

Sample
Mark-to-Market
PAE to Owner Transmitting Ownership Certification Requirements **Form 4.10**

From: PAE
To: Owner
Transmission: Overnight Hard Copy - With Evidence of Receipt
Date: _____
Project Name: _____
FHA Number: _____

Dear: *(name of owner)*

In all new financings, it is imperative that the lender or insurer be satisfied that the principals of the entity have acceptable history of ownership, that the entity can legally execute the documents reflecting the new financing and appropriately own and manage the property for the term of the financing.

In Mark-to-Market, we require that the information needed to satisfy these concerns be submitted within 45 days of the kick off meeting, held [by conference call] on -----, 200X. This permits adequate time not only to review the material, but to take appropriate action in the event that some change in the ownership entity or ownership documents must be made. If we cannot complete the review or make any necessary changes in a timely manner, the closing may be delayed and the rents may be reduced prior to restructuring – adding extraordinary financial burden to the property.

The deadline for submission of the documents in this transaction is -----, 200x.

All of the necessary guidance for submitting the appropriate information is enclosed. It must be submitted in the form of a certification containing all of the information listed in the enclosure and must include all of the required attachments. . If the certification and attachments are not submitted within the time requested, we, as PAE, may recommend that the owner be declared non-cooperative. If Recap agrees and the issue is not resolved within 10 days of the letter declaring the owner non-cooperative, processing will be discontinued, rents will be reduced without restructuring of the debt and the transaction will be returned to HUD Multifamily as a troubled project.

Please contact if you have any questions about preparation of the submission. We are anxious to receive the information and assure that the restructuring of this transaction can proceed smoothly and without interruption.

Sincerely,

(PAE project manager)
(official title)

Enclosed: Ownership Certification Instructions

Instructions for Submission of Ownership Documents and Supporting Information

General

Your submission must include a letter that contains the information and certifications listed below. In addition, the submission must include a number of attachments that will be listed in the letter.

We have included the prescribed form of certifications and guidance on the information that must be submitted.

We have also included explanatory material that provides appropriate definitions and selections from the Mark-to-Market Operating Procedures Guide that are necessary to complete the certification.

Letter Certification

Address: Your letter must be on the ownership entity letterhead and addressed as follows:

TO: U.S. Department of HUD
Office of Recapitalization (“Recap”)
Name of Preservation Office Director, Recap Preservation Office Director

TO: name of PAE (“PAE”)

Re: FHA Project No. number
Project Name: name
Location: address, city, state

Certification: your letter must start with the following statement:

With respect to the referenced project (“Project”) and its owner (“Ownership Entity”), I hereby certify and agree as follows:

Document Submission: Your letter must include the following paragraphs and all of the documents needed must be listed and attached:

1. The following is a true and complete list of all organizational documents (e.g., partnership agreement, articles of incorporation and bylaws, limited liability company operating agreement, certificate of limited partnership) of the Ownership Entity, including all amendments and modifications thereto (“Organizational Documents”):

[insert a list of the documents]

2. True, correct and complete copies of all Organizational Documents are attached hereto.
3. In the event of any change in the Organizational Documents, I will immediately amend this certification and advise Recap of such change.

Certifications: Your letter must contain the following certifications:

4. I have reviewed Appendix F to the Mark-to-Market Operating Procedures Guide as provided to me and **[insert the appropriate phrase]**

the Organization Documents are in compliance with the requirements of Appendix F.

[or]

the Organizational Documents are not in compliance with such requirements. I agree to use best efforts to seek amendment of the Organizational Documents to remedy all exceptions no later than **[insert date]**.

5. The Organizational Documents provide in **[provide the appropriate citation in the documents]** that the consent of the Ownership Entity to the implementation of a Mark-to-Market restructuring plan for the Project will be valid and enforceable if given in the following manner: **[describe consent process]**

Example, “by any general partner”, or “by vote of partners having at least 51% Partnership Interests”. Provide citation; for example, “pursuant to Article IX of the Limited Partnership Agreement”.

6. The Organizational Documents provide in **[provide the appropriate citation in the documents]** that the Ownership Entity will continue **[insert the appropriate phrase]** in perpetuity.

