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**MAP Guide**  
**CHAPTER 19 – CLOSING GUIDE**

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## CHAPTER 19 – CLOSING GUIDE

**Part I: Introduction and Procedures**

**Part II: Closing Documents and Program-Specific Requirements**

**Part III: Sample Language, Certifications and Riders**

### **Part I: Introduction and Procedures**

#### **—General Loan Closing Procedures**

##### **19.1.01 Introduction**

- A. Applicability. This Chapter 19 of the MAP Guide (“Guide”) applies to all FHA-insured Multifamily loan closings authorized under the National Housing Act (12 USC 1701 *et. seq.*, the “Act” or “NHA”), whether processed through MAP or through TAP. This Chapter 19 supersedes and replaces the FHA Multifamily Program Closing Guide (last revised February 2015).
- B. Objective. This Chapter is intended to:
1. Provide procedures and protocols for Lender, counsel for Lender (“Lender’s Counsel”), Borrower, counsel to the Borrower, the assigned closing attorney (“HUD Closing Attorney”) from the Office of General Counsel (“OGC”), the HUD Multifamily Regional Center Director (“RC Director”), and other Multifamily Housing Production (“MHP”) staff, to prepare, submit, and review closing packages and otherwise prepare for the closing of Multifamily loans; and
  2. Promote uniformity in the requirements and procedures for HUD-closings held nationwide.
- C. Defined Terms.
1. Capitalized terms used in this Chapter have the meanings provided in the Project Loan documents, including the *Note (Multistate)* (HUD-94001M), *Multifamily [Leasehold] (Mortgage, Deed of Trust, Deed to Secure Debt, or Other Designation as Appropriate in jurisdiction) Assignment of Leases and Rents and Security Instrument* (HUD-94000M) (the “*Security Instrument*”), and *Regulatory Agreement for Multifamily Projects* (HUD-92466M) (the “*Regulatory Agreement*”), unless specifically defined in this Chapter 19.
  2. As used in this Chapter 19, the term Program Obligations has the meaning set forth in

the *Regulatory Agreement*.

3. For purposes of this Chapter 19, RC Director includes the RC Director's designees, as appropriate and pursuant to the Office of Housing's delegations of authority. The RC Director is the organizational position with delegated authority to make administrative policy determinations with respect to insuring an FHA loan for Multifamily projects, in accordance with Program Obligations.

### **19.1.02 Closing Document Review and Procedures**

- A. General. This Section 19.1.02 outlines HUD's requirements and general procedures for review of draft closing documents, including Lender's submission of the draft documents and resolution of issues identified during application processing and closing review. The RC Director may request OGC legal assistance throughout the processing period, including when the RC Director identifies complex legal issues and determines that the resolution of a legal issue may be uncertain, problematic, or time-consuming, or may delay closing.
- B. Firm Application. Upon Lender's submission of an application for *Firm Commitment*, the RC Director may request OGC legal assistance and consultation where complex legal issues have been identified, the resolution of which may be uncertain, problematic, or time-consuming, and such review would reduce impediments to or delays in closing after the *Firm Commitment* is issued.

Lenders and Lender's Counsel may contact the RC Director to request early legal review consistent with this subsection. The RC Director will evaluate the validity of each outside request and will consult with OGC when necessary.

- C. After *Firm Commitment* Issuance and Prior to Package Submission.
  1. *Initial Communication*. Once the RC Director has issued a *Firm Commitment*, the RC Director will send an introductory or "Hello" communication to Lender within two (2) business days after the issuance of the *Firm Commitment*. The communication will provide:
    - a. The name and contact information for the assigned Closing Coordinator;
    - b. The name and contact information for an initial point of contact in OGC and information about when the actual HUD Closing Attorney will be assigned (as set forth below in C.2);
    - c. A request that Lender identify its preferred closing date;
    - d. A request that Lender provide a specific timeline for closing by its preferred target date based on HUD's established review times, set forth in this Chapter 19; and
    - e. A request that Lender identify any external deadlines relevant to closing (*e.g.*, bond/tax credit deadlines).

2. *Lender's Introductory Response and Interim Communication.*

- a. Lender must respond to the assigned Closing Coordinator in writing to provide the information requested in the introductory letter. The Closing Coordinator will distribute the Lender's response to the relevant staff within MHP and OGC.
- b. If Lender requests a preferred closing date that is within 60 calendar days, OGC and the RC Director will review the information provided and mutually agree upon a Tentative Closing Date.
- c. The Tentative Closing Date is preliminary, established only to manage expectations, and may be changed by HUD if Lender or Lender's Counsel fails to adhere to the review times prescribed in this Chapter 19, including timely submission of a complete draft closing package and response to HUD comments. Additionally, any Tentative Closing Date remains subject to rescheduling by HUD due to exigent circumstances.
- d. HUD will not transition from a Tentative Closing Date to a confirmed closing date until the RC Director and HUD Closing Attorney approve a substantially complete draft closing package, as set forth below.
- e. If a Tentative Closing Date is set, OGC will assign a HUD Closing Attorney that is available for the Tentative Closing Date.
- f. If a Tentative Closing Date is not set, OGC will maintain a Point of Contact for the convenience of all parties, and assign a HUD Closing Attorney when Lender submits the draft closing package to the Closing Coordinator.
- g. OGC will endeavor to provide continuity by assigning the same HUD Closing Attorney for closing review that was assigned for any early legal review. The assignment of the HUD Closing Attorney remains within the discretion of OGC and may be adjusted, for example, where the workload of an individual attorney or an OGC office precludes assignment of the same attorney or office. Where a change in the attorney assignment occurs, OGC will advise all relevant parties as soon as possible.
- h. The Closing Coordinator will promptly notify Lender and Lender's Counsel of any set Tentative Closing Date and provide contact information for the OGC Point of Contact, or HUD Closing Attorney, as applicable.

3. *Preparation and Delivery of Draft Closing Package.* Lender's Counsel is responsible for competently compiling the draft closing package for submission to HUD, which includes reviewing all documentation to correct errors and omissions prior to submission and complying with the document submission standards set forth in Section 19.2.01, *infra*. To facilitate the HUD Closing Attorney's review, Lender's Counsel may provide a written narrative outlining legal issues that will require negotiation or special attention of the HUD Closing Attorney.

If any revision is made to a required document after submitting the draft closing

package, Lender's Counsel must promptly email the HUD Closing Attorney to identify the revision(s) made and provide an explanation as to why the revision(s) are necessary or appropriate.

4. *Submission Deadlines for Tentative Closing Dates.* To maintain a Tentative Closing Date, Lender or Lender's Counsel must submit a draft closing package to the Closing Coordinator at least thirty (30) business days prior to any Tentative Closing Date.

Lender's failure to submit a draft closing package by this deadline may result in a change to a Tentative Closing Date, at the discretion of the RC Director.

Lender should take into consideration holidays, GNMA delivery schedule, bond closing and tax credit funding deadlines, and other known events that may affect review times.

#### D. HUD Review of Closing Packages.

1. *Preliminary Review by Closing Coordinator.* The Closing Coordinator will conduct a cursory review at the time of submission to determine whether the submission appears generally ready for substantive closing review. If the Closing Coordinator determines the submission is adequate to begin closing review, the Closing Coordinator will initiate the closing package review process outlined in this subsection.

The Closing Coordinator will notify the Lender when a package is determined to be inadequate to begin closing review, together with a list of deficiencies. Lender must resolve threshold deficiencies identified by the Closing Coordinator, and update the draft closing package accordingly, before the Closing Coordinator will route the closing package for OGC and MHP closing review.

Tentative Closing Dates are subject to change at the RC Director's discretion for any Project where the draft package submission is determined by the Closing Coordinator to be inadequate to start closing review.

2. *Notice of Closing Review and Communication.* The Closing Coordinator will communicate with all relevant parties after the Closing Coordinator initiates the closing package review. If not yet assigned, OGC will promptly make a HUD Closing Attorney assignment once the Closing Coordinator initiates the closing package review.

The HUD Closing Attorney will contact Lender's Counsel within 2 business days following the Closing Coordinator's approval to start review. The HUD Closing Attorney will be available to participate in calls at the request of the RC Director, including when specific legal issues have been identified that require input from the HUD Closing Attorney (e.g., title issues that may require negotiation).

3. *Substantive Closing Review.* Assigned MHP staff and the HUD Closing Attorney will substantively evaluate each package routed for closing review by the Closing Coordinator and will endeavor to meet previously set Tentative Closing Dates subject to the limitations set forth in this section. The RC Director and HUD Closing

Attorney will work collaboratively to review draft closing packages and maintain set Tentative Closing Dates.

The RC Director is primarily responsible for reviewing the substantive business terms of each document submitted, including without limitation, the review and consideration of requested closing document changes that relate to business and policy concerns, business implications of litigation, satisfaction of *Firm Commitment* conditions, insurance coverage, UCC filings, site plans, survey matters, title encumbrances, agreements related to construction, architectural work, and disbursement of funds. The RC Director may only accept changes to the HUD forms or deviations from the requirements of this Chapter 19 that have been made in accordance with the procedures set forth in Section 19.2.01.

The HUD Closing Attorney is primarily responsible for determining that the draft submission is legally sufficient, meaning: (i) the documents submitted do not reflect discernable violations of statute or regulation; (ii) all standard form documents are accurate and complete (including duly approved changes); (iii) riders and boilerplate provisions required by Program Obligations are accurate and complete; (iv) evidence to satisfy *Firm Commitment* special conditions has been reviewed and approved by the RC Director, and is included in the submission; and (v) documents are consistent with deal-specific requirements of the *Firm Commitment*, the applicable closing checklists, and determinations of the RC Director.

4. *HUD Comments and Lender Response/Resubmission.* After completing the initial substantive review, assigned MHP staff and the HUD Closing Attorney will provide the Closing Coordinator with comments identifying deficiencies in the package. The Closing Coordinator and/or the HUD Closing Attorney will electronically distribute HUD's comments to Lender and/or Lender's Counsel via email for consideration and response.

To maintain a Tentative Closing Date, Lender and Lender's Counsel must respond to HUD comments within 5 business days after the date comments were distributed.

Lender's response to HUD's comments must resolve identified deficiencies in a manner consistent with this Chapter and Program Obligations. Lender's Counsel must substantively address all HUD Closing Attorney comments and include corrected documents. Changes to previously submitted documentation must be presented in redline form whenever possible. Lender's Counsel may include a written narrative or imbed written responses in the HUD Closing Attorney's comment document to assist the HUD Closing Attorney in their review.

5. *Substantial Completeness.* Closing dates, including previously set Tentative Closing Dates, will not be confirmed until the Closing Coordinator and HUD Closing Attorney determine that the package is substantially complete, and any outstanding issues elevated to HUD HQ pursuant to this Chapter 19 have been resolved. A substantially complete closing package means:
  - a. In accordance with Program Obligations, and except for the items addressed



immediately below (in Section 19.1.02.D.5.b.): all documents required by the applicable Closing Checklist and the *Firm Commitment* are included; blanks, bracketed language, and other deal specific information in form documents are accurately completed; non-form documentation is accurately prepared in substantially final form for closing the transaction in accordance with this Chapter 19; and HUD's review comments are resolved in a manner consistent with this Chapter 19. This includes, but is not limited to, surveys (where applicable), documentation evidencing compliance with *Firm Commitment* conditions, a pro forma title policy and legible copies of all exception documents, rate-lock terms for the *Note*, and secondary financing loan documents. See Section 19.2.01 for further guidance on the compilation and completion of closing documents.

- b. A substantially complete closing package need not include completion of items specifically identified in this Chapter 19 as appropriate for submission at or near the confirmed closing date, including time-sensitive form information (*i.e.*, dates and recording information), Certificates of Good Standing, Foreign Status Certificates, UCC searches, fully issued building permits, cost-certification, closing statements, and LIHTC equity pay-in schedule. See *Part II* of this Chapter 19 for document specific guidance.

The Closing Coordinator will confer with assigned MHP staff to determine when the package is substantially complete as to programmatic requirements. The HUD Closing Attorney will provide prompt written notice to the Closing Coordinator when the HUD Closing Attorney determines that the closing package is substantially complete as to legal requirements.

6. *Confirmation of Closing Date.* Once HUD determines the closing package is substantially complete, the Closing Coordinator will consult with assigned MHP staff, the HUD Closing Attorney, Lender, and Lender's Counsel to determine a closing date, which the Closing Coordinator will then confirm in writing. Until Lender receives the Closing Coordinator's confirmation of a closing date, any previously requested closing date, including a set Tentative Closing Date, remains tentative.
7. *Conditions for Maintaining a Confirmed Closing Date.* In addition to the threshold review criteria outlined above, a confirmed closing date is subject to the following conditions:
  - a. *Completion of Closing Package.* Pursuant to 19.02.D.5.b. above, Lender's Counsel must submit all remaining documents not yet reviewed or approved by HUD, at least four (4) business days prior to the confirmed closing date for closings-by-mail and three (3) business days for in-person closings (unless later delivery is expressly permitted by this Chapter 19 or elsewhere in this Guide). Any additional changes may result in a change to the confirmed closing date, at the RC Director's discretion and in consultation with the HUD Closing Attorney;

- b. *Final Approval.* Lender and Lender’s Counsel must resolve any additional deficiencies identified by HUD at least 1 business day prior to Lender’s submission of the Closing Docket (defined in Section 19.1.03.E). Any resulting changes to closing documents must be submitted to and approved by the HUD Closing Attorney and RC Director prior to Lender’s submission of the Closing Docket to HUD, except as permitted by the HUD Closing Attorney.

E. Changes to Tentative or Confirmed Closing Dates.

Lenders Counsel may request to change to a set closing date (Tentative or confirmed, depending on review stage). The request should be made in writing to the HUD Closing Attorney and include alternative dates for closing. The HUD Closing Attorney will consult with the RC Director to reset the closing date. Once reset, the HUD Closing Attorney will notify the applicable Regional Counsel that the closing date has been changed at the request of Lender’s Counsel.

Additionally, when the HUD Closing Attorney and Closing Coordinator determine that the conditions of this Section 19.1.02 are not met, or other exigent circumstances exist that necessitate a change to a set closing date (Tentative or confirmed, depending on the stage of review), they will seek the concurrence of the RC Director and the applicable Regional Counsel. Upon concurrence, the Closing Coordinator will notify the Lender of the need to reschedule the set closing date. Lender’s Counsel may then request a new preferred closing date. The HUD Closing Attorney will consult with the RC Director to reset the closing date and notify the Regional Counsel accordingly.

### **19.1.03 Closing Arrangements**

- A. Administrative Clearance to Close. On or before the confirmed closing date, the RC Director will provide the HUD Closing Attorney with administrative clearance to close the Loan, either by written memorandum or email. The RC Director’s administrative clearance will include the following confirmations:

1. All special conditions of the *Firm Commitment* have been met;
2. The Loan is ready to be closed;
3. The documents submitted to the RC Director for the closing were fully examined and approved; and
4. The *Firm Commitment* is current.

- B. HUD Signature Page. All documents that require HUD signature must be prepared and submitted by Lender’s Counsel sufficiently in advance of the confirmed closing date. For each document signed in counterpart, HUD’s signature page should be formatted to include the Project name, FHA project number, and the document title. Recordable documents must include notary blocks. These form completion changes are not considered substantive changes under Section 19.2.01.F, and do not require explicit HUD approval.

