

**Escrow Agreement
for Deferred Repairs
and Debt Service –
223(f)**

U.S. Department of Housing
and Urban Development
Office of Housing

Warning: Federal law provides that anyone who knowingly or willfully submits (or causes to submit) a document containing any false, fictitious, misleading, or fraudulent statement/certification or entry may be criminally prosecuted and may incur civil administrative liability. Penalties upon conviction can include a fine and imprisonment, as provided pursuant to applicable law, which includes, but is not limited to, 18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802, 24 C.F.R. Parts 25, 28 and 30, and 2 C.F.R. Parts 180 and 2424.

{For Section 223(f) Multifamily projects subject to Mortgagee Letter 2020-11 that involve post-closing repairs.}

This ESCROW AGREEMENT FOR DEFERRED REPAIRS AND DEBT SERVICE – 223(f) (“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 HUD
Project No. _____, located in the City/County of _____,

State of _____, which Project [has been, is being, or will be] [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 Agreement, 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 the Secretary 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 “HUDCLIPS,” at www.hud.gov.)

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 funds in the amount of \$ _____ be available for the completion of repairs deferred until after endorsement of the Note, and, if necessary, debt service payments and/or to offset operating losses that may result after closing of said Loan, subject to the limitation on uses for the specific amounts further identified in this Agreement (“**Escrow**”).
- C. The deferred repair cost estimate and list of deferred repairs itemized in Exhibit “A” (“**Repair Work**”) are attached to and made part of this Agreement.
- D. As used herein, the term “**Completion Date**” means the date that is _____ (____) months following endorsement of the Note by HUD for mortgage insurance.

AGREEMENTS:

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:

{ALTERNATIVE A, USE FOR PROJECTS WHERE THE DEFERRED REPAIR ESCROW IS IN CASH}

1. Cash in the amount of \$ _____, equal to one hundred percent (100%) of the estimated cost of the Repair Work, has been withheld by Lender from the proceeds of the Loan, or deposited by Borrower with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, and is hereby included in the Escrow (“**Repair Estimate Amount**”). A letter of credit may not be substituted for this amount. The Repair Estimate Amount may only be used for Repair Work.
2. (a) Additional cash or Letter of Credit (permitted only for non-cash out portions) in the amount of \$ _____, consisting of not less than **{for § 223(f)}** twenty percent (20%) **{for § 223(a)(7)}** ten percent (10%) **{insert different percentage if permitted by Program Obligations}** ___ percent (___%) of the estimated cost of the Repair Work, has been deposited by Borrower with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, and is hereby included in the Escrow (“**Additional Deposit Amount**”), in 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 "B" (permitted only for non-cash out portions). The rating of the issuing banking institution and the duration of such letter(s) of credit shall comply with Program Obligations.

The Additional Deposit Amount may be used for Repair Work, and if Repair Work is completed pursuant to the terms of this Agreement, may be used for Debt Service Shortfalls or Cash Deficits, as such terms are defined in Paragraph 5 below.

(b) Further additional cash or Letter of Credit (permitted only for non-cash out portions) in the amount of \$_____, **{INSERT REQUIRED DEBT SERVICE RESERVE SET FORTH IN THE FIRM COMMITMENT}** has been withheld by Lender from the proceeds of the Loan (permitted only if funded from cash out proceeds), or deposited by Borrower with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, and is hereby included in the Escrow ("**Debt Service Reserve**"). The Debt Service Reserve may only be used for Debt Service Shortfalls or Cash Deficits.

cash, and/or

one or more unconditional irrevocable letter(s) of credit issued to Lender by a banking institution, attached hereto as Exhibit "B" (permitted only for non-cash out portions). The rating of the issuing banking institution and the duration of such letter(s) of credit shall comply with Program Obligations.

{ALTERNATIVE B, USE FOR 223(f) TRANSACTIONS WHERE THE ESCROW IS FUNDED WITH TAX CREDIT EQUITY}

1. Cash and tax credit equity in the amount of \$_____, equal to one hundred percent (100%) of the estimated cost of the Repair Work, has been withheld by Lender from the proceeds of the Loan, or deposited by Borrower with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, or will be paid in subject to the tax credit equity pay-in schedule attached as Exhibit "D", and is hereby included in the Escrow ("**Repair Estimate Amount**"). A letter of credit may not be substituted for this amount. The Repair Estimate Amount may only be used for Repair Work.