[or]

through **[insert date]**. I understand and agree that the term of any mortgage loan originated at the Mark-to-Market closing (including, without limitation, any Mark-to-Market Mortgage Restructuring Note and/or Contingent Repayment Note) shall not extend past such date or such extended date as may be achieved through duly authorized modification of the Organizational Documents.

7. I agree to notify Recap if any change in Principals (as defined by HUD in the instructions to Form HUD-2530 provided to me) in the Ownership Entity occurs or is contemplated, through the Mark-to-Market closing date.
8. **[Insert the appropriate paragraph]**

The Ownership Entity was approved by HUD at the time of original development of the Project. No changes in Principals have occurred since original HUD approval except: **[insert “none” or provide the name and SSN of each new Principal, date when each new Principal became a Principal, and statement whether HUD approval was obtained with respect to each change]**

[or]

The Ownership Entity was approved by HUD pursuant to a Final Transfer of Physical Assets (TPA) approval issued by HUD on **[insert date]**, a true and complete copy of which approval is attached hereto. Except as set forth below, no changes in Principals have occurred since original HUD approval except: **[insert “none” or provide the name and SSN of each new Principal, date when each new Principal became a Principal, and statement whether HUD approval was obtained with respect to each change]**

9. The following is a complete and accurate listing of all parties with ownership interests (e.g., partners, stockholders, members of a limited liability company) of the Ownership Entity, as of the date of this certification, showing each party’s full name, Social Security Number / Tax Identification Number and ownership interest(s):

[Note: ownership interests must add to 100%]

10. The following is a complete and accurate list of all Principals of the Ownership Entity, other than parties identified in the preceding paragraph. **["Principal" is defined in the explanatory materials provided with this document. Principals to be listed here would include (without limitation) the management agent (including, if the management agent is a corporation, its officers and directors) and officers and directors of any corporate general partner.]**
11. The Ownership Entity is currently the title holder of record to the Project or the lessee of record to the ground lease to the Project (whichever is applicable), a true and correct copy of the appropriate conveyancing document is attached hereto.
12. Attached hereto is a current, complete and accurate legal description of the Project.
13. Authorized Representatives.
 - a. I am duly authorized by the Ownership Entity to make the certifications contained herein.
 - b. The Mark-to-Market Restructuring Commitment should be addressed to the following representative of the Ownership Entity: **[insert name, address]**
 - c. The signature block for the Ownership Entity for the Restructuring Commitment, and for the Mark-to-Market closing documents, should be prepared as follows: **[insert name of Ownership Entity]**

by **[insert name and title of authorized representative (If this is not the same as the representative who is signing this certification, explain why two different authorized representatives will be utilized.)]**

d. The authorized representative named in subparagraph c. is **[or will be, on or before {insert date}]** duly authorized to bind the Ownership Entity to enter into a Mark-to-Market debt restructuring transaction and to execute any and all documents on behalf of the Ownership Entity to effectuate the transaction. On or before such date, I will provide to Recap evidence of such authorization.

14. As of the date of this certification: [Insert the appropriate paragraph]

The Ownership Entity has fee simple title to the real estate on which the Project is situated.

[or]

The Ownership Entity has a leasehold interest in the real estate on which the Project is situated, and a true and correct copy of the ground lease is attached hereto. I have reviewed Appendix F to the Mark-to-Market Operating Procedures Guide and determined that the ground lease is in compliance with the requirements set forth in paragraph A of Appendix F.

[or]

The Ownership Entity has a leasehold interest in the real estate on which the Project is situated, and a true and correct copy of the ground lease is attached hereto. I have reviewed Appendix F to the Mark-to-Market Operating Procedures Guide and determined that the ground lease is not in compliance with such requirements, I agree to use best efforts to seek amendment of the ground lease to remedy all exceptions by **[insert date]**.

15. I agree that all of the foregoing certifications shall remain true and correct at all times through and including the Mark-to-Market closing date. In the event any such certification is no longer complete or correct, and without limiting Recap's rights and remedies, the Ownership Entity shall immediately provide to Recap an updated document completing or correcting the certification.

16. I acknowledge that the making of a false statement of fact in this certification will constitute grounds for a finding that the Ownership Entity has failed to cooperate in the restructuring process, which finding may result in discontinuance of the restructuring process and reduction of rents to market levels, as provided in the Mark-to-Market Operating Procedures Guide, Section 6-6.C.