C. Note Endorsement. When feasible, the RC Director will sign the *Note* for endorsement on the date of closing. If not feasible, the RC Director may sign the *Note* for endorsement prior to closing and OGC will hold the *Note* until the conclusion of the closing.

D. Circulation and Submission of Recordable Documents.

1. The RC Director will only sign original recordable closing documents (*e.g.*, the *Regulatory Agreement*) when HUD deems the closing package to be substantially complete. See Section 19.1.02.
2. HUD will sign original recordable closing documents in counterpart when allowed under state and local law. If a recordable document is not signed in counterpart, Lender's Counsel must obtain the non-HUD signatures first, and then submit the original to the RC Director for HUD signature. HUD may permit the designated escrow officer (*e.g.*, title agent) to hold HUD signed documents in escrow.
3. The designated escrow officer engaged to close the Loan must review all documents submitted for recording to ensure compliance with local recording requirements.
4. Closing documents requiring recordation must be recorded prior to or on the day of closing, and prior to HUD's delivery of the endorsed *Note*. The Regional Counsel and RC Director are authorized to deviate from this standard in jurisdictions where pre-recording or contemporaneous recording on the date of closing is not possible, or in other exigent circumstances. HUD generally permits pre-recording of documents (recorded prior to the HUD-approved closing date); Borrower and Lender assume all risk related thereto.
5. HUD requires two hard copies of each recorded document, except when instructed otherwise by the HUD Closing Attorney. The documents may be originals bearing evidence of recording from the recorder's office, or copies certified by the title company to be true and correct copies of the document that was recorded. Title certified copies should specify the date of recording, recording information (document number, book and page, etc.), and recording location (*i.e.*, the county recorder's office). Where documents are recorded post-Closing, Lender and Lender's Counsel are responsible for ensuring the documents have been recorded in the proper order and that the title policy is updated with all recording information, either by endorsement or other customary practice.

E. Form of Closing Docket Submission. For closing, Lender's Counsel must provide the HUD Closing Attorney with two (2) sets of all closing documents (the "Closing Docket") in hard copy, except when instructed otherwise by the HUD Closing Attorney. Lender's Counsel is responsible for the administrative tasks necessary to compile the complete Closing Docket, except for internal HUD documents identified as such in the applicable Closing Checklist.

The first set of documents must include all originals required by the applicable closing checklist for submission to the Washington Docket. See Appendix 19E. Lender's Counsel must identify which set is being submitted for the Washington Docket and which as the

attorney docket.

Lender's Counsel is responsible for providing the RC Director and HUD Closing Attorney with an electronic copy of the Closing Docket within 14 calendar days after closing (preferably in searchable PDF format). The electronic copy must include separate files for each document, with file names that reflect the title of the document and the order of the applicable closing checklist. Lender's Counsel is responsible for ensuring that the electronic copy is an accurate copy of the Closing Docket, as submitted and approved by the HUD Closing Attorney.

- F. Restriction on Post-Closing Revision to Closing Docket. After closing, the Closing Docket may not be revised or amended without the prior written approval of the RC Director and HUD Closing Attorney.
- G. Closing Type: Mail or In-Person.
1. Mail Closings. A closing by mail will be scheduled at Lender's request, except as provided below. In requesting a closing by mail, Lender and Lender's Counsel agree to adhere to the mail closing procedures of this subsection.
    - a. Standards for Denying a Request to Close by Mail. The RC Director and the appropriate Regional Counsel have the authority to deny a Lender request to close by mail if they determine that the complexity of the transaction necessitates an in-person closing.
    - b. Mail Closing Procedures. When closing by mail, Lender's Counsel must follow these standards:
      - i. Package Format. Except as otherwise provided in this Chapter 19 or when instructed otherwise by the HUD Closing Attorney, two (2) complete hard copy sets of the Closing Docket must be delivered to the HUD Closing Attorney at least two (2) business days in advance of the confirmed closing date (morning delivery unless the HUD Closing Attorney specifies otherwise). Lender's Counsel is responsible for compiling the closing packages before delivering to HUD (including documents generally within the control of other parties), except that the Title Policy, recorded documents, and final building permits may be delivered on closing day (first overnight delivery or morning delivery by courier).
      - ii. Availability by Telephone. All parties to the transaction, including the RC Director, must be available by phone and email on closing day in case questions or issues arise.
      - iii. Failure to Close by Mail on HUD-Approved Closing Day. If there are problems with the Closing Docket as delivered (*e.g.*, delayed delivery,

errors, or missing documents), the HUD Closing Attorney, in consultation with the RC Director and applicable Regional Counsel, will determine appropriate next-steps, which may include rejecting the entire closing package (Lender may request return of the package at Lender's expense), and/or rescheduling closing for another day. Lender's Counsel is solely responsible for ensuring that any package deficiencies are resolved.

- iv. Endorsement and Delivery of Note. HUD will not deliver the endorsed *Note* until all documents are presented to, and approved by, the RC Director and HUD Closing Attorney. In addition, a pre-addressed, pre-paid envelope and an appropriate cover letter must be provided for return delivery of the endorsed *Note*, or Lender's Counsel may make alternate arrangements, as approved by the HUD Closing Attorney, for in-person pick-up of the endorsed *Note* (e.g., courier service).
2. In-Person Closing Procedures. An in-person closing will be scheduled at Lender's request, or when the RC Director and Regional Counsel deny Lender's request for a mail closing. The RC Director, in consultation with the HUD Closing Attorney, determines the location of in-person closings. In-person closings are generally held at the HUD office where the HUD Closing Attorney is located.

HUD will not deliver an endorsed *Note* unless all documents are presented to, and approved by, the RC Director and HUD Closing Attorney. Lender's Counsel is solely responsible for ensuring that any deficiencies in the Closing Docket are resolved. If there are problems with the Closing Docket as submitted, the HUD Closing Attorney, in consultation with the RC Director and applicable Regional Counsel, will determine appropriate next steps, which may include rescheduling closing for another day.

#### **19.1.04 Post-Closing Handling of Closing Dockets**

- A. Retention of Closing Dockets. After closing, the attorney docket is retained by OGC. The documents submitted for the Washington Docket are retained by HUD Headquarters.
- B. Multifamily Insurance System. In connection with the Multifamily Insurance System (MFIS), the RC Director must complete the following items: *Official Receipt* (HUD-27038), *Schedule of Project Collections* (HUD-3416), and *Closing Memorandum* (HUD-290).
- C. Transmittal. When the RC Director determines that the entire Washington Docket is complete, the RC Director will mail the completed forms identified above, together with the Washington Docket, to HUD Headquarters at the following address:

U.S. Department of Housing and Urban Development

Housing Records Management Office  
451 7th St., SW  
Ste. B-264  
Washington, D.C. 20410

## **—Initial Loan Closing Procedures, New Construction and Substantial Rehabilitation**

### **19.1.05 Initial Endorsement Activities**

- A. Definition. For purposes of this Chapter, “Initial Closing” means the closing at which HUD initially endorses the *Note* for insurance of advances for new construction and substantial rehabilitation.
- B. Pre-Construction Conference. The pre-construction conference must be held prior to or concurrently with the Initial Closing and must be held before the start of construction. See Section 12.2 for instructions for conducting the pre-construction conference, and Appendix 5E for administrative requirements related to plans and specifications. The RC Director is responsible for ensuring that the preconstruction conference includes all necessary parties, and for scheduling and reserving space for the meeting.
- C. Initial Draw of Loan Proceeds. Initial draw of Loan proceeds may be made on the day of Initial Closing, provided that no draw may occur until HUD releases the endorsed *Note* to Lender.

### **19.1.06 Prevailing Wage Rates and Coordination with the Office of Davis-Bacon and Labor Standards (DBLS)**

- A. DBLS Clearance Required. For all Projects subject to Davis-Bacon labor standards, the RC Director will not provide administrative clearance to close or endorse the *Note* until: (1) the RC Director has received clearance for closing from DBLS; (2) if applicable, any conditions of the DBLS clearance have been fully satisfied; and, (3) if applicable, the parties have submitted evidence that any conditions of Department of Labor (DOL) withholding letters, consent orders, or other DOL determinations and findings have been fully satisfied. The RC Director will include a copy of the DBLS closing approval in the RC Director’s administrative clearance.
- B. Procedures for Firm Application, Firm Issuance, and Initial Closing.
  - 1. Prior to issuing a Firm Commitment, the RC Director will provide DBLS with a copy of each application for Firm Commitment (e.g., the first four pages of *Application for Multifamily Housing Project* (HUD-92013)). Upon request from assigned DBLS staff, the RC Director will make other Project documentation in its possession available for DBLS review, in accordance with the information collection

requirements of the Paperwork Reduction Act.

- a. The RC Director will obtain written confirmation of the DBLS wage decision, including copies of selected general wage determination(s).
  - b. The RC Director and/or HQ MHP will review the DBLS wage decision and will consult with OGC if there are any legal questions.
2. After legal questions are resolved, if any, the RC Director will forward the DBLS wage decision to the Lender and include any additional clarifying information provided by DBLS.
  3. After Firm Commitment, and after HUD receives the draft closing package, the RC Director will notify assigned DBLS staff of any Tentative Closing Date (*see* Section 19.1.02) and provide a copy of the draft *Construction Contract* (HUD-92442M), including exhibits.
    - a. DBLS will review the draft *Construction Contract* and provide written confirmation to the RC Director indicating whether the applicable wage rates and the *Supplementary Conditions to the Construction Contract* (HUD-92554M) are included in the draft submission. If DBLS informs the RC Director that the wage rates included in the draft *Construction Contract* are inaccurate, the RC Director will provide corrective instructions to the Lender, with a copy to the HUD Closing Attorney.
  4. The RC Director will notify assigned DBLS staff of a Project's confirmed closing date 3 to 5 business days in advance. *See* Section 19.1.02. The RC Director will obtain written clearance from DBLS for the Initial Closing at least 1 business day in advance of the confirmed closing date (via email or memo). The RC Director will provide a copy of the DBLS clearance to the HUD Closing Attorney as soon as possible.
  5. On the morning of Initial Closing, the RC Director will contact DBLS to confirm the effective modification number for the general wage determination(s) selected for the Project. *See* 24 CFR 200.33 and 29 CFR 1.6(c)(3)(ii). The RC Director will immediately notify Lender, Lender's Counsel, and the HUD Closing Attorney if there are any updates to the wage decision.
  6. The RC Director will coordinate with DBLS to schedule the pre-construction conference and provide DBLS with contact information for the General Contractor. *See* Section 12.2.
- C. Early Start of Construction. When the RC Director approves an early start of construction for a Project that is subject to Davis-Bacon labor standards, the requirements of subsection B, immediately above, will be modified to accommodate the early start. The RC Director will

work collaboratively with DBLS staff to ensure there is sufficient time to review Project documentation and select the applicable wage rates prior to the start of construction. See Sections 19.1.07 and 5.8.F; *see also* 29 CFR 1.6(c)(2)(i)(C).

D. Procedures for Final Closings:

1. The RC Director will notify DBLS of a pending Final Closing as soon as practicable, and no later than 1 business day after the date the RC Director finalizes the *Maximum Insurable Mortgage* (HUD-92580).
2. The RC Director will obtain a written determination from DBLS confirming either that: (a) all labor relations issues are resolved; or, (b) appropriate mitigants are established to resolve outstanding issues.
3. The RC Director will obtain clearance for Final Closing from DBLS at least 5 business days in advance of a confirmed final closing date. The RC Director will immediately provide a copy of said clearance to the HUD Closing Attorney.
4. The DBLS clearance for Final Closing may be qualified:
  - a. If the DBLS clearance is conditional, the RC Director will ensure that the closing clearance includes notification of what, if any, documentation must be provided, or actions taken, to clear the conditions for Final Closing; and
  - b. If issues remain that cannot be resolved in advance of Final Closing, the RC Director will ensure that the closing clearance includes either:
    - i. A deposit to the U.S. Treasury of an amount sufficient to meet any wage restitution and/or liquidated damages that have been or may be found due; or
    - ii. A completed deposit agreement (*Labor Standards Deposit Agreement* (HUD-4732)), a schedule for the deposit, and wire transfer instructions for the depositor's financial institution.
  - c. If the DBLS clearance for Final Closing is qualified, either by conditions or a deposit requirement, the RC Director will include a description of the applicable limitations in the RC Director's administrative clearance to close the Loan.

## **19.1.07 Early Start of Construction**

- A. General Requirements. Construction may not start before Initial Endorsement and recordation of the *Security Instrument*, except with the prior written approval of the RC Director. (Note that the authority to give this approval may not be delegable.) In general, any construction work performed on the Land after HUD's receipt of the application for *Firm*



*Commitment* but before Initial Endorsement constitutes an early start of construction. Unless the RC Director indicates otherwise, demolition, environmental remediation, and off-site work does not constitute an early start to the construction of the Project; however, the RC Director must approve these activities in advance to address compliance with environmental review and Davis-Bacon wage requirements. Further, any work undertaken prior to Initial Endorsement must not impair the first lien priority of the *Security Instrument*.

- B. Early Start Date. For Projects where HUD approves an early start to construction, the HUD-approved start date (the “Early Start Date”) will be used instead of the Initial Closing date for determining: the completion date in the *Construction Contract*; the date of the first amortized payment under the *Note*; and the completion date in the *Building Loan Agreement*. If HUD approves an early start, the *Construction Contract* and *Payment and Performance Bonds* (or other completion assurance) and any other closing documents required to be signed by the General Contractor must be dated no later than the Early Start Date.
- C. Document Submission and OGC Review. The documents listed on the Early Start Checklist must be submitted, reviewed, and approved by HUD prior to the commencement of construction, as defined in the *Request for Permission to Commence Construction Prior to Initial Endorsement* (HUD-92415). See Section 19.2.01.D for the online location of all HUD closing checklists.