2. (a) Additional cash or tax credit equity or Letter of Credit in the amount of \$_____, consisting of not less than twenty percent (20%) [ten percent (10%)] **{insert different percentage if permitted or required by Program Obligations}** _____ percent (___%) of the estimated cost of the Repair Work, has been deposited by Borrower with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations and is hereby included in the Escrow ("**Additional Deposit Amount**"), in 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 "B". The rating of the issuing banking institution and the duration of such letter(s) of credit shall comply with Program Obligations.

The Additional Deposit Amount may be used for Repair Work, and if Repair Work is completed pursuant to the terms of this Agreement, may be used for Debt Service Shortfalls or Cash Deficits, as such terms are defined in Paragraph 5 below.

(b) Further additional cash or Letter of Credit (permitted only for non-cash out portions) in the amount of \$ _____, **{INSERT REQUIRED DEBT SERVICE RESERVE SET FORTH IN THE FIRM COMMITMENT}** has been withheld by Lender from the proceeds of the Loan (permitted only if funded from cash out proceeds), or deposited by Borrower with Lender or subject to the control and order of Lender with a depository institution satisfactory to Lender in accordance with Program Obligations, and is hereby included in the Escrow ("**Debt Service Reserve**"). The Debt Service Reserve may only be used for Debt Service Shortfalls or Cash Deficits.

cash, and/or

one or more unconditional irrevocable letter(s) of credit issued to Lender by a banking institution, attached hereto as Exhibit "B" (permitted only for non-cash out portions). The rating of the issuing banking institution and the duration of such letter(s) of credit shall comply with Program Obligations.

3. In the event of a cash out refinancing under § 223(f) of the National Housing Act, a further additional cash amount of \$ _____, **{INSERT REQUIRED CASH OUT HOLDBACK SET FORTH IN THE FIRM COMMITMENT}** has been withheld by Lender from the proceeds of the Loan, and is hereby included in the Escrow ("**Cash Out Proceeds Amount**"). The Cash Out Proceeds Amount may be used for Repair Work, Debt Service Shortfalls or Cash Deficits.

4. Borrower shall complete the Repair Work, free of all liens, on or before the Completion Date. Borrower shall remedy or cause to be remedied all defects in the Repair Work due to faulty materials or workmanship, defective materials, or damage to the Project resulting from such defects, which defects or damage become apparent within twelve (12) months from completion of the Repair Work to the satisfaction of HUD ("**Latent Defects**").

5. Lender may release and/or apply funds from the Escrow for any of the following purposes, subject to the limitations on uses for the specific amounts further identified in this Agreement: (a) completed work pursuant to the estimated amounts set forth in Exhibit "A" Repair Work **{INSERT ONLY IF HUD HAS APPROVED DELEGATION OF**

ESCROW ADMINISTRATION TO LENDER} [in accordance with the HUD-approved Lender Self-Administration Rider (“**Lender Self-Administration Rider**”) attached hereto as Exhibit “C”]; (b) to meet any shortfall in debt service payments due under the Note, Security Instrument and Regulatory Agreement (principal, interest and mortgage insurance premiums) (“**Debt Service Shortfall**”); or (c) to meet any Cash Deficit in the operation of the Project for the time frame set forth in Paragraph 8. The term “**Cash Deficit**” means the shortfall between Rents and Reasonable Operating Expenses.

6. Disbursements from this Escrow shall be made only upon prior written approval of HUD, with the exception of those amounts expended by Lender pursuant to Paragraph 7 of this Agreement, to meet any established cost for which the Escrow was intended **{INSERT ONLY IF HUD HAS APPROVED DELEGATION OF ESCROW ADMINISTRATION TO LENDER}** [in accordance with the HUD-approved Lender Self-Administration Rider].