Date: **date**

name of Ownership Entity

by:

Name: name of authorized representative

Title: title of authorized representative

Explanatory attachments

- OPG Appendix F, paragraph B (see item 3)
- Definition of “principals” (see items 6 and 8)
- OPG Appendix F, paragraph A (see item 12)

Explanatory Attachment For Item 4:
Excerpt from OPG Appendix F, Detailed Guidance for PAE's Attorney,
Closing Document Preparation (revised January 2003)

B. Organizational Documents of Mortgagor Entity. Organizational documents are required to be submitted with Form 4.10 (within 30 days after the kickoff meeting) and to be updated at closing. They must expressly indicate that the duration of the ownership entity is at least coextensive with the term of **the FHA-insured Section 223(a)(7) mortgage and any HUD-held secondary mortgage financing**, that the terms of the Regulatory Agreement as modified by the M2M Modification of the Existing Regulatory Agreement take precedence in the event of any conflict with the terms of the organizational documents, that the ownership entity has authority to enter into the transaction and to comply with the requirements of the applicable mortgage insurance program and that unless previously approved otherwise by HUD, the mortgagor is a single asset entity.

1. If the mortgagor entity applying for the FHA-insured financing is newly created, the operating partnership agreements, articles of incorporation, or articles of organization must include provisions stating that:
 - a) If any of the provisions of the organizational documents conflict with the terms of the Note, Mortgage, Security Agreement, or FHA Regulatory Agreement, the provisions of the Note, Mortgage, Security Agreement or FHA Regulatory Agreement control.
 - b) No provision required by HUD to be inserted into the organizational documents may be amended without prior Recap/HUD approval, for so long as FHA is the insurer or the holder of the Note.
 - c) No provision in the organizational documents that results in any of the following will have any force or effect without the prior written consent of Recap/HUD:
 - i) Any amendment that modifies the term of the mortgagor entity;
 - ii) Any amendment that activates the requirement that a HUD previous participation certification be obtained from any additional partner, or an additional member of a limited liability company;
 - iii) Any amendment that in any way affects the Note, Mortgage, Security Agreement, or the Regulatory Agreement;
 - iv) Any amendment that would authorize any member of a limited liability company, other than the Managing Member or pre-approved Successor Managing Member to bind the company for all matters concerning the project which required HUD consent or approval;
 - v) A change in the Managing Member/General Partner or pre-approved Successor Managing Member of the mortgagor entity; or

- vi) Any change in a guarantor of any obligation to the Secretary.
- d) The mortgagor entity is authorized to execute a Note, Mortgage, or Security Agreement in order to secure a loan to be insured by the Secretary and to execute the Regulatory Agreement and other documents required by the Secretary in connection with the insured Section 223(a)(7) mortgage.
- e) Any incoming partner/member/owner must as a condition of receiving an interest in the partnership/company agree to be bound by the Note, Mortgage, Security Agreement, Regulatory Agreement, and any other documents required in connection with the Section 223(a)(7) insured mortgage loan to the same extent and on the same terms as the other partners/members/owners.
- f) Notwithstanding any other provisions, upon any dissolution, no title or right to possession and control of the Project, and no right to collect the rents from the Project, shall pass to any person who is not bound by the Regulatory Agreement in a manner satisfactory to the Secretary.

2. *Corporate Mortgagor.*

- a) Copy of Articles of Incorporation and Code of Regulations or Bylaws and all amendments thereto, certified by jurisdiction where filed;
- b) Certificate of Good Standing. If the mortgagor is a foreign corporation, a certificate of good standing from the State/Commonwealth where the project is located and the state of incorporation or an opinion from mortgagor's attorney that such certificate is not required in that jurisdiction;
- c) Enabling resolution which authorizes the loan and designates the appropriate officer(s) to execute the loan documents; and
- d) Incumbency Certificate certified by corporate officer.
- e) Corporate articles of incorporation and bylaw provisions, which make the corporation responsible for indemnifying its board members are not acceptable, except to the extent mandated by State law.