### **19.1.08 Lender’s Assignment of the Loan between Initial Endorsement and Final Endorsement**

- A. HUD Prior Written Approval Needed. When a Lender wants to assign the FHA-insured Loan to another FHA-approved Lender during construction (after Initial Closing and prior to Final Closing) the Lender must request prior approval from HUD. Handbook 4435.1 *Project Construction and Servicing Before Final Closing*, par. 1-33, lists HUD’s requirements for assignment of an insured mortgage loan prior to Final Endorsement, including that circumstances must warrant the assignment, and that the assignee must be an approved lender.
- B. Prior Document Review by HUD Counsel. Lender or Lender’s Counsel must submit complete draft documents to the RC Director for preliminary HUD review. The RC Director and OGC will review the documents submitted with a Lender’s request for assignment, including the following:
  - 1. Checklist and written narrative, drafted by Lender or Lender’s Counsel, including the reason(s) for the assignment, and all documents being submitted to HUD for preliminary approval;
  - 2. *Note* endorsement to assignee;
  - 3. Assignment and Assumption of the *Security Instrument* to and by assignee, which must include the following provisions:

- a. Assumption of Lender's obligations under the Contract of Mortgage Insurance;
  - b. Assumption of the terms and conditions pertaining to all Project Loan documents, funds and escrow deposits required in connection therewith;
  - c. Assignee's agreement to be bound by the provisions of the *Lender's Certificate* (HUD-92434M, at par. 3) that relate to the servicing of the Loan; and
  - d. Assignee's agreement to be bound by the provisions of the *Agreement and Certification* (HUD-93305M) or Assignee's execution and delivery of such form to HUD;
4. UCC-3, *Amendment of UCC-1 Financing Statement*, to evidence the change in secured party thereunder;
  5. Assignment of *Building Loan Agreement* (HUD-92441M) with Borrower's written consent;
  6. Assignment of the following types of assurance of completion, if applicable, with the written consent of the Borrower and Contractor, as well as indemnitor or surety, including assignment of cash or letter of credit, and/or escrow agreements, if applicable:
    - a. Assurance of completion of construction; and
    - b. Assurance of installation of offsite facilities;
  7. Assignment of all escrow agreements and related transfers of funds held by the Lender for the benefit of the Project and/or Borrower;
  8. Opinion of assignee's counsel as to the validity of the assignment transaction and of the documents executed and delivered in connection therewith;
  9. Executed *Mortgage Record Change* (HUD-92080);
  10. Endorsement to ALTA Loan Policy reflecting the Lender's assignment of the mortgage Loan and of any other recorded documents; and
  11. All other documents required (a) by state or local law; (b) by the HUD Closing Attorney (*e.g.*, disbursement agreement, special condition documents, as applicable); and (c) the RC Director.
- C. Implementation. The RC Director will determine whether to approve a Lender's request for assignment, in consultation with the HUD Closing Attorney. HUD will issue approvals in

writing. If HUD provides approval for assignment of the FHA-insured Loan, the Lender has 30 days to complete the assignment, and 7 days from the consummation of the assignment to submit a final set of assignment documents to HUD, including copies of filed and recorded documents, *e.g.*:

1. Assignment of the Security Instrument (must be recorded before the endorsement to the lender's title policy can be issued); and
2. Amendment of UCC-1 Financing Statements (state and county).

Note: The RC Director may extend the 7 day deadline submission of final documents in jurisdictions where early or contemporaneous recording is not available, and in other exigent circumstances as determined by the RC Director.

## **—Final Loan Closing Procedures, New Construction and Substantial Rehabilitation**

### **19.1.09 Final Loan Closings**

- A. Final Closing. For purposes of this Chapter, "Final Closing" means the closing at which HUD finally endorses the *Note* for the full amount of the Loan, including the final advance of insured Loan proceeds.
- B. Project Completion. For the purpose of Final Closing, "Completion" means that:
  1. The Project has been completed in accordance with the drawings and specifications as indicated by the final *HUD Representative's Trip Report* (HUD-95379), except for RC Director-approved items of delayed completion covered by the *Escrow Agreement for Incomplete Construction* (HUD-92456M); and
  2. The entire Project has been accepted for occupancy by the local authorities having jurisdiction (as evidenced by a final Certificate of Occupancy or other evidence customarily provide in the jurisdiction), and by Lender and HUD (as evidenced by the *Permission to Occupy Project Mortgages* (HUD-92485)).
- C. Assurance of Completion. See Section 19.2.17 for HUD's requirements for project completion assurance.
- D. Commencement of Preparation for Final Closing. Lender and Lender's Counsel should begin to prepare for Final Closing upon the earlier of HUD's determination that an advance of mortgage loan funds will be the last advance prior to disbursement of the contract retainage, or that the Project has achieved substantial completion.
- E. Prerequisites for Final Closing. Prior to final endorsement of the *Note*, the RC Director will confirm the following:

1. Construction has been completed (except as otherwise provided in this Chapter);
  2. The RC Director has approved the *Cost Certification*, if applicable;
  3. The RC Director issued the *Maximum Insurable Mortgage* (HUD-92580) to the Lender; and
  4. The HUD Closing Attorney has reviewed and approved the Final Closing package, including evidence of updated title insurance and an as-built survey.
- F. Final Closing Procedures. The submission and review standards in Section 19.1.02, and the closing procedures of Section 19.1.03 apply to Final Closings.
- G. Internal Closing Forms. The RC Director will prepare the following documents, and provide copies to the HUD Closing Attorney:
1. *HUD Representative's Trip Report* (HUD-95379). The most recent inspection report must indicate if there are items of delayed completion and, if so, the amount of funds that must be escrowed for their completion.
  2. *Maximum Insurable Mortgage* (HUD-92580). This document should specify if an escrow must be established, or funds must be disbursed from an existing escrow.
  3. Labor standards clearance from DBLS. *See* Section 19.1.06.
  4. *Any Request for Waiver of Housing Directive*, HUD-2, issued or approved by the RC Director since Initial Endorsement.
  5. Housing's administrative clearance to close. *See* Section 19.1.03.A.

## 19.1.10 Final Endorsement

- A. Request for Final Endorsement. Lender must prepare the *Request for Final Endorsement of Credit Instrument* (HUD-92023M) (the "*Request for Final Endorsement*").
1. The RC Director will compare the *Request for Final Endorsement* to each *Application for Insurance of Advance of Mortgage Proceeds* (HUD-92403), and determine whether the amount of each advance is correctly stated in the *Request for Final Endorsement*, and to confirm that the total sum of advances on the *Request for Final Endorsement* equals the sum of all advances from each HUD-92403. The RC Director will also review the title evidence already submitted with the statement of outstanding indebtedness in the *Request for Final Endorsement*, to confirm consistency between the two. If the RC Director identifies any error or issue with the *Request for Final Endorsement*, the RC Director will return it to Lender, together with a written explanation of deficiencies.

**Note:** The *Request for Final Endorsement* should not include any advance of escrowed funds required for completion of the Project (e.g., *Escrow Agreement for Incomplete Construction* (HUD-92456M)).

2. The *Request for Final Endorsement* requires full disclosure and certification by Borrower and General Contractor concerning payments, project completion, and unpaid obligations.
  - a. The *Request for Final Endorsement* Certificate of Borrower requires Borrower's disclosure of all unpaid obligations, including, as applicable, land acquisition, property acquisition, construction, and soft costs.

The unpaid obligations listed by Borrower in the *Request for Final Endorsement* should not exceed the amount of the final advance. If the amount of unpaid obligations exceeds the final advance, Borrower must cover the difference between the unpaid obligations and the final advance either by (a) depositing sufficient funds in escrow, or (b) providing cash or other assurance of payment acceptable to the RC Director, in consultation with the HUD Closing Attorney. In either case, the RC Director will approve the amount and form of payment assurance before the RC Director approves the *Request for Final Endorsement*.

- b. The *Request for Final Endorsement* Certificate of General Contractor requires General Contractor's disclosure of all unpaid obligations of the General Contractor under the *Construction Contract* (HUD-92442M), including amounts due to any sub-contractors.

If the amount of unpaid obligations listed in the *Request for Final Endorsement* Certificate of General Contractor exceeds the amount certified by Borrower as owed to the General Contractor, the RC Director will urge the Lender to promptly resolve the dispute prior to Final Endorsement, and to obtain agreement between Borrower and General Contractor as to the amount owed to the General Contractor. If prompt resolution is unattainable, see Sections 19.1.10.A.3, and 19.1.12 (for Final Closing procedures when Borrower and General Contractor are in dispute).

Additionally, for Projects with an identity of interest between Borrower and General Contractor, the RC Director will not approve a *Request for Final Endorsement* and HUD will not proceed to Final Closing, until and unless Lender provides HUD with documentary evidence demonstrating that cash is available to cover the difference between the stated obligations.

3. RC Director's Receipt of Payments for Unpaid Obligations. The *Request for Final Endorsement* Certificates of Borrower and of General Contractor require payment of all listed unpaid obligations within prescribed time limits, and Lender must provide

documentary evidence of such payment to the RC Director. Future compliance is certified by Borrower and General Contractor, subject to civil or criminal penalty for false claims or statements.

- a. If Lender does not provide the required receipt and supporting evidence of Borrower's payment of listed unpaid obligations by the deadline prescribed in the *Request for Final Endorsement*, the RC Director will immediately make a written inquiry to the Lender to determine the status of payment(s).
- b. If the RC Director does not receive the receipt for the payment of reported unpaid obligation(s) within fourteen (14) days from the date of the RC Director's inquiry, the RC Director will determine appropriate next steps.

- B. Final Endorsement of the Note. When the RC Director determines the *Request for Final Endorsement* is satisfactorily completed, HUD will proceed to Final Closing. The RC Director will not date their Final Endorsement of the *Note* prior to the date of Final Closing. The final amount of the *Note* must equal the amount of all insured advances to Borrower, as approved by the RC Director and shown in the *Request for Final Endorsement*, even if Final Endorsement occurs after the commencement of amortization.
- C. Release of Final Advance. Lender must not release the final advance until the HUD Closing Attorney confirms that Final Closing is complete and releases the finally endorsed *Note*. See Sections 19.1.11 and 12.8.G.
- D. Release of Working Capital Deposit. The balance of the working capital deposit attributable to the Construction Contingency Amount (as that term is defined in the *Escrow Agreement for Working Capital* (HUD-92412M), if any, may be released to the Borrower upon Final Endorsement upon Borrower's request. Terms for the release of that portion of the working capital deposit attributable to the Working Capital Amount are set forth in paragraph 4 of the *Escrow Agreement for Working Capital*.

### **19.1.11 Final Advance**

- A. Requirements for Final Advance. Prior to approving the final advance of mortgage Loan proceeds, the RC Director will make the determinations required by *Application for Insurance of Advance of Mortgage Proceeds* (HUD-92403), and Section 12.08.G, and notify the Lender of any deficiencies.
- B. Application for Insurance of Advance of Mortgage Proceeds. When the final advance is in order, Lender and Borrower will execute the completed *Application for Insurance of Advance of Mortgage Proceeds*.
  1. If all items of on-site construction are complete, the word "None" will appear in the *Certificate of Mortgage Insurance* (HUD-92403), in the space provided for the amount of the escrow deposit.

2. If there are incomplete items of on-site construction, an escrow deposit will be required unless otherwise determined by the RC Director, in accordance with the *Escrow Agreement for Incomplete Construction* (HUD-92456M). In addition, an itemized list of incomplete construction items must be attached to the *Escrow Agreement for Incomplete Construction* and the *Application for Insurance of Advance of Mortgage Proceeds*. The amount of the escrow deposit required for completion of incomplete items must be typed into the Certificate of Mortgage Insurance portion of form HUD-92403 in the space provided.
3. On or before Final Closing, the RC Director will deliver one executed original of the *Application for Insurance of Advance of Mortgage Proceeds* to the HUD Closing Attorney for inclusion in the Washington Docket, one copy for the attorney docket, and any remaining duplicate or original copies to the Lender, each including any attachment listing incomplete items. The RC Director will retain at least one copy of the *Application for Insurance of Advance of Mortgage Proceeds* for its records.

### **19.1.12 Final Closings when Borrower and General Contractor are in Dispute**

- A. Disputes. Occasionally, Borrower and General Contractor dispute change orders, the quality or cost of completed construction work, or other matters related to project completion or payment. These disputes can delay Final Closing if the Contractor is unwilling to complete all of the required forms and provide required documentation of project costs and completion. If Borrower and Contractor enter into mediation, litigation, or both, the delay may be extensive. HUD's expectation is that the Lender and Borrower will engage in a good faith effort to resolve disputes with the Contractor prior to requesting Final Endorsement.

However, if a dispute remains unresolved and results in extension fees or other hardship (e.g., Lenders need to convert the underlying financing of the mortgage Loan to permanent status), the Lender may request that HUD proceed to Final Closing while the dispute is pending. HUD will consider such requests on a case-by-case basis as outlined in this Section 19.1.12. HUD's priority in evaluating these requests is to ensure that Final Endorsement is statutorily and regulatorily compliant, that the construction of the Project is satisfactory, and that sufficient funds are made available to cover potential liabilities of the Borrower thereby mitigating significant risk to (a) the Project (e.g., mechanic's liens) and (b) the viability of the FHA-insured Loan.

- B. Relevant Issues for HUD's Consideration. The RC Director, in consultation with the HUD Closing Attorney, will consider the following factors related to a Lender's request to proceed to Final Endorsement without full participation of the Contractor, in addition to any other matters deemed necessary by the HUD Closing Attorney or the RC Director:
1. *Has cost certification been completed?* When cost certification is required, HUD will not proceed to Final Endorsement without Borrower's completion of the *Mortgagor's Certificate of Actual Cost* (HUD-92330). See Chapter 13 for HUD's requirements for

cost certification.

- a. Cost certification in cases of unresolved dispute(s) also facilitates HUD's review of requests to proceed to Final Endorsement by:
  - 1) Providing the factual basis for HUD to determine that the maximum insurable mortgage calculation does not exceed the statutory limit; and
  - 2) Illustrating what outstanding obligations are disputed, which helps establish that sufficient funds are escrowed (or otherwise available) to cover Borrower's potential liability and mitigate the risk of future construction-related liens against the Project.

2. *Can the dispute result in a mechanic's lien that primes the HUD mortgage?*

- a. Have any liens been filed?
- b. If no liens have been filed, has the statutory period for filing liens expired, or is it possible that liens could be filed in the future?
- c. If future liens are possible, are the relevant program participants willing to sign lien waivers? Are such waivers enforceable under applicable state law?
- d. If a lien waiver is conditional, is the Borrower willing to provide assurances of payment in the event the dispute is resolved in the Contractor's favor?
- e. If liens have been filed, is the final draw sufficient to pay such liens?
  - 1) If sufficient, will the Borrower and Lender agree to escrow the mortgage Loan proceeds with the title company pending resolution of the dispute?
  - 2) If not sufficient, will the Borrower furnish additional funds (or other assurances acceptable to the RC Director) to cover any liens and other pending obligations until the dispute is finally resolved?

3. *What title coverage is available to bring the effective date of the policy forward to Final Endorsement? Is clean title available, with no liens shown as exceptions? Alternatively, if any mechanic's liens exist, is the title insurance policy providing affirmative coverage against those liens?*

4. *Is it possible for Borrower to bond over the liens, if any, or the litigation, if any, in order to free the project from the effects thereof and clear title to the project? (See, e.g., Colorado Revised Statutes § 38-22-131; other states may have similar procedures.)*



5. *Are there state laws that affect the dispute resolution process?* For example, some states have statutes under which a claimant can force the disbursing of funds either to pay the claimed amount or hold all undisbursed mortgage Loan proceeds in escrow pending the outcome of the dispute. (See, e.g., Colorado Revised Statutes § 38-22-126.) If so, does state law provide or permit a process consistent with HUD's requirements?

6. *What is the status of Labor Clearance for the Project?* See Section 19.1.06.