7. If Borrower has not completed all the Repair Work by the Completion Date, Lender will have the right, subject to HUD approval, to complete the Repair Work, and to pay the cost thereof, including all costs and a reasonable fee of the Lender, from the amounts available under this Escrow for the completion of Repair Work. For this purpose, Borrower irrevocably appoints Lender as its attorney-in-fact, with full power of substitution, to do and perform for Borrower in Borrower’s name, place and stead, all matters and things which Lender shall in its judgment deem necessary and proper to effectuate the completion of the Repair Work, and to apply the amount deposited under the Escrow for the completion of Repair Work to the payment of debts, expenses, costs and charges of any kind contracted or incurred in connection therewith. The orders given by Lender as attorney-in-fact for Borrower shall be good and sufficient vouchers for all payments made by virtue thereof. In this connection, this power of attorney shall provide Lender with full and sufficient authority to enter into and upon the Project and take charge thereof, together with all materials, appliances, Fixtures and other improvements and to call upon and require contractors to complete the Repair Work. Except for intentional misconduct or gross negligence on the part of Lender, Borrower shall indemnify, hold harmless and defend Lender from and against claims of third parties arising from Lender’s performance under this paragraph. Lender shall have the right to obtain any property and/or liability insurance coverage which Lender shall in its judgment deem necessary or appropriate in connection with Lender’s performance under this paragraph. Subject to written HUD approval, Lender may extend the Completion Date. Lender will not be responsible for performance of the Repair Work beyond the expenditure of the amount available from the Escrow for Repair Work, and if that amount is insufficient, Lender will be under no obligation to proceed further with the Repair Work. The power granted herein is coupled with an interest, and Borrower acknowledges and agrees that all powers granted herein to Lender may be assigned to HUD.

8. Subject to Paragraphs 7 and 9 of this Agreement, provided that an Event of Default does not then exist,

(a) any balance remaining in the Escrow may be released to Borrower when: (i) all Repair Work has been satisfactorily completed, as determined by HUD; (ii) evidence of clear title has been provided to HUD; (iii) the later of six (6) months have elapsed from the date of endorsement of the Note, or the Project has achieved ___ debt service coverage **{INSERT DEBT SERVICE COVERAGE RATIO REQUIRED UNDER PROGRAM OBLIGATIONS}** for each month of three (3) consecutive months; and (iv) where required by the Firm Commitment, Latent Defects assurances that are compliant with Program Obligations have been provided in the form of a cash escrow, letter of credit, or a surety bond from a surety on the accredited list of the U.S. Treasury, in an amount equal to two and one-half percent (2 ½ %) of the critical and non-critical repair estimate in the amount of \$_____ (“**Latent Defects Deposit**”), which shall be held as part of the Escrow. The Latent Defects Deposit shall be used for the correction of Latent Defects, as may be required by either Lender or HUD. Said sums may be used for the correction of Latent Defects in the event Borrower fails to make such corrections; and

(b) any balance remaining on account of the Latent Defects Deposit shall be released to Borrower, upon the latter of (i) fifteen (15) months from the completion of the Repair Work, or (ii) at such time as the Latent Defects have been corrected to the satisfaction of HUD.

9. In cases where all or a portion of the repair cost is required to support the Loan amount and the actual cost of the Repair Work is less than estimated, a supplemental cost certification will be required and the maximum insurable Loan amount must be recalculated. If the maximum insurable Loan is reduced due to lower actual costs, the Borrower must use the excess funds that were funded from Loan proceeds for one or more of the following purpose(s) in accordance with Program Obligations and with the consent of Lender: (a) to pay for additional repairs approved by Lender and HUD, the funds for which shall continue to be subject to this Agreement, in addition to further cost certification if Program Obligations so require; (b) to reduce the outstanding Loan balance, which payment will not be deemed by HUD as a prepayment of the Loan; (c) or to deposit in the Reserve for Replacement.

10. 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, 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.

11. 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 Agreement 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 "B"
Exhibit "C"
Exhibit "D"

EXHIBIT "A"

Repair Work

EXHIBIT "B"

Form of Letter of Credit

EXHIBIT "C"

Lender Self-Administration Rider

EXHIBIT "D"

Tax Credit Equity Pay-In Schedule