3. *Partnership Mortgagor.*

- a) Certified copy of Partnership Agreement and all amendments thereto;
- b) Copy of Certificate of Partnership, if applicable, which has been recorded in the appropriate jurisdiction, if required. If the mortgagor is a foreign partnership, a copy of the application for registration as a foreign partnership, and an indication that it is qualified to do business in the State/Commonwealth where the project is located;
- c) Copy of the "Full, Force and Effect" Certificate, or Certificate of Good Standing, if any provided by the State/Commonwealth; and
- d) If less than all the general partners are signing the loan documents, a partnership resolution which authorizes the loan and designates the appropriate partner for signing.

4. *Limited Liability Company Mortgagor.*

- a) Certified copy of Articles of Organization and Operating Agreement or Code of Regulations and all amendments thereto;
- b) Certificate of Continued Existence. If the mortgagor is a foreign limited liability company holding a license, and a Certificate of Continued Existence from the State with jurisdiction, or, alternatively, a legal opinion from an attorney licensed to practice in the State in which the project is located to the effect that the limited liability company is qualified to do business and hold title to real estate in that State;
- c) Enabling resolution which authorizes the loan and designates the appropriate Managing Member to execute the loan documents; and
- d) Incumbency Certificate with authorized Member's signature.

**Explanatory Attachment For Items 10:
Excerpt from Instructions to Form HUD-2530,
Definition of “Principals”**

Principals include all individuals, joint ventures, partnerships, corporations, trusts, nonprofit organizations, any other public or private entity, that will participate in the proposed project as a sponsor, owner, prime contractor, turnkey developer, managing agent, nursing home administrator or operator, packager, or consultant. Architects and attorneys who have any interest in the project other than an arms length fee arrangement for professional services are also considered principals by HUD.

In the case of partnerships, all general partners regardless of their percentage interest and limited partners having a 25 percent or more interest in the partnership are considered principals. In the case of public or private corporations or governmental entities, principals include the president, vice president, secretary, treasurer and all other executive officers who are directly responsible to the board of directors, or any equivalent governing body, as well as all directors and each stockholder having a 10 percent or more interest in the corporation.

Explanatory Attachment for Item 14:
Excerpt from OPG Appendix F, Detailed Guidance for PAE's Attorney,
Closing Document Preparation (revised January 2003)

- A. **Ground Leaseholds.** Ground leaseholds must conform to the FHA Lease Addendum Form FHA-2070.
1. The term of the Lease Addendum may be varied to conform with applicable State and local law except any term changes must be consistent with the Section of the National Housing Act under which the project is underwritten:
 - a) Mortgages insured under Sections 220, 221(d), and 236 pursuant to Section 223(a)(7) must have a lease term that satisfies one of the following requirements:
 - i) Term is 99 years and is renewable, or
 - ii) Term has at least 10 years to run after maturity date of the mortgage.
 - b) Mortgages insured under Section 207 pursuant to Section 223(a)(7) must have a lease term that satisfies one of the following requirements:
 - i) Term is 99 years and is renewable, or
 - ii) Term is at least 50 years from the date the mortgage is executed.
 2. PAE's counsel needs to ensure the non-default status of any ground lease that exists at the time of closing. This can be done by collecting an estoppel certificate from the lessor as part of the closing package. This certificate must be dated within 30 days of closing and state that the lessee is current on all rents due, the lessee is not in default of any lease provision and no event has occurred which, with the passage of time, would be a default under the lease.

Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This information is required to obtain benefits. The Office of Multifamily Housing, Office of Recapitalization, 451 7th Street SW, Room 6230 Washington, DC 20410. HUD may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. Title V of the Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1988 (P.L.105-65, 111 Stat. 1384) authorizes the FHA Multifamily Housing Mortgage and Housing Assistance Restructuring Program. HUD implemented a statutory permanent program directed at FHA-insured multifamily projects that have project-based Section 8 contracts with above-market rents. The information collection is used to determine criteria eligibility of FHA-insured multifamily properties for participation in the Mark to Market program and the terms on which participation should occur. The purpose of the program is to preserve low-income rental housing affordability while reducing the long-term costs of Federal rental assistance. While no assurances of confidentiality are pledged to respondents, HUD generally discloses this data only in response to a Freedom of Information request.