C. Closing Without Full Participation of the Contractor. If the RC Director, in consultation with the HUD Closing Attorney, determines that HUD is willing and authorized to approve a Lender's request to proceed to Final Closing with disputes pending, and without full participation of the General Contractor, the following matters must be addressed to the RC Director and HUD Closing Attorney's satisfaction:

1. Certain administrative requirements of Section 12.7.G (Final Advance), will not be met. The RC Director may waive non-statutory and non-regulatory requirements. HUD's expectation is that the requirements for Final Endorsement will be met to the greatest extent possible. For necessary deviations from this Chapter or elsewhere in this Guide, Lenders must adhere to the requirements of Section 19.2.01, *infra*.
2. All documents listed on the HUD Final Closing checklist must be submitted. Lenders must request form changes (e.g., a change to the Contractor's certification on the *Request for Final Endorsement*) following the procedures in section 19.2.01, *infra*.
3. Lender must provide a written narrative to explain what good faith efforts were made by Lender and Borrower to resolve the outstanding dispute(s) prior to making the request to proceed to Final Endorsement with the dispute(s) pending.
4. Lender must provide evidence that all relevant parties (e.g., Contractor, Surety) were notified of the Lender's request to proceed to Final Closing while the dispute(s) between Borrower and Contractor are pending.
5. Potential liens and claims related to the dispute, and the authority of the Borrower to proceed to Final Endorsement under the terms of the *Construction Contract*, including the A-201, must be addressed through a supplemental *Opinion of Borrower's Counsel* (HUD-91725M). See e.g., the standard form *Opinion of Borrower's Counsel* opinion 7, and confirmations (c) and (e).
6. Cost certification must be satisfactorily completed by all required parties. See 24 CFR 200.96, Section 12.7.G.1, and Chapter 13.
7. The title company must bring the policy forward to the date of Final Endorsement (typically through a date-down endorsement) or issue a new policy as of the date of Final Endorsement and provide affirmative coverage over all existing mechanic's liens.

8. Section 12.7.G.2. requires the Contractor to execute *Contractor's Requisition and Contractor's Prevailing Wage Certificate* (form HUD-92448), and HUD must receive the customary letter or memorandum from HUD's Office of Davis Bacon Labor Standards stating that the Project may be closed (the letter may be conditional, may be issued by DBLS or DOL, and may require specific mitigation to address unpaid obligations).
9. 24 CFR 200.101 requires Borrower to certify, among other matters, as to "all unpaid obligations in connection with the mortgage transaction, the purchase of the mortgaged property, the construction or rehabilitation of the project or the purchase of the equipment financed with mortgage loan proceeds." See *Request for Final Endorsement* (HUD-92023M), which may require modification to accurately reflect the parameters of the dispute while still providing the information required under 24 CFR 200.101.
10. Section 12.7.G.5. requires the Contractor to execute the *Request for Final Endorsement*, discussed more fully in Section 19.1.10.A.2. This includes the Contractor's certification as to its outstanding obligations, which may require modification to accurately reflect the parameters of the dispute.
11. Section 12.7.G.4. requires an escrow for items of delayed completion (see Section 19.1.09). If the dispute includes allegations of incomplete construction, this escrow must be established as part of the Final Closing.
12. The remaining mortgage Loan proceeds (as well as additional sums, if required) must be placed in escrow or otherwise made available (e.g., bonded, or letter of credit) pending the outcome of the dispute. See Section 19.1.12.C.13, immediately below, and Section 12.15.E (re General Contractor's retainage).
13. The terms for resolving the dispute, including release or advancement of funds to the prevailing participant, must be evidenced by an agreement (e.g., escrow agreement), and such terms must be satisfactory to the RC Director and HUD Closing Attorney. The agreement should, at a minimum, meet the following requirements:
  - a. Provide a mechanism for the payment of all *undisputed* outstanding obligations, such as amounts owed subcontractors, upon receipt of proper lien waivers;
  - b. Provide for funds disbursement to the prevailing parties upon resolution of the dispute, or upon a designated future date, etc.;
  - c. Include supplemental cost certification, if needed, for items of delayed completion, etc., to ensure that the Loan amount needs no further adjustment;
  - d. Address unique requirements (and compliance therewith) of state or local law

regarding disbursement and payment;

- e. Stipulate Borrower's present or future right to any awards, payments, settlements or other compensation resulting from litigation involving the Project are deemed Mortgaged Property under the Regulatory Agreement; and
- f. Ensure the agreement is entered into by the Lender and Borrower, and, if applicable, the title company, court, Contractor, and/or surety.

### **19.1.13 Workout Restructuring and Interim Closing**

A. Introduction. When problems occur during construction necessitating a workout or restructuring of a Project, an interim closing may be necessary.

- 1. Handbook 4435.1 along with Chapter 12 (Construction Period) and its appendices, provide HUD's administrative guidance for a Project's construction period. When serious problems arise during construction (*see* Appendix 12D), the RC Director and HUD Closing Attorney will work with the Lender to resolve the serious construction problems in a manner that is consistent with HUD policy.
- 2. Handbook 4435.1 (Chapter 4), Section 12.3.E, and Appendix 12D (Problems before Final Closing) prescribe HUD's policies for managing serious construction problems and initiating workouts during the construction period.

B. Workouts. The RC Director has broad discretion under this Guide (*e.g.*, Chapter 12 and its appendices), and Handbook 4435.1, to approve the terms of an interim workout during the construction period to resolve serious construction problems that pose a risk of foreclosure and other hardship regardless of the cause. If negotiations are successful, there may be workout, disbursement, or settlement agreements to evidence the agreed upon resolution of the serious construction problem(s) (*e.g.*, contractor default and abandonment). The RC Director and HUD Closing Attorney will review takeover agreements, settlement agreements, etc., that affect the documents from Initial Closing, including the *Construction Contract*. The RC Director, in consultation with the HUD Closing Attorney, will approve the terms of the workout, the takeover agreement, if applicable, and any changes to existing agreements from Initial Closing.

- 1. Checklist. The Interim Closing/Workout Checklist (*see* Section 19.2.01.D) functions as a guide for the RC Director and HUD Closing Attorney as to what documents may be required for a workout. The documents listed on the checklist are not mandatory by default, and each workout is case specific. The RC Director and HUD Closing Attorney determine what documents, if any, are necessary for HUD to approve a structured workout during construction. Some documents in the checklist may be appropriate for collection as part of the workout, even if they do not require amendment.

2. Other Administrative Guidance Applicable. Guidance elsewhere in this Chapter 19, in the remainder of this Guide, and in Handbook 4435.1, provide guidance in HUD's review of the terms of construction period workouts and interim closings, when appropriate.
3. Mortgage Increase. If the RC Director approves a mortgage increase in connection with the workout, HUD's requirements for Final Closing loan modification apply. See Section 19.2.20.C. Lender's Counsel must provide a written certification from all relevant program participants, including the Surety when the bond(s) have been called, acknowledging the applicability of these Final Closing requirements, and compliance therewith as a condition of HUD's approval of the structured workout and/or interim closing. (a certification is acceptable).
4. Contractor Default and Project Abandonment. In cases of General Contractor default and abandonment, Lender's Counsel must coordinate with Lender, Borrower, HUD, and Surety to initiate the Surety's takeover of the *Construction Contract* under the performance bond. The workout may also require a call on the payment bond. HUD, Lender, Borrower, and Surety, as applicable, will negotiate the terms for completion of the project. This often results in extensive negotiation between the HUD Closing Attorney and Surety's counsel over the terms of the surety's takeover agreement, and a disbursement agreement between Lender, Borrower, and Surety. There may be additional costs and significant alterations to the Project, especially if the Project is less than 75% complete. Compliance with this Chapter 19 must be stipulated in the body of any takeover agreement. See also Section 19.1.12, Final Closing when Contractor and Borrower are in Dispute.
5. Litigation. If litigation related to construction of the Project has been filed or is threatened, Lender and Borrower must disclose the litigation to the RC Director and the HUD Closing Attorney.
  - a. The HUD Closing Attorney will confer with their Regional Counsel and Associate Regional Counsel for Litigation to determine whether a litigation hold is necessary prior to HUD granting approval for any workout or interim closing.
  - b. The RC Director and the HUD Closing Attorney will also evaluate disclosed litigation and determine whether any risk mitigants related to the litigation should be included as terms of the workout. See Section 19.1.12, Final Closings in Dispute, for further guidance on considerations and risk mitigants related to construction litigation.

## Part II: Closing Documents and Program-Specific Requirements

### —Document and Diligence Requirements Applicable to All Loans

#### 19.2.01 General Requirements for Closing Documents

- A. Required Use of HUD Forms and Closing Protocols. The *Firm Commitment* conditions HUD's endorsement of the *Note* on the Lender's submission of all required documents. Lenders must use HUD forms when such forms exist, and, when no form exists, each document must be approved by HUD. Required documents are listed on the applicable closing checklists and in the *Firm Commitment*. HUD's endorsement is also conditioned on compliance with the procedures and requirements of this Chapter.
- B. Completion of HUD's OMB-approved Forms. HUD's OMB-approved form documents include blank spaces for insertion and bracketed alternatives to accommodate project specific information. Lender's Counsel is responsible for completing HUD's OMB-approved forms through insertions in blanks, the selection of bracketed language, formatting documents for signature and recordation (including separating and marking counterpart signature pages), and insertion of signature and notary blocks. Inapplicable provisions (*e.g.*, inapplicable construction provisions in refinance transactions) should be shown as strikethroughs. These strikethroughs alert HUD and the Lender to modifications during the loan servicing period and mitigate shifting document numbers and paragraphs. For HUD closing documents that provide bracketed alternatives, the preparer may remove or strikethrough the alternatives that do not apply. For example, sections of *Note* (HUD-94001M) provide bracketed alternatives for interest rate definitions, payment provisions, prepayment provisions, and endorsement panels. The form completion changes outlined in this Section 19.2.01.B are not considered substantive changes under Section 19.2.01.F, and do not require explicit HUD approval.
- C. Date of Documents. All closing documents must be dated with the same date, to the extent possible, which may be prior to the date the *Note* is endorsed by HUD for insurance. However, the following documents must be dated the date of endorsement (whether Initial, Initial/Final, or Final Endorsement, as applicable, as such terms are defined in the HUD *Firm Commitment*):
1. Title insurance policy;
  2. *Borrower's Incumbency Certificate* for Borrower's Organizational Documents;
  3. *Opinion of Borrower's Counsel* (HUD-91725M);
  4. *Lender's Certificate* (HUD-92434M); and

5. *Request for Endorsement of Credit Instrument and Certificate of Borrower, Lender and General Contractor* (HUD-92455M).

D. Closing Checklists. Closing checklists can be found here: [https://www.hud.gov/OGC Multifamily Closing Documents Checklist](https://www.hud.gov/OGC_Multifamily_Closing_Documents_Checklist). HUD's closing checklists will be updated from time to time for technical corrections and for any changes to Program Obligations. The most current version of the applicable checklist published to HUD's website must be used for each closing.

Changes to the required checklist items are not permitted, except as required by local law or the *Firm Commitment*. Any such changes must be added to the end of the checklist in the section specifically identified for "Additional documents required by local law or the *Firm Commitment*." Lender's Counsel must also notify the HUD Closing Attorney of any such changes they have made to the checklist consistent with this paragraph.

E. Submission of Closing Documents.

1. Draft Submissions. Lender's Counsel must submit two (2) complete sets of the draft closing package, one to the Closing Coordinator and the other to the HUD Closing Attorney. Lender's draft submission must include all documents required by the *Firm Commitment* and applicable closing checklist, including documents previously submitted as part of an early legal review, and excepting those time-sensitive items for which later submission is expressly permitted (*e.g.*, current status certificates).

Lender's submission must include "clean" versions of the HUD form closing documents and redlines of those drafts compared against the OMB-approved forms, together with the non-form documents required by the applicable checklist. See Sections 19.1.02 and 19.1.03, *supra*, for HUD's closing review standards and procedures.

2. Closing Docket Submission. Lender's Counsel must ensure that the Closing Docket submitted to the HUD Closing Attorney at closing is consistent with the draft submission(s) previously reviewed and approved by the HUD Closing Attorney and the RC Director, and that no modifications to the closing documents (form and non-form) have been made without the HUD Closing Attorney's actual knowledge and prior approval.
3. Exhibit of Document Changes. The *Request for Endorsement of Credit Instrument* (HUD-92455M), and *Lender's Certificate* (HUD-92434M), require Lender to certify that the final closing documents submitted to HUD (with the exception of the *Opinion of Borrower's Counsel*) conform to the OMB-approved forms, and that those documents have not been "changed or modified in any manner except as specifically identified and approved by HUD as evidenced by the attached Exhibit." The exhibit must include an itemized list of changes to the OMB-form documents, excluding

filled-in information, deletion of inapplicable bracketed language, changes for state addenda and riders already approved by HUD, and selection of alternatives.

F. Substantive Changes to Form Documents and Deviations from Closing Guide. HUD strongly discourages substantive changes to HUD forms and deviations from this Chapter 19. Substantive change requests will likely result in a longer closing package review time and may impact Tentative Closing Dates. Further, HUD’s approval of any request should not be presumed.

1. Substantive Changes Requiring Project Specific Approval by HUD. For purposes of this Chapter 19, a substantive revision to a HUD form means any modification to the provisions of an OMB-approved form that is not a matter of form completion (*see* Section 19.2.01.B, *supra*). Substantive form revisions and any deviations from procedures of this Chapter require HUD’s written approval on a case-by-case basis, except for substantive form revisions expressly provided for in this Chapter or elsewhere in this Guide (*e.g.*, modifications to the *Security Instrument* to accommodate a 241(a) supplemental loan closing; HUD-approved templates required by state or local law for the *Subordination Agreement – Public*). For brevity, this Chapter 19 refers to these substantive form revisions and deviations from this Chapter 19 for which Project-specific HUD approval is required as “substantive changes.” Lender and Lender’s Counsel must request HUD’s approval for any substantive change through the procedures set forth herein.
2. Narrative Submission to HUD Closing Attorney. For all substantive change requests, Lender must submit a written justification supporting the request to the RC Director, and the HUD Closing Attorney, if a HUD Closing Attorney has been assigned for the Project. The Lender’s justification must include either (a) an explanation of how the substantive change(s) are necessary to comply with state or local law, or (b) a transaction-specific justification for the request, whichever is applicable. The Lender’s request should be submitted with the *Firm Application* whenever possible. Lender and Lender’s Counsel should not directly contact HQ OGC or MHP regarding any submitted request except in coordination with the RC Director and the HUD Closing Attorney. Lender and Lender’s Counsel are also responsible for providing any additional information and supporting documentation requested by HUD.

Lender is responsible for identifying any related conflicts with other program directives and ensuring that a directives waiver request is properly submitted to the appropriate HUD program office.

3. Substantive Changes Related to Separate Housing Directive Waivers. Often, a substantive change is necessary to effectuate a Lender’s requested waiver of a program directive (*e.g.*, a programmatic requirement found in other chapters of this MAP Guide). In such cases, Lender’s request to waive the program directive must include written identification of the substantive change(s) necessary to effectuate the requested program directive waiver. Lender’s Counsel is responsible for submitting

the Lender's written request to the HUD Closing Attorney or OGC Point of Contact, as applicable. The RC Director will not approve a Lender's request to waive a housing directive until and unless the related substantive change(s) is approved by HUD in accordance with this Section 19.2.01.

4. Approval Authority. The RC Director, in consultation with Regional Counsel, may approve requests for substantive changes that are necessary to comply with state and local law, provided that there is no statutory or regulatory conflict. Any change to an OMB-approved form associated with a state or local law request must be narrowly tailored to address the state or local law provision at issue. Lender's Counsel is responsible for providing the HUD Closing Attorney with legal citations and documentation to support any such request.

All other substantive changes require a multi-tiered HUD review, detailed below at 19.2.01.G.

G. Multi-Tiered Review of Requests for Substantive Changes. This tiered review is intended to facilitate uniformity, efficiency, and consistency among HUD offices, and HUD's fair and equal treatment of program participants. HUD will only approve such requests when HUD determines that the request is supported by a compelling deal-specific justification. All requests for substantive changes must be consistent with federal, state, and local law.

