

**Escrow Agreement for
Operating Deficits
Section 232**

**U.S. Department of Housing
and Urban Development**
Office of Residential
Care Facilities

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Warning: Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions.

This ESCROW AGREEMENT FOR OPERATING DEFICITS (Agreement) made this _____ day of _____, 20____, by and between _____, (**Lender**), whose principal address is _____, and _____, (**Borrower**), whose principal address is _____, [and if applicable, _____ (**Depository Institution**), whose principal address is _____,] in connection with the U.S. Department of Housing and Urban Development (**HUD**) FHA Project No. _____, located in the City/County of _____, State of _____, which Project [has been, is being, or will be] [constructed, rehabilitated, purchased or refinanced] from the proceeds of a Loan insured by HUD and made by Lender. (The definition of any capitalized term or word used herein can be found in this Escrow Agreement for Operating Deficits, the Regulatory Agreement between Borrower and HUD, the Note, and/or the Security Instrument except that the term **Program Obligations** means (1) all applicable statutes and any regulations issued by HUD pursuant thereto that apply to the Project, including all amendments to such statutes and regulations, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, and mortgagee letters that apply to the Project, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Project only to the extent that they interpret, clarify and implement terms in this Agreement rather than add or delete provisions from such document. Handbooks, guides, notices, and mortgagee letters are available on HUD's official website: (<http://www.hud.gov/offices/adm/hudclips/index.cfm> or a successor location to that site)).

RECITALS:

A. HUD has issued a Firm Commitment to insure said Loan pursuant to § _____ of the National Housing Act, as amended, and Program Obligations, on which mortgage insurance Borrower is relying for financing of the Project.

B. The Firm Commitment is conditioned upon assurance that additional funds be made available for Project purposes, primarily for the absorption of any deficits resulting from the operation of the Project during the initial period of occupancy.

AGREEMENT:

In consideration of the mutual promises and undertakings contained herein, and for the purpose of inducing the Lender to make and HUD to insure said Loan, the parties acknowledge and agree as follows:

1. At or before initial endorsement of the Note by HUD for mortgage insurance, Borrower shall deposit, or cause to be deposited with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, the sum of \$ _____ (**Escrow**).

2. It is agreed that the Lender at all times shall control the Escrow, and that the funds in the Escrow may be released or allocated for the purposes indicated in this Agreement and for no other purpose without the prior written approval of HUD. The Escrow shall take the form of [*specify as applicable*]:

- cash, and/or
- one or more unconditional, irrevocable letter(s) of credit issued to Lender by a banking institution, attached hereto as Exhibit "A". The rating of the issuing banking institution and the duration of such letter(s) of credit shall comply with Program Obligations. The letter(s) of credit is attached for informational purposes only. It is expressly agreed and understood that HUD assumes no responsibility for reviewing the letter(s) of credit for sufficiency or enforceability.

3. Disbursements from the Escrow may be authorized monthly with written HUD approval to meet any Cash Deficit in the operation of the Project for the respective month.-. The term **Cash Deficit** means the shortfall between revenue and owner certified reasonable operating expenses. (Closing costs are not eligible operating expenses). Expenses not included in the Initial Operating Deficit (IOD) Escrow Calculation, form HUD-91128-ORCF, are not reasonable operating expenses.

4. Any unused balance remaining in the Escrow will be released at Borrower's request and returned to Borrower at the later of twelve (12) months after the date of final endorsement [____{**insert different number of months if required by Program Obligations**}]and when the Project has demonstrated to HUD's satisfaction that the Project has achieved an average debt service coverage (including Mortgage Insurance Premium) ratio of at least 1.45 for three (3 consecutive months. [____{**insert different number of months if required by Program Obligations**}].; except unused funds in the Escrow attributable to the

Debt Service Reserve, if applicable, will be released once the Project has achieved a debt service coverage (including Mortgage Insurance Premium) ratio of at least ____ for each month of ____ (___) consecutive months. HUD will look to the servicing Lender to certify that this requirement has been met, based on financial statements provided to the Lender by the Borrower. For purposes of determining the debt service coverage ratio, any Operator Lease Master Lease and/or sublease, if applicable, shall be disregarded. The debt service coverage ratio shall be determined based on the operating results of the Project, rather than upon the operating results of the Borrower, Master Tenant, if applicable, and/or Operator.

5. The Escrow, when in the form of cash, shall be held by Lender or a depository institution satisfactory to the Lender and in accordance with Program Obligations. Lender may, at any time, for any reason or no reason, draw upon any letter of credit included in the Escrow and convert the same to cash, which cash shall then be held and disbursed pursuant to the terms of this Agreement. Fees charged by Lender and any interest earned on the Escrow shall be governed by Program Obligations.

6. The Escrow may, at HUD's direction, be subject to immediate application to the Indebtedness if an Event of Default by Borrower occurs at any time.

Each signatory below hereby certifies that each of their statements and representations contained in this Agreement and all their supporting documentation thereto are true, accurate, and complete. This Agreement has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD as a true statement of the facts contained therein.

IN WITNESS WHEREOF, the parties have duly executed this Escrow Agreement for Operating Deficits as of the day and year first above written.

BORROWER:

LENDER:

By: _____

By: _____

Print Name and Title

Print Name and Title

DEPOSITORY INSTITUTION:

By: _____

Print Name and Title

Attachment: Exhibit "A"

EXHIBIT "A"

Form of Letter of Credit