, the "Borrower-Operator Agreement" is entered into by the Operator and Master Tenant. The document is correct as drafted.

**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.

**HUD's Response** –The term "bargain purchase option" is an accounting determination and this paragraph is important to ensure that the operator's lease is not characterized as anything other than an "operating lease" for accounting purposes. HUD will revise the provision to add in the suggested comment, with the addition of the phrase "provided that such terms do not cause the Operator Lease to be characterized as something other than an "operating lease" for accounting purposes and" after the phrase "arms-length negotiated terms."

**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.

**HUD's Response** - HUD disagrees with this change. This comment is confusing, as lease payments are typically made by Operator to Borrower, not by Borrower to Operator. Nothing in this provision prohibits the Operator from increasing payments to Borrower. The provision prohibits increases in the obligations of Borrower which would put more strain on the debt service than underwritten.

## 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.

**HUD’s Response** - HUD agrees to clarify this definition, but does not agree with the commenter’s suggestion. HUD will revise the definition to read: “Event of Default means a Monetary Event of Default or a Covenant Event of Default, as each is defined in Section 22 and according to the provision of Section 22.”

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

**HUD’s Response** - HUD has determined that this change is not necessary.

**Commenter** suggested that HUD revised Section 4(a), 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.

**HUD’s Response** - This clarification is not necessary. Borrowers rights to security deposits are included in both the language of this section 4(a), “... all of Borrower’s rights, title and interests in, to and under Leases...,” and in the definition of Mortgaged Property. HUD will clarify the definition of Mortgaged Property to more explicitly and more broadly include any security deposits consistent with the intent of this comment.

**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.

**HUD’s Response** - HUD has no objection to the revision.

**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.

**HUD's Response** - HUD has no objection to the revision.

**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.

**HUD's Response** - HUD agrees to the revision.

**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.

**HUD's Response** - HUD agrees that an extension of the borrower's cure period may in some cases be acceptable, but prefers alternate language to the language proposed by the commenter. HUD will revise the document to read, "Lender shall extend such 30-day period by such time as Lender reasonably determines is necessary to correct the failure for so long as Lender determines, in its discretion, that: (i) Borrower is timely satisfying all payment obligations in the Loan Documents; (ii) none of the Permits and Approvals is at substantial and imminent risk of being terminated; (iii) such failure cannot reasonably be corrected during such 30-day period, but can reasonably be corrected in a timely manner, and (iv) Borrower commences to correct such failure, or cause such correction to be commenced, during such 30-day period and thereafter diligently and continuously proceeds to correct, or cause correction of, such failure."

**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.

**HUD's Response** - HUD does not designate non-HUD parties to be its agent as a Departmental policy.

## 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.

**HUD's Response** - HUD fully supports promptly taking action against an operator, but believes that this provision is overly broad and not necessary. First, this provision is not limited to instances of operator defaults, but gives the landlord unfettered rights at any time. Secondly, this provision circumvents HUD and Lender's rights to consent to the party effectively acting as operator and holding that party accountable through an operator's regulatory agreement and other oversight. Furthermore, HUD has effectively worked with parties in the past to bring in such receivers. To the extent that the operator's breaches of the operator lease cause either a payment default or a violation of the operator's regulatory agreement, HUD has the ability to require the borrower to terminate the operator's lease, or in negotiating a work-out with the parties, to require a receiver step in.

#### 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.

**HUD's Response** - HUD disagrees; see response above.

#### 11. Intercreditor Agreement

**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.

**HUD's Response** - HUD agrees with the commenter.

#### 12. Guide for Opinion of Operator's Counsel, and Certification

**Commenter** states that the Lessee Opinion contains three items that are a problem for opinion writers, relating to the documents covered and jurisdictional matters. First, the narrowing of references to the laws of the UCC Filing Office to the UCC itself is in the Lessee Opinion form and should be carried over and permitted on the laws of the Organizational Jurisdiction, above. Second, the Property Jurisdiction counsel, for example, if able to narrow the review of the laws of the Control Collateral State to only Section 9-304 thereof, will be much more likely to include this provision of the Control Collateral State as among the laws considered in the rendering their opinions. Third, the definition of “Transaction Documents” inappropriately includes the accounts receivable documents.”

**HUD’s Response** - HUD agrees with the commenter on all three points and has revised the document accordingly.