1. Regional Review for Cause. When Lender's Counsel submits a substantive change request, the HUD Closing Attorney will discuss the requested change with the RC Director. The RC Director is responsible for determining whether, as a matter of program policy, the request is warranted. If the RC Director determines that the change is not warranted, the RC Director will notify the Lender, Lender's Counsel and HUD Closing Attorney.
2. Legal Conflicts Review. If the RC Director determines that the substantive change is warranted as a matter of program policy, the RC Director will verify whether there is any need to waive related program directives and refer the request to OGC for legal conflict clearance. If not previously cleared for statutory and regulatory conflicts, the HUD Closing Attorney will complete the legal conflicts review in coordination with the appropriate Regional Counsel.
  - a. *No Conflicts*. If there are no statutory or regulatory conflicts related to the request, the HUD Closing Attorney will forward the request to HQ for final consideration.
  - b. *Regulatory Conflict*. If there is a regulatory conflict, the HUD Closing Attorney will discuss the regulatory conflict with the RC Director and HQ OGC. If the RC Director determines that it is in HUD's best interest to approve the requested change notwithstanding the regulatory conflict, the RC Director will prepare a draft regulatory waiver for referral to HQMHP.



- c. *Statutory Conflict*. If there is a statutory conflict, the request will be rejected.
3. Addressing Other Legal Concerns. Once the request is evaluated for conflicts, the HUD Closing Attorney will determine if there are any other legal concerns (including impacts on other closing documents). If the HUD Closing Attorney identifies other legal concerns, they will document the concerns in writing and include the written explanation with their referral of the request to HQ.
4. Referral to HQ. The HUD Closing Attorney will refer the request via email to the Assistant General Counsel for the Multifamily Mortgage Division (“MMD”). The MMD is responsible for coordinating its review and the review of the HQ Office of Multifamily Housing Production (“HQ MHP”). The HUD Closing Attorney must ensure the following information is included in the referral to HQ:
  - a. A description of the substantive change(s) requested, including a reference to the relevant document(s) and/or policy. When applicable, a redline excerpt of the relevant document provision identifying the requested change(s) may be included in the submitted narrative (redline comparisons of entire documents will not be reviewed);
  - b. Confirmation that the RC Director supports the request;
  - c. Confirmation that there are no identified statutory conflicts;
  - d. Explanation of regulatory barriers, if any;
  - e. An explanation of why the change is supportable, *i.e.*, the justification approved by the RC Director, including compelling deal-specific and unique circumstances underlying the requested change. The justification should include enough detail, context, and rationale to allow HQ MMD and MHP to make an informed determination, as well as to establish that HUD is not acting in an arbitrary and capricious manner in its decision-making;
  - f. An explanation of whether the requested substantive change relates to a separate request for waiver of a housing directive (HUD-2), and if so, confirmation that the RC Director is willing and able to approve the related HUD-2 waiver;
  - g. When available, –a copy of any related requests to waive a program directive;
  - h. An explanation of the extent to which such change impacts other documents;
  - i. A discussion of additional legal considerations and concerns, if any, including any reservations of the HUD Closing Attorney; and
  - j. A statement of any time constraints.

5. HQ Review. The MMD will respond to the HUD Closing Attorney in writing. HQ staff will make every attempt to respond within ten (10) business days, provided the submitted justification meets the requirements of this Chapter 19. Program participants should submit substantive change requests as early as possible, and well before their desired closing date. When the substantive change request involves matters of program policy, the MMD will solicit the review and decision of HQ MHP, which will make the final determination on behalf of HUD. The MMD will review and decide requests that are strictly legal in nature.
6. Approved Substantive Change Requests. The MMD will provide a copy of approved substantive change requests to the assigned HUD Closing Attorney and appropriate Regional Counsel. The HUD Closing Attorney will notify the RC Director. Approved substantive change requests will be noted by the RC Director in their administrative clearance to close.

## 19.2.02 Security Instrument

- A. General Requirements. *Multifamily (Mortgage, Deed of Trust, Deed to Secure Debt, or Other Designation as Appropriate in Jurisdiction), Assignment of Leases and Rents and Security Agreement* (HUD-94000M) (the “*Security Instrument*”) must be used to secure the FHA-insured Loan and grant the FHA Lender, and its successors and assigns, a first lien on the Mortgaged Property (except for 241(a) supplemental loans – see Section 19.2.25). The caption or title of the document must be revised as appropriate to reflect the appropriate designation in the Project jurisdiction.
- B. Permitted Modifications for State-Specific Requirements and Practices.
  1. Lender’s Counsel must modify the *Security Instrument* to comply with local requirements relating to recording practices and enforceability. Preparers should attach a HUD-approved state addendum or rider, if applicable, and a recording cover sheet, if necessary. State-specific riders and modifications can be found on HUDClips at:  
[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/administration/hudclips/forms/hud9/riders-addendums](http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/forms/hud9/riders-addendums)
  2. In certain jurisdictions (*e.g.*, Florida and New York), Borrowers refinancing under Sections 223(a)(7) and 223(f) frequently request to modify the *Security Instrument* and *Note* to facilitate a reduction in mortgage recording taxes. The HUD Closing Attorney may accept this modification without HQ OGC review when the practice is permitted under applicable state law, and the RC Director determines that the change is consistent with HUD Program Obligations.
- C. Supplemental, Consolidated, Amended or Restated Loan Documents. Lender’s Counsel may revise the *Security Instrument* to accommodate supplemental, consolidated, amended, or

restated mortgage loans. All revisions are subject to final approval by the HUD Closing Attorney, and the requirements of this Chapter. *See also* Sections 19.2.01, 19.2.20 and 19.2.25.

- D. Ground Lease. When all or part of the Mortgaged Property consists of a leasehold estate, the ground lease must include the provisions set forth in *Lease Addendum* (HUD-92070M). The *Lease Addendum* provisions must be attached to the ground lease and incorporated into the ground lease by reference prior to the execution of the ground lease. If incorporation of the *Lease Addendum* prior to execution of the ground lease is not possible, the *Lease Addendum* must be separately executed by the Landlord and Tenant prior to HUD's endorsement of the *Note*, with an appropriate amendment to the ground lease. A rider to the *Security Instrument* relating to the ground lease is not required.

For 223(a)(7) refinancing transactions, a new *Lease Addendum* will not be required unless the ground lease has been materially modified from the version approved at the previous HUD-insured loan closing and without HUD approval, or the ground lease term does not comply with the National Housing Act .

- E. Fee-Joiners. In limited circumstances, HUD will allow use of a fee-joinder to establish the Borrower's interest in the requisite fee or leasehold. OGC's Multifamily Mortgage Division maintains a template fee-joinder for use in these transactions; Lender's Counsel should contact the HUD Closing Attorney to obtain the most current version before drafting the *Security Instrument*.

### **19.2.03 UCC-1 Financing Statements**

#### **A. General Requirements**

1. As set forth in the *Security Instrument*, Borrower must grant Lender a first lien security interest in the Mortgaged Property, including the personalty associated with the project (except for 241(a) supplemental loans – *see* Section 19.2.25). FHA Lender must take any and all measures available under the Uniform Commercial Code (“UCC”) of the Project's and the Borrower's jurisdictions and locations, including the filing of UCC financing statements, to ensure that it has and maintains an enforceable first-lien security interest in the Mortgaged Property for the entire duration of the FHA-insured mortgage Loan. *See* 24 CFR 207.258(b)(4). FHA Lender must also certify that these requirements have been met in *Lender's Certificate* (HUD-92434M) for new construction/substantial rehabilitation, or *Request for Endorsement of Credit Instrument & Certificate of Lender, Borrower & General Contractor* (HUD-92455M) for refinances.
2. Additional UCC-1 Financing Statements and a separate legal opinion may be required if the construction advances include offsite storage of building components. *See* Section 19.2.18.

3. Real property and any non-realty equipment, furnishings, and all other collateral covered by the *Security Instrument*, must be free and clear of all liens other than the FHA-insured Loan, liens for taxes and assessments that are not yet due and payable, and any other inferior liens that the RC Director approves in writing.
4. The legal description of the real property must be identical to the legal description in the *Regulatory Agreement* and in all other closing documents, including the *Building Loan Agreement* (HUD-92441M) (the “*Building Loan Agreement*”), *Security Instrument*, title insurance policy, and survey. Minor differences, such as abbreviations or other non-substantive stylistic differences, are allowed.
5. The “Secretary of Housing and Urban Development” must be listed as an additional secured party, using the notice address for the “Office of Housing” in the *Regulatory Agreement*.
6. The name of the Project and FHA project number should be listed on the UCC-1 Financing statements for reference.

B. Description of Collateral.

1. Lender must attach to the UCC-1 Financing Statement a description of the non-realty Mortgaged Property, as defined in the *Security Instrument*. Descriptions of non-realty collateral for the UCC-1 Financing Statement may differ from the language used in the definition of Mortgaged Property in the *Security Instrument*, if required to comport with state law.
2. Lender is responsible for ensuring that the UCC-1 description of collateral is sufficient to create an enforceable first-priority lien, as certified to in the *Lender's Certificate* or *Request for Endorsement*, as applicable.
3. Appropriate after-acquired property and proceeds clauses must be included in the collateral description.

## 19.2.04 Promissory Note

A. General Requirements.

1. *Note (Multistate)* (HUD-94001M) (the “*Note*”), must be used. Any changes to the form must be approved by the procedure set forth in Section 19.2.01. Preparers should attach a HUD-approved state addendum or rider, if applicable. State-specific riders and modifications can be found on HUDClips at: [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/administration/hudclips/forms/hud9/riders-addendums](http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/forms/hud9/riders-addendums)
2. Terms. The terms of the *Note* (e.g., maturity, payments of principal and interest,

interest rate) must be consistent with the *Firm Commitment*.

**Note:** A Loan may be evidenced by multiple *Notes* (i.e. tranches) when approved by the RC Director and memorialized in the *Firm Commitment*. In such cases, the *Firm Commitment* will provide the HUD-approved terms applicable to each *Note*.

- B. Prepayment Provisions. The *Note* includes instructions for alternative prepayment and lockout provisions. To the extent a rider is necessary to set forth the prepayment terms, as called for in Alternative B to Section 9 of the *Note*, the rider must include only the prepayment restriction(s) and prepayment premium charge(s) (see Section 11.8.B., Prepayment Provisions), and the statement, “This Rider 1 is subject to the restrictions and requirements for prepayment set forth in Paragraph 9 of the Note.” No other provisions to the prepayment Rider 1 are permitted.
- C. Endorsement Panel. The *Note* form contains a separate endorsement panel for each section of the Act under which the mortgage Loan may be insured, and the various closing types covered by this Chapter 19. Lender’s Counsel must prepare the *Note* to include only the endorsement panel applicable to the loan being closed.
- D. Late Charge Provision. When preparing the *Note*, Lender’s Counsel may include a denominated late charge amount. The late charge amount must comply 24 CFR 200.88 with the limitations in Section 11.8.D.
- E. Changes to Loan Interest Rates. Any change to the interest rate prior to Initial Endorsement requires an amendment to the *Firm Commitment*.
  - 1. Amendment for Rate Reduction. If the construction interest rate is reduced before initial endorsement and it is not feasible to reprocess the loan application, the *Firm Commitment* must be amended to state the proper interest rate and contain the following condition (see Section 8.15.B.2.a, Loan Rates):

*“Any interest savings resulting purely from a differential between the HUD-processed interest rate and the actual, final interest rate may not be construed as excess funds that may be used to offset costs in other categories at the time of cost certification. Any such saving must be applied as a mortgage reduction.”*
  - 2. Reprocessing for Rate Increase Before Initial Closing. If the construction and/or permanent interest rate increases before initial endorsement, the *Firm Commitment* must be amended, and the loan application reprocessed to reflect the higher rate.
- F. Change(s) to Permanent Financing After Initial Closing. Re-processing of loans for changes to the permanent financing from the terms in the *Firm Commitment* after Initial Closing is generally prohibited by Section 3.1.D. Changes are only allowed in the limited situation of a bond deal, as the permanent interest rate may not be known at Initial Closing (see Section 8.15.B, Bond Financed Projects, Loan Rates). If the evidence submitted in preparation for Final Endorsement indicates that permanent financing is not available at the interest rate,

term length, or mortgage loan amount identified in the *Firm Commitment*, then the *Firm Commitment* must be reprocessed accordingly.

- G. Supplemental, Consolidated, Amended or Restated Loan Documents. Lender's Counsel may revise the *Note* to accommodate supplemental, consolidated, amended, or restated mortgage loans. All revisions are subject to final approval by the HUD Closing Attorney, and the requirements of this Chapter. *See also* Sections 19.2.01, 19.2.20, and 19.2.25.

## 19.2.05 Regulatory Agreement.

- A. Form. The *Regulatory Agreement for Multifamily Projects* (HUD-92466M), is used to establish regulatory restrictions on the Project, Borrower's financial and project management obligations, and HUD's rights if the *Regulatory Agreement* is violated. Section 9 of the *Security Instrument* incorporates the *Regulatory Agreement* by reference.
- B. Notice Address for HUD. In Section 46.b., the address for HUD will be the Multifamily Housing Regional Center or Satellite Office responsible for Asset Management of the Project (as identified in the *Firm Commitment*).
- C. Section 50. Section 50 and the Section 50 Addendum of the *Regulatory Agreement* relate to the non-recourse nature of the indebtedness and indicate certain matters for which the parties may be held personally liable; the *Firm Commitment* will identify the party(ies) to be inserted in the Section 50 Addendum. Any party to Section 50 must execute the Addendum as indicated by the HUD form, separate from the *Regulatory Agreement* signature page and also with all formalities required for recording a deed to real estate according to the law of the Project jurisdiction.
- D. Section 30 - Additional Occupancy Restrictions and Policies. Lender and Borrower must work closely with HUD during the application and closing process to ensure that any proposed occupancy restrictions are lawful and comply with Program Obligations.
1. Any occupancy restrictions required in connection with the FHA-insured Loan that are not already included in the *Regulatory Agreement* must be listed in Section 30.a.
  2. Any other occupancy restriction imposed on the Project (separate from FHA requirements) may be listed in Section 30.b. If listed, the form language of Section 30.b. must be modified to state, "these non-FHA occupancy restrictions are listed for informational purposes only and are not required under the Loan."
- E. Residual Receipts Rider. In some cases, other HUD programs (such as Section 8 and Section 202 Supportive Housing for the Elderly) impose Residual Receipts requirements on non-profit owners. In such cases, a Project will be subject to Residual Receipts requirements even though the FHA mortgage insurance program does not impose these requirements.

1. The *Regulatory Agreement* requires projects subject to Residual Receipts requirements to attach a *Rider to Regulatory Agreement for Residual Receipts Requirements* (see Section 19.3.03) and indicate whether the Project is subject to such a rider on page 1 of the *Regulatory Agreement*. If the rider is attached and the “yes” blank is checked, the Surplus Cash provisions of the *Regulatory Agreement* are thereby modified, and the provisions of the attached rider indicate that Residual Receipts account requirements are imposed by another program. The rider must clearly define the source and duration of the Residual Receipts requirements, and indicate that upon expiration of these requirements, the terms in the *Regulatory Agreement* regarding Surplus Cash will control.
2. In the case of FHA-insured projects that receive rental assistance from a project-based Section 8 housing assistance payments (HAP) contract, the mortgage insurance documents, including the *Regulatory Agreement*, are separate and apart from the Section 8 HAP contract. Thus, the maturity or prepayment of the FHA-insured Loan and the resulting release of the *Regulatory Agreement* have no effect on the Section 8 HAP Contract, which continues in full force and effect until the date on which it expires, unless terminated for cause.

F. Additional Riders. Additional riders to the *Regulatory Agreement* may be required for certain transactions pursuant to the *Firm Commitment* and/or Program Obligations, including:

1. *Rider to Regulatory Agreement for Affordable Projects*, required when the Project benefits from reduced MIP as an Affordable project.
2. *Rider to Regulatory Agreement, Borrower’s Obligation to Maintain Project’s Energy Performance as Consideration for MIP Reduction* (HUD-92466-R-5), required when the Project benefits from reduced MIP as a Green project.
3. *Riders to Regulatory Agreement – Multifamily Housing Projects: for the Borrower, Master Tenant, Master Sub-lessee (Commercial Tenant), and the Master Sub-lessee (Residential Tenant)* for master lease structures used to accommodate multifamily tax credit sources pursuant to Chapter 16 (forms HUD-92466-R1 to HUD-92466-R4).
4. *Section 213 Cooperative Program Rider to Regulatory Agreement for Multifamily Projects*, which may be adapted for Section 207/223(f) cooperative refinances. See Section 19.3.11.
5. *Mark-to-Market HAP Contract Riders (FHA-First Mortgage and MRN CRN)*, for Projects with Section 8 Housing Assistance Payment Contracts participating in the Mark-to-Market Program. When applicable, the HUD Closing Attorney will contact the MMD for the most recent versions of these forms.

## 19.2.06 Borrower Entity's Organizational Documents

- A. General. Organizational documents for the Borrower entity are required to be submitted for the following types of closings:
1. Initial Endorsement;
  2. Final Endorsement, if any organizational documents have been modified since Initial Endorsement or additional authorization is necessary (*see* 19.2.06.E.);
  3. Initial/Final Endorsements;
- B. Borrower's Counsel Legal Review and Opinion. *Opinion of Borrower's Counsel* (HUD-91275M) requires Borrower's Counsel to state that the Borrower has the organizational authority needed to execute and deliver the Loan Documents, complete the transaction(s) called for thereunder, and perform its obligations accordingly. Depending on the Borrower's organizational structure, Borrower's Counsel must review organizational documents for controlling entities, and, in some cases, review and retain authorization(s) from controlling and/or upper-tier entities in order to provide and support Opinion 4 of Opinion of Borrower's Counsel. *See* also Section 8.3 (Reviewing Principals and Other Parties in Control).
- C. Required Organizational Documents for Borrower. The following organizational documents must be provided:
1. Borrower's Incumbency Certificate. A certificate dated the date of closing, and signed by the secretary or other authorized Borrower representative (which may be the individual executing the Loan documents), stating:
    - a. The organizational documents attached to the certificate are true and correct copies, and have not been amended, modified, rescinded, or revoked, and remain in full force and effect; and
    - b. The name(s) and title(s) of the Borrower's officers and key principals, with specimen signature(s) of the individual(s) authorized to execute the Loan documents.
  2. Formation Documents. Copies of the Borrower's filed formation documents, including all amendments and subsequent filings, certified by the relevant jurisdiction's Secretary of State, or legal equivalent, within 60 days prior to closing, or such longer period approved by the HUD Closing Attorney.
  3. Governing Document. Copy of the Borrower's fully executed governing document, including any and all amendments, and including the HUD-Required Provisions in effect as of the date of *Firm Commitment*. *See* Section 19.3.01.
  4. Authorization. Evidence that the transaction is authorized, and that the Borrower has



authority to execute the Loan documents. If such authorization is not explicitly provided in the entity's governing document, this may take the form of a resolution, written consent, or other legal equivalent, consistent with local law, custom, and the entity's organizational documents.

5. Status certificate. A status certificate from the Secretary of State, or legal equivalent, of the jurisdiction where the Borrower is organized evidencing Borrower's authority to do business (*e.g.*, a Certificate of Good Standing). This status certificate must be dated within 30 days prior to closing, or a longer period if approved by the RC Director.

If Borrower is not organized in the state where the Project is located, a certificate from the Secretary of State, or legal equivalent, in the Project state evidencing Borrower's authority to conduct business in the Project jurisdiction (*e.g.*, a Foreign Status Certificate).

D. Tax Credit Transactions. In tax credit transactions, the Borrower's governing document (or the governing document of Borrower's single-member, if Borrower is a single-member LLC and the equity will be paid-in to the single-member) must incorporate the tax-credit investor's equity pay-in schedule, as approved by the RC Director. The HUD Closing Attorney will confirm with the RC Director that the equity pay-in schedule is acceptable.

E. Final Closings.

1. At Final Closing, a certification signed by the Secretary or other authorized representative, either:
  - a. Confirming that no changes have been made to the Borrower's organizational documents delivered to HUD at Initial Closing and that the authorizing resolution given at Initial Closing covers the Final Closing and is still in effect; or
  - b. Identifying any changes made to the organizational documents delivered to HUD at Initial Closing and attaching copies of the amendments or other documents effecting such changes.
2. An authorizing resolution may be required if the Borrower's governing organizational documents and previously delivered resolutions did not fully authorize the Final Closing or final Loan amount.

## **19.2.07 Title, Escrow, and Survey Requirements**

A. Logistics.

1. Closing Review. After the Firm Commitment has been issued, the RC Director and

HUD Closing Attorney review a pro forma title insurance policy, a survey of the Land, and the *Survey Instructions and Surveyor's Report* (HUD-91073M), as submitted by Lender's Counsel in the draft closing package. HUD reviews to confirm that the Borrower's interest in the real estate is not impaired by title or survey matters that impermissibly impact the insurability, operation, financial viability, or marketability of the Project, and that title and survey are consistent with HUD Program Obligations.

2. Closing. At or before closing, Lender must provide the HUD Closing Attorney with an authenticated and enforceable title policy (see Section 19.2.07.B, below for currently approved form). The policy must be effective as of the date of HUD's endorsement of the *Note*, in the form approved by the HUD Closing Attorney, and including all endorsements prescribed by this Section 19.2.07.

B. Title and Survey Review Standards.

1. Form. HUD's currently approved form of title insurance policy is the American Land Title Association (ALTA) 2006 Loan Policy of Title Insurance – Lender's Policy, or state approved equivalent ("Title Policy").

**Note:** HUD may approve revised versions of the ALTA 2006 title policy or related forms as ALTA releases new versions. When approved, HUD will post the approval to HUD's external website.

- C. Pro Forma Title Policy Submission. As part of the draft closing package, Lender's Counsel must submit a pro forma of the Title Policy, along with legible copies, or if illegible, certified transcripts, of all exception documents listed in Schedule B. If the title company cannot produce a legible copy or certified transcript of an exception document, the exception must be extinguished and removed from the Title Policy, or affirmatively covered, except where the RC Director, in consultation with the HUD Closing Attorney, determines that elimination is impossible or impracticable, and does not pose an unacceptable risk to HUD.

Lender's Counsel must thoroughly review the pro forma Title Policy prior to submission with the closing package and, when possible, obtain corrections to the pro forma to comply with the standards of this section prior to submitting the pro forma to HUD.

1. HUD Closing Review. The RC Director and HUD Closing Attorney have concurrent responsibility to review the pro forma Title Policy, for completeness, acceptability, and accuracy, as detailed below. Lender's Counsel is responsible for resolving deficiencies, whenever possible, and submitting a final Title Policy, that is consistent with the form and substance approved by the HUD Closing Attorney and RC Director.

- a. RC Director Responsibilities. The RC Director will:

- 1) Review all subordinate liens and encumbrances for programmatic acceptability and compliance.
  - 2) Review all title exceptions and survey matters for consistency with the proposed financing of the Project. Confirm that listed exceptions do not adversely affect the Project value or marketability, unless previously approved by HUD during Project underwriting. If the RC Director cannot determine acceptability, the RC Director will refer the issue to HQ MHP. *See* 24 CFR 200.61, 200.72, and 200.73.
  - 3) If the Project's zoning compliance is established by title endorsement (*see* checklist), confirm that the Project's approved use under the applicable section of the NHA is consistent with the zoning endorsement. *See* 24 CFR 200.72.
  - 4) Provide the HUD Closing Attorney and Lender with written comment identifying all title and survey matters deemed by the RC Director to be programmatically unacceptable. The RC Director will consult with the HUD Closing Attorney to resolve identified deficiencies.
  - 5) Ensure all identified deficiencies have been resolved to the RC Director's satisfaction prior to issuing the administrative clearance to close and assist Lender in resolving deficiencies as appropriate.
- b. HUD Closing Attorney Responsibilities. The HUD Closing Attorney will:
- 1) Confirm that the Title Policy reflects that the FHA-insured *Security Instrument* will be a valid and enforceable first lien against the insured Land (except for loans insured under sections 241 and 223(d)).
  - 2) Ensure the elimination of unacceptable title and survey matters, including covenants, restrictions, or exceptions that violate federal law, except where the RC Director, in consultation with the HUD Closing Attorney, determines that elimination is impossible or impracticable, or that the encumbrances can be insured over or otherwise adequately addressed.
  - 3) Identify all Schedule B items with rent, affordability, and/or use restrictions, including those imposed by state or local government(s) or instrumentalities. If the item reflects a restriction that is not approved in the *Firm Commitment* (*e.g.*, secondary financing, *see* Section 19.2.09), disclose the matter to the RC Director in writing.

Note: The HUD Rider to Restrictive Covenants (see 19.3.09) is required when the RC Director, in consultation with the HUD Closing Attorney, determines that the Rider is necessary to comply with the Project's underwriting or Program Obligations.

- 4) Identify Schedule B and Survey matters that the RC Director should review for programmatic acceptability, including:
  - i. Indemnification provisions;
  - ii. Private charges or assessments;
  - iii. Options to purchase;
  - iv. Rights of first refusal, or the prior approval of a future purchaser or occupant;
  - v. Tenant in possession under a recorded or unrecorded lease;
  - vi. Air rights, whether they are part of the insured real property or reserved to a party other than Borrower;
  - vii. Condominium rights;
  - viii. Mineral rights, mineral reservations, and mineral leases;
  - ix. Patent reservations;
  - x. Riparian rights;
  - xi. Reversionary interest (conditional or unconditional);
  - xii. Telecommunication leases and rooftop leases;
  - xiii. Commercial leases; and
  - xiv. Development agreements.

#### D. Title Policy Requirements.

1. *Schedule A.* Schedule A details the coverage provided by the Title Policy.
  - a. Effective Date. The Title Policy effective date must be the same as the date of HUD's endorsement of the *Note*. If a time of day is included, the time must be end of the business day.
  - b. Policy Amount. The amount of the title insurance coverage, shown in Schedule A, must be the full amount of the FHA-insured Loan.

**Note:** For new construction and substantial rehabilitation loans, HUD requires that the Title Policy insure the full amount of the FHA-insured Loan (*e.g.*, the amount of the *Note*); pending disbursement endorsements are permitted if the endorsements are consistent with the requirements of this Section. HUD insures all 223(f) transactions

in full at the time of endorsement, thus pending disbursement endorsements are not permitted for 223(f) Title Policies.

- c. Named Insureds. Schedule A, number 1 lists the insureds for the Title Policy. Lender “and/or the Secretary of Housing and Urban Development, and their successors and/or assigns, as their interests may appear” must be the named insureds on the Title Policy. No other parties, *e.g.*, subordinate lenders, may be named insureds.
- d. Estate or Interest in the Land. Schedule A, number 2 identifies the type of estate encumbered by the *Security Instrument*. The identified estate must be consistent with the *Firm Commitment*. By statute, the Borrower’s estate or interest in the Land must be fee simple or an eligible leasehold. In addition, the Borrower’s statutorily required interest, Schedule A, number 2 must also reference any appurtenant right, including beneficial easements. In such instances, Borrower’s appurtenant right must be distinguished from the Borrower’s statutorily required interest (*e.g.*, “fee simple as to [Borrower’s fee simple or leasehold estate] and easement as to [beneficial easement]”).
- e. Vested Title Holder. Schedule A, number 3 identifies the entity that holds title to the Land. Generally, the Borrower must be identified as the only vested title holder in Schedule A, number 3. If the *Firm Commitment* evidences HUD’s approval of an alternative (*e.g.*, air rights, bifurcated ownership, or public entity held fee subject or joined to the *Security Instrument*), the vested title holder in Schedule A, number 3, must be consistent with the *Firm Commitment*.
- f. Insured Mortgage. Schedule A, number 4 describes the instrument(s) that create the mortgage insured in the Title Policy. Both the *Security Instrument* and the *Regulatory Agreement*, because it is incorporated into the *Security Instrument*, must be shown in Schedule A, number 4. The reference to the *Regulatory Agreement* must state that the *Regulatory Agreement* is “incorporated by reference” in the *Security Instrument* (other legally equivalent phrasing may be used, subject to HUD Closing Attorney approval).
- g. Legal Description. The legal description of the Land used in the Title Policy must exactly match the legal description in the *Firm Commitment*, on the Survey, and in other closing documents except for minor stylistic differences or immaterial reference language. Appurtenant interests shown in Schedule A, number 2 may be listed as separate tracts, parts, or other legal equivalent.

## 2. *Schedule B. Exceptions.*

- a. Standard Exceptions. The Title Policy must not include “standard exceptions” on Schedule B, unless a standard exception cannot be deleted under applicable state law. Lender and Lender’s Counsel are responsible for requesting deletion of standard exceptions from the Title Policy. Affirmative coverage over these matters is not permitted unless such coverage is the only available mitigation under applicable state law. Standard exceptions, sometimes called “general exceptions,” include, but are not limited to:
- 1) Rights or claims of parties in possession not shown by the Public Records;
  - 2) Easements, or claims of easements, not shown by the Public Records;
  - 3) Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey or inspection of the Land;
  - 4) General exception for matters shown on survey, or that would be shown on survey;
  - 5) Any lien, or right to a lien, for services, labor, or material heretofore or hereafter furnished, imposed by law and not shown by the Public Records (aka mechanic’s liens); and
  - 6) Taxes or special assessments which are not shown as existing liens in the Public Records.
- b. Senior Record Exceptions. Schedule B must list items identified by title in the land records. In most jurisdictions, title matters senior to the FHA-insured mortgage are shown on a Schedule B-I. Senior record exceptions must either be approved by the HUD Closing Attorney (in consultation with RC Director pursuant to the criteria in Section 19.2.07(B) above), or extinguished and removed, affirmatively insured over, or otherwise mitigated to the satisfaction of the HUD Closing Attorney and RC Director, as appropriate.

No monetary liens may supersede the FHA-insured mortgage, except supplemental loans insured under Section 241, which will be subordinate, and real estate taxes and assessments for current year that are not yet due and payable.

- c. Project Survey Exception. While the general title exception for survey matters is prohibited (*see* Section 19.2.07.B.2, above), minor survey matters expressly noted by the surveyor (*e.g.* a specific fence encroachment not affecting Borrower’s use of or liability for the Land) may be listed as exceptions from coverage in Schedule B,

subject to RC Director approval, which may require affirmative coverage if available under state law.

d. Subordinate Record Exceptions. In most jurisdictions, matters subordinate to the *Security Instrument* are shown on a Schedule B-II.

1) The UCC-1 Financing Statement recorded as a fixture filing in the real estate records of the Property jurisdiction must be shown in Schedule B as subordinate to the *Security Instrument*.

**Note:** HUD does not require that the UCC-1 Financing Statement filed with the Secretary of State, or legal equivalent, in the Borrower's organizational jurisdiction be shown on Schedule B.

2) If the *Firm Commitment* authorizes secondary financing, either from a governmental or private source, secured by a subordinate lien on the Project, such lien(s) must be shown in Schedule B as subordinate to the *Security Instrument*.

e. Record Exceptions that Appear to Violate Federal Law or the Regulatory Agreement. Exceptions that appear to violate Federal law or the Regulatory Agreement, in whole or in part, must be extinguished as a matter of record and removed from the Title Policy, except where determined by the RC Director to be impossible or impracticable. If removal is impossible or impracticable, the HUD Closing Attorney will request that the Title Policy or the title company state that the conflicting provisions are unenforceable.

3. *Affirmative Coverage (Endorsements) and Deletions to the Title Policy*. The Title Policy must include the affirmative coverage (coverage added to the standard policy) and deletions listed below, and any other coverage required by the RC Director and the HUD Closing Attorney, except where prohibited by applicable state law.

a. Affirmative Coverage, Endorsements. Affirmative coverage extends the insurance provided through the Title Policy by covering additional risks of loss or damage. Affirmative coverage is added to the Title Policy by annotation (e.g., notation of additional coverage directly on a schedule), or through the title company's issuance of standard form endorsements.

The affirmative coverage listed below is generally required. When a specific ALTA endorsement number is listed but not available in the Project jurisdiction, the HUD Closing Attorney may accept a state approved endorsement bearing a different form number, or alternative affirmative coverage, provided that the coverage is substantially similar. The RC Director, HUD Closing Attorney, and Lender are each permitted to require additional affirmative coverage not required by this section based on the specific characteristics of the transaction.

- 1) *Comprehensive Coverage over Restrictions, Encroachments, and Minerals.* ALTA Endorsements 9, 9-06, 9.7-06, 9.10-06 (also known as the *Series 9, Comprehensive Endorsement*, or *Comp 9*), as applicable, to provide affirmative coverage related to mortgage divestment, and violations of restrictions, encroachments, and minerals.

In many jurisdictions, the comprehensive ALTA 9-06 is intended for use with improved residential property but may also be issued for unimproved property (*e.g.*, new construction on vacant land). Other jurisdictions have authorized issuance of a series 9 endorsement specifically for unimproved property.

**Note:** Most of the ALTA series 9 endorsements specifically exclude certain Schedule B matters. For that reason, other affirmative coverage (notation or other endorsement) will be required to extend coverage over such items in Schedule B, as determined necessary by the RC Director and HUD Closing Attorney.

- 2) *Private Rights.* ALTA Endorsement 9.6.-06 – Loan Policy, to provide affirmative coverage against loss or damage resulting from options to purchase, rights of first refusal, rights of prior approval, and other private charges or assessments.
- 3) *Deletion of Arbitration.* The Title Policy must provide affirmative coverage that deletes Condition 13 of the ALTA jacket policy (arbitration). There is no published ALTA form number for this endorsement.
- 4) *Zoning.* ALTA Endorsements 3.1-06 (completed structure/improved land), or 3.2-06 (construction/unimproved land), as applicable, when Lender elects to use a zoning endorsement as the requisite evidence of zoning compliance. See *Instructions to Opinion of Borrower's Counsel* (HUD-91725M-INST).



When the ALTA 3.2-06 is used, the plans and specifications reference must be consistent with the *Firm Commitment* and the *Building Loan Agreement* (i.e., the referenced plans and specs must be consistent with the HUD-approved version).

- 5) *Environmental Protection Lien*. ALTA Endorsement 8.1-06, to provide coverage related to lien priority of the *Security Instrument* vis-à-vis environmental protection liens as defined in the endorsement. “None” should be inserted after the colon (: ) in the endorsement paragraph (b). If any environmental protection liens are listed by title in paragraph (b), the HUD Closing Attorney must consult with the assigned HUD Environmental Officer.

**Note:** ALTA Endorsement 8.2-06 is not an acceptable alternative as it applies to commercial property.

- 6) *Leasehold*. ALTA Endorsement 13.1-06 to provide additional coverage when the Project is secured by a HUD-approved ground lease.
- 7) *Access and Entry*. ALTA Endorsements 17-06 (direct access), 17.1-06 (easement access), as applicable, to provide affirmative coverage related to property access and entry. The access endorsement must be consistent with the point(s) of access depicted on the Survey.
- 8) *Tax Parcels*. ALTA Endorsement 18-06 (for Land consisting of a single parcel) or 18.1-06 (for Land consisting of multiple tax parcels or Land that includes insured easements), as applicable, to provide affirmative coverage related to tax parceling risk.
- 9) *Contiguity*. ALTA Endorsements 19-06 and 19.1-06, as applicable, to provide additional coverage for Projects with contiguity risks (e.g., multiple or adjacent parcels, or beneficial easements).
- 10) *Same as Survey*. ALTA Endorsement 25-06 or 25.1-06, as applicable, to provide coverage related to non-objectionable inconsistencies between the record legal description (Land in Schedule A) and the boundaries identified on the Project’s survey. The survey reference in the endorsement must be consistent with the date and number revision of the HUD-approved Survey.

11) *Policy Authentication, Electronic Signature*. ALTA Endorsement 39-06, as applicable, to ensure coverage when the Title Policy will be issued electronically or without wet-ink signatures.

12) *Pending Disbursements*. ALTA Endorsements 32-06 and 33-06, to provide alternative coverage when the title company will only insure a new construction or substantial rehabilitation loan by deleting Covered Risk 11(a) (mechanic's lien coverage) during the construction of the Project.

HUD only permits deletion of Covered Risk 11(a) and pending disbursements title coverage for loans closed as new construction/substantial rehabilitation *Insurance of Advances*. Pending disbursements coverage is prohibited when HUD insures the total Loan amount at endorsement (*e.g.*, 223(f) projects with Expanded Work, *see* Section 19.2.23.I) or where mechanic's liens relate back to the start of construction pursuant to state law.

13) *Easements and Encroachments*. ALTA 28 Series Endorsements, as applicable, when easements or encroachments are shown on survey and listed as senior to the *Security Instrument* in Schedule B.

14) *Minerals and Other Sub-Surface Substances*. ALTA Endorsement 35.1-06 (improved land), or ALTA Endorsement 35.3-06 (land under development), as applicable, to provide affirmative coverage over Schedule B exceptions for mineral or other sub-surface substance rights.

**Note:** The 35 series endorsements provide additional coverage that is not afforded by the *Series 9* comprehensive endorsement(s).

15) *Other Resource Extraction*. Endorsement, such as CLTA Endorsement 103.5-06, to provide affirmative coverage when title or survey show rights of third parties to subsurface resource extraction or surface use of the Land (*e.g.*, mineral or water extraction, water irrigation, other resource reservations).

16) *Utility Access*. When required by the *Firm Commitment* or applicable closing checklist, ALTA Endorsement 17.2-06 to provide affirmative coverage related to a Project's access to standard utilities.

b. *Non-Standard Exception Deletions from Policy.* The matters listed below must be resolved prior to closing and deleted from the Title Policy. Affirmative coverage is not permitted.

1) *Taxes.* Specific tax liabilities that are not yet due and payable may be listed on Schedule B. However, all taxes that are liens and payable as of closing, must be paid prior to closing.

2) *Specified Mechanic's Liens.* Previously recorded mechanic's liens shown in Schedule B must be resolved, and the liens removed from the Title Policy prior to closing.

E. Title Policy Issuance and Escrow Services.

1. Title Agent Letter of Authority. Where the Title Policy is issued by a title agent (*i.e.*, not directly by the issuing title company), HUD requires a letter of authority (aka agency verification letter). The agency verification letter must: be on the letterhead of the Title Company issuing the Title Policy; be addressed to HUD and the Lender; include Borrower's name, Project name and number, policy amount, and title agent's name; and state that the title agent is in good standing with the title company issuing the Title Policy. Additionally, the agency verification letter must state that the title agent has the authority to issue the Title Policy on behalf of the title company for the project identified in the letter and must be valid as of the date of closing. Lender's Counsel is responsible for obtaining any necessary updates to the agency verification letter to ensure compliance with these requirements.

2. Escrow Services and Closing Protection.

a. *General.* HUD generally permits a local title company branch, title agent, or approved attorney to provide additional escrow services along with issuance of the Title Policy. The local branch, title agent, or authorized attorney will "close" the transaction by ensuring that the documents are recorded, disbursing the funds to the proper parties, and issuing the Title Policy.

b. *Closing Protection Letter.* HUD requires a closing protection letter (*e.g.*, ALTA Closing Protection Letter (ALTA CPL – Single Transactions R-12-01-2015), or an equivalent form letter authorized by the state regulatory body in the Project jurisdiction) for all closings where a title agent, approved attorney, or other individual not directly employed by the issuing title company will perform escrow services and/or manage original documents required for closing.

The title company issuing the Title Policy must issue the CPL to Lender and HUD, as their interest may appear. Any liability limitation stated in the CPL must be equal to or greater than the amount of the FHA-insured Loan.

The CPL ensures that the title agent, approved attorney, or other third party escrow agent is authorized to perform the escrow services on behalf of the title company, and to indemnify the Lender for actual losses caused by certain misconduct of the closing agent (subject to specific exceptions and exclusions therein). The CPL must state that the protection afforded by the CPL is valid as of the date of closing. Lender's Counsel is responsible for obtaining any necessary updates to the CPL to ensure compliance with these requirements.

HUD will only accept third-party escrow services and related CPLs when such services and coverage are permitted by state law of the Project jurisdiction.

#### F. Survey, Survey Map/Plat and Surveyor's Report.

##### 1. Survey Map/Plat

- a. *Form.* When a survey is required for closing (see applicable closing checklists and instructions elsewhere in this Guide), an ALTA/NSPS Land Title Survey map or plat (the "Survey") and a surveyor's report supplementing the Survey must be submitted, and must conform to the instructions and form set forth in the *Survey Instructions and Surveyor's Report* (HUD-91073M) (the "*Surveyor's Report*"), including the listed ALTA/NSPS Table A items and the required certification.
- b. *Date.* The current Survey and *Surveyor's Report* must be signed and sealed by the surveyor not more than 180 days prior to closing. The date of the last site inspection/field work must be no more than 180 days prior to closing. The RC Director, in consultation with the HUD Closing Attorney, may extend the 180 timeframes at its reasonable discretion. If the RC Director allows for most recent fieldwork to be completed more than 180 days prior to closing, Lender must submit a *Survey Affidavit of No Change* from the Borrower, in a format similar to the sample included at Section 19.3.04. All references to 180 days in this paragraph are reduced to 120 days for as-built surveys submitted for final closing of a construction Loan. See Section 19.2.20.
- c. *All Identifiable Interests Must Appear.* The Survey must show all identifiable easements, apparent interests (including railroads), and encroachments on the Land, and from the Land onto contiguous parcels. All identified interests must be acceptable to the RC Director, in consultation with the HUD Closing Attorney. All

- plottable easements, restrictions and exceptions shown on the Title Policy, including existing maintenance, joint-use, easement, and other agreements, must be depicted on the Survey. Blanket easements that cannot be plotted must be listed with recording information, and notation “not plottable” or equivalent must appear next to the title exception.
- d. *Access.* All access roads must be labeled as public or private, as applicable.
  - e. *Common Elements.* When a Project includes common facilities not exclusive to the Project, Borrower must provide for recordation of an agreement for the shared common use of applicable land and facilities (*e.g.*, common drives, common lobbies, elevators, walkways, utility roads, parking structures, recreation facilities, storm water management facilities (retention ponds, detention ponds, swales, and culverts), or other common facilities). The agreement must grant shared rights to the Borrower, with rights of use for tenants, and must run with the land. All common elements, including common elements located on adjacent parcels, must be depicted and labeled on the Survey, unless the RC Director determines that such depiction is not necessary.
  - f. *Declarations.* When the Project is subject to condominium, property/homeowner association, or other HUD-approved covenant or declaration, (*e.g.*, documents providing for maintenance, access, or cost sharing) and the document(s) affect Borrower’s interest in the Land (*e.g.*, air rights), they must be shown or referenced on the Survey.
  - g. *New Agreements Required After Survey Review.* After survey review, the RC Director, in consultation with the HUD Closing Attorney, may determine that a recordable maintenance, joint use, easement, or other agreement is necessary to mitigate risk of identifiable rights or third-party use, etc. If so, the RC Director will notify the Lender of the need for a new agreement. Once created, any new agreement must be depicted (or referenced, if not plottable) on Survey, and recorded sufficiently in advance to allow for such depiction; the RC Director, in consultation with the HUD Closing Attorney, may deviate from this Survey requirement in exigent circumstances.
2. *Surveyor’s Report.* The Survey must be supplemented with the *Surveyor’s Report*. The *Surveyor’s Report* must be signed and dated on or after the date of the last revision to the Survey, and must be completed by a licensed surveyor, not merely an engineer, and bear the surveyor's original signature (or other legally effective authentication), and professional seal.

## 19.2.08 Opinion of Borrower's Counsel

- A. General. The *Opinion of Borrower's Counsel* (HUD-91725M) provides HUD with a comprehensive transaction opinion letter from Borrower's Counsel. The *Instructions to Opinion of Borrower's Counsel* (HUD-91725M-INST), explains the requirements for completion of the *Opinion*, including *Exhibit A to Opinion of Borrower's Counsel*, *Certification of Borrower* (HUD-91725M-CERT) and additional required exhibits, and use of alternate provisions, as applicable. Inapplicable provisions in the form *Opinion* must be retained, and either stricken or replaced with the notation "Intentionally Omitted" in order to retain the numbering/lettering sequence in the *Opinion*.
- B. Supplemental Opinions. Transactions may require a supplemental *Opinion of Borrower's Counsel*. Circumstances that may necessitate a supplemental opinion are discussed elsewhere in this Chapter. See e.g., Sections 19.1.12.C.5, 19.2.20.E.
- C. Litigation Disclosure. Litigation docket searches for the Borrower and Borrower's general partner, managing member, or similar controlling person(s) or entity(ies), must be conducted in the state, federal district, and bankruptcy courts of the Project jurisdiction and in the jurisdiction of their principal places of business.

All litigation identified by a required docket search and any other claim threatened in writing and known to Borrower or Borrower's Counsel (including litigation arising after the date of the litigation docket search but prior to closing), must be disclosed to the HUD Closing Attorney in writing. This disclosure must be accompanied by an explanation from the Borrower and/or an assessment of risk by Borrower's Counsel to the reasonable satisfaction of the Lender and HUD. The explanation/assessment must describe the nature of the litigation or claim, the status of the proceeding, and whether insurance is/will cover potential liability. Lender's Counsel is responsible for obtaining any information requested by the HUD Closing Attorney or the RC Director.

## 19.2.09 Secondary Financing

- A. General.
  - 1. Secondary financing must comply with the requirements in Section 8.7 (Secondary Financing), the NHA first-lien requirement, and 24 CFR Part 200, particularly 200.71 and 200.85). Approval of secondary financing is a Housing business decision, including whether it may be secured with a subordinate lien against the Project. Sections 8.7 and 14.12 discuss when the RC Director may approve secured, secondary financing.
  - 2. The RC Director must ensure any approved secondary financing is consistent with Program Obligations and memorialized in the *Firm Commitment*, including: the name of source, whether it is private or public, amount\*, interest rate, whether it will be

secured or unsecured, repayment terms, maturity date, financing instrument(s), and the name of maker on the Note.

3. To the extent the RC Director approves secondary financing for a transaction, Lender's Counsel must ensure, and HUD Closing Attorney will confirm, that the appropriate forms discussed below are used.
4. Any liens created by secondary financing must be shown on the Title Policy in Schedule B, Part II or otherwise shown as subordinate to the lien of the FHA-insured *Security Instrument* in conformance with state-specific practice and approved by the HUD Closing Attorney.
5. The *Request for Endorsement of Credit Instrument* (HUD-92455M) and the *Request for Final Endorsement of Credit Instrument* (HUD-92023M) require copies of all HUD-approved promissory notes be attached. The RC Director is responsible for confirming that only the promissory notes approved by HUD are attached.
6. Subordinate secondary financing may be secured by a collateral assignment of the Project's HAP contract, provided the proper documentation is used and approved by the RC Director and HUD Closing Attorney. See applicable *Consent to Assignment of HAP Contract as Security for Financing*, (e.g., HUD-9649 and HUD-9649a). If the HAP Contract, by its terms, already includes HUD's consent for collateral assignment of the contract as security for financing, HUD will not require additional documentation.
7. Additional secondary financing-related guidance may apply to the transaction, depending on the circumstances. See, e.g.:
  - a. 2.7.D. Identity of interest requirements for various secondary financing and tax credit scenarios
  - b. 3.1.Q. Bridge or Gap Financing
  - c. 3.1.S. Tax Increment Financing
  - d. 7.15. Tax Abatement and Deferrals
  - e. 8.12. Firm Commitment Processing with Grants/Loans
  - f. 8.14. Determining the Estimated Cash Requirements for Completing the Project
  - g. 8.15. Bond Financed Projects
  - h. Chapter 14 – LIHTC and Other Tax Credit Program Guidance, particularly:

- i. 14.11. Developer Fees
- ii. 14.12. Structuring of Secondary Debt in Tax Credit Transactions
- iii. 14.13. Tax Credit Equity Pay-In Schedule
- iv. 14.14. Equity Bridge Loans (“EBLs”) in Tax Credit Projects
- i. Appendix 12(A). Instructions for Approval of Initial / Interim Advances

**B. Unsecured Secondary Financing**

1. Promissory notes may be used to evidence subordinate Borrower debt approved by HUD. One of the two following forms must be used:
  - a. *Surplus Cash Note* (HUD-92223M); or
  - b. *Residual Receipts Note* (HUD-92908M), when Borrower’s distributions are restricted through a *Residual Receipts Rider* to the *Regulatory Agreement*.
2. The foregoing forms may be used to evidence the following types of debt:
  - a. Discounts, financing fees, and/or extension fees paid by a third party on behalf of Borrower;
  - b. Secondary loans from a governmental or non-governmental source;
  - c. Deferral of the developer’s fee in return for Borrower’s agreement to pay upon completion of the Project (deferred developer fee), if: (1) disclosed by the parties before Initial Endorsement, and (2) the *Firm Commitment* does not provide for a builder’s and sponsor’s profit and risk allowance (“BSPRA”); and
  - d. Land acquisition costs that exceed HUD’s warranted price of land fully improved.
3. Promissory notes are prohibited:
  - a. For costs disallowed in the cost certification review;
  - b. To determine the distribution of surplus cash; and
  - c. To establish an equity interest, other than Equity Bridge Loans for tax credit projects, as discussed in 19.2.09.F, below.

**C. Secured Secondary Financing – Public Sources.**



1. Secondary financing from a public entity that will be secured with a lien against the Mortgaged Property, as memorialized in the *Firm Commitment*, must be subordinated through HUD's *Subordination Agreement – Public* (HUD-92420M).

**Note:** The *Subordination Agreement – Public* should not be used to subordinate HUD-held debt. Existing Mark-to-Market (“M2M”) debt should be subordinated using the form of subordination agreement from the HUD Office of Recapitalization attached to post-M2M approval memos. The HUD Closing Attorney will contact the MMD to advise on documentation required to subordinate other HUD-held debt, including Partial Claim and Flexible Subsidy loans.

2. The *Subordination Agreement – Public* contains HUD-required language that must be inserted or incorporated by reference into the subordinate note (*see Subordination Agreement – Public* (HUD-92420M), Section 3(c), Borrower's and Subordinate Lender's Representations and Warranties). The HUD Closing Attorney will review the subordinate note to confirm inclusion/incorporation of this required language. The form also contains bracketed alternative options for subordinate public debt that is forgivable.
3. Negotiated Templates. HUD will consider requested changes to the *Subordination Agreement – Public* if the change is necessary to comply with state or local law, in accordance with the procedures set forth below. HUD's written acceptance of any changes will result in a template for a given jurisdiction and program. Pursuant to the Paperwork Reduction Act, HUD's approval of any template expires upon implementation of the next OMB-approved version of the form, at which time public lenders must again request HUD approval to modify the new OMB-approved version.
  - a. Requested changes are subject to the review of the HUD Closing Attorney, the RC Director, and the Regional Counsel.
  - b. Counsel to the governmental agency must separately identify each specific provision(s) of the *Subordination Agreement – Public* that needs to be modified in order to comply with specific provisions of state or local law. The request must include a narrative outline of the request in which each requested form change must be numbered, with a depiction of the change shown as redlined text compared to the HUD form, accompanied by a detailed description explaining why the change is necessary to comply with state or local law. Note that HUD will not consider non-substantive, stylistic changes. HUD will only approve requested changes that are accurate, sufficiently explained, and narrowly tailored to address the state or local law compliance issue(s). The requested changes and supporting justification must be submitted to the HUD Closing Attorney. The HUD Closing Attorney will independently analyze and confirm whether the justification and rationale are accurate and narrowly tailored to address compliance with the identified state or local law and confirm there are no statutory or regulatory barriers.

- c. If the HUD Closing Attorney determines the requested changes are legally acceptable, the HUD Closing Attorney will submit the requested changes and justification to the RC Director and Regional Counsel. The RC Director and Regional Counsel will review the submission and render a final decision on programmatic and legal acceptability.

**Note:** The HUD Closing Attorney will be the sole point of contact for Lender's Counsel and the government agency during HUD's review of a template change of the *Subordination Agreement – Public*, unless the HUD Closing Attorney requests that outside parties communicate directly with other HUD staff.

- d. The RC Director will provide a written statement to the requesting party evidencing its final decision.
  - e. If HUD approves the template, that version will be used for all transactions involving the same governmental program in that state or locality until the expiration of the current OMB-approved *Subordination Agreement – Public*.
  - f. The RC Director and applicable Regional Counsel will maintain copies of all approved negotiated templates.
4. **Deal-Specific Changes.** To further facilitate the use of other public funds, the RC Director is authorized to approve, on a case-by-case basis, the following changes to the *Subordination Agreement – Public* that may be necessary to accommodate affordable housing, and where there is minimal to no legal and business risk to HUD. Such business-driven changes may be made if the RC Director ensures that the changes are consistent with Program Obligations, are supported from a business and HUD mission perspective, and that resulting risks are appropriately underwritten.
    - a. Modification of Section 3(b) to allow the subordinate loan to mature prior to the FHA-insured Loan; and
    - b. Allowance of compounding of interest, which is otherwise prohibited by Section 3(c)(4).

**Note:** All other deal-specific deviations from the OMB-approved *Subordination Agreement – Public*, including business-driven changes in state and local templates approved for expired iterations of the form, constitute substantive changes subject to the review procedures in Section 19.2.01.F of this Chapter 19.

5. Instructions for submission to the HUD Closing Attorney.
  - a. **Draft Submissions.** The draft *Subordination Agreement – Public* submitted to

the HUD Closing Attorney for review must include a clean version as well as a redline comparison to show any and all changes to the established state/local program-specific template (or standard form if there is no template), including any changes required by the HUD *Firm Commitment*.

- b. Closing Submissions. A redlined version of the HUD approved *Subordination Agreement – Public* must be submitted at the closing table together with the clean version. All changes from the state/local program-specific template must be shown in the redline, including any inapplicable provisions, approved deal-specific changes, and changes required in the HUD *Firm Commitment*.

#### D. Secured Secondary Financing – Private

1. When the RC Director approves secured secondary financing from a private entity, that is secured with a lien against the Mortgaged Property consistent with Program Obligations and reflected in the *Firm Commitment*, the parties must use *Subordination Agreement – Private* (HUD-92907M). Note that the *Secondary Financing Rider* is no longer in effect.
2. The conditions for secured secondary financing from a private entity differ depending on the section of the National Housing Act through which the mortgage is being insured, including whether it may be secured with a lien on the Project (*see, e.g., Sections 8.7 and 14.14*).
3. Section 3(c) of the *Subordination Agreement – Private* contains HUD-required language that must be inserted into the subordinate note. The HUD Closing Attorney should confirm inclusion of the required language.

#### E. Restrictive Covenants and Use Agreements Related to Secondary Financing

1. The sources of the secondary financing or of the Project's other approved financing structures (*e.g., LIHTCs, tax-exempt bonds, etc.*) may contain affordability restrictions on rents and occupancy based on tenant incomes. When imposed in connection with the HUD-approved financing, such affordability restrictions (and the accompanying encumbrances on title, such as use agreements and other restrictive covenants) must be documented in the *Firm Commitment* and be consistent with Program Obligations.
2. The HUD Closing Attorney will ensure that the *HUD Rider/Amendment to Restrictive Covenants* (the "*Restrictive Covenants Rider*," found in Section 19.3.09), is used. The *Restrictive Covenants Rider* ensures, in part, that nothing in the restrictive covenants prevents HUD from enforcing its Loan documents and Program Obligations, and further ensures that the agency's enforcement of the restrictive covenants will not conflict with the National Housing Act and related regulations.

The document also provides that the use restrictions terminate upon foreclosure.

3. The affordability restrictions may be permitted to remain in place following a foreclosure of the FHA-insured Loan in one of the three following scenarios, keeping in mind that only pure restrictive covenants without lien rights may be recorded prior to the HUD *Security Instrument* under the NHA.
  - a. Individual Transaction. As long as any risks are appropriately mitigated from a business perspective, the RC Director may, on a case-by-case basis, permit affordability restrictions to remain in place after foreclosure. Such an exception to the termination requirement must be expressly provided for in the *Firm Commitment*, otherwise there is no guarantee that HUD will be able to accommodate last minute requests to permit the use restrictions ahead of the HUD-insured financing. Any approval under this section for an individual transaction is specific to that transaction only and does not obligate HUD to approve the same exception for affordability restrictions on a subsequent transaction.
  - b. HOME Program Use Restrictions. See 24 CFR 92.252.
  - c. “HOME-like” Use Restrictions. State and local affordable housing use restrictions that are substantially similar to the HOME Program may be recorded prior to the HUD Security Instrument, provided that:
    - i. the affordability levels are similar to the HOME program, and
    - ii. the state or local program risks recapture of funds (i.e., statutory or regulatory required payback to HUD or other original funding source, such as a state treasury) in the event the use restrictions are terminated prior to the mandated use period.

Counsel for state or local programs seeking “HOME-like” use restriction treatment should send written requests to the RC Director and HQ MHP for a determination. Such requests must be accompanied by a detailed explanation of the state or local program and precisely how it is similar to the HOME program in terms of affordability restrictions and threat of recapture, including a discussion of the governing statutes and/or regulations. HUD will only consider requests for “HOME-like” designation of a program if the request is submitted with the Project loan application or earlier. If it is established that a state or local affordable financing program satisfies these conditions, as determined and approved by HUD in writing, HUD will permit the associated use restrictions to be recorded ahead of the HUD *Security Instrument* for that specific program.

4. Notwithstanding the foregoing, prior to determining that affordable use restrictions

may be recorded in first position, the MAP Lenders and RC Directors must properly underwrite all secondary financing and related use restrictions for their impact on the Project viability and marketability.

5. When use restrictions or other restrictive covenants are permitted ahead of the HUD *Security Instrument*, the *Restrictive Covenants Rider* must still be used with appropriate modification (approved by the HUD Closing Attorney) of the form to remove the requirement that the restrictions terminate upon foreclosure. No exceptions are permitted, as the *HUD Rider* serves other important objectives beside termination of use restrictions upon foreclosure. See Section 19.2.01.F.
6. All other requested changes to the *HUD Rider* must be processed in Headquarters as requests for substantive changes under Section 19.2.01.F.
7. If there are affordability use restrictions imposed on the Project that are not in connection with new secondary financing but remain from previous financing sources, the *Restrictive Covenants Rider* must be used when required by the *Firm Commitment* or when the RC Director and HUD Closing Attorney determine that the *Rider* is necessary to comply with the Project's underwriting or Program Obligations. Any request to allow the use restrictions to have recording priority ahead of the HUD *Security Instrument* must be addressed following the procedures found above.

F. Equity Bridge Loans (“EBL”) for Tax Credit Projects. HUD will address requirements for EBL terms in the *Firm Commitment*. The EBL documents must meet the requirements of Section 14.14, which must be memorialized in a rider attached to the EBL documents and reviewed and approved by the HUD Closing Attorney. See Section 19.3.10, Equity Bridge Loan Rider – LIHTC Projects.

G. Deferred Developer Fees (“DDF”) for Low Income Housing Tax Credit Projects (“LIHTC”)

1. A DDF loan in connection with a LIHTC transaction may be documented as a promissory note using the *Surplus Cash Note* (HUD-92223M) or as a defined obligation in the Borrower's organization documents. In either instance, language must be included specifying that repayment is restricted to Surplus Cash, as that term is defined in the *Regulatory Agreement*.
2. A DDF loan must not be secured by the Project, and its term may be shorter than the term of the FHA mortgage.
3. See Section 14.11.D and Appendices 3.B.1. and 2 for additional guidance for DDFs.

H. Secondary Financing That Is Unavailable at Initial Closing.

1. Secondary Financing from Federal, State or Local Government Agencies. If grant or loan funds from government sources are being contributed as Project Completion

Funds (as defined in Section 4(c) of the *Building Loan Agreement*) and are unavailable at Initial Endorsement, the FHA-insured mortgage proceeds must be disbursed in accordance with procedures set forth in Section 8.12 and memorialized in the disbursement agreement attached to the *Building Loan Agreement* (see 24 CFR 200.54).

2. Grants or Loans from Private (Non-governmental) Sources. If grant or loan funds from private, non-government sources are being contributed as Project Completion Funds but are not available at initial endorsement, HUD will require the Borrower escrow an equivalent amount with Lender before or at initial endorsement, and will require that such escrowed funds be disbursed in full prior to disbursement of any insured Loan proceeds. Unless approved in advance by the RC Director and FHA Lender, a mortgage or deed of trust for a private loan that is approved to be secured with a lien against the Project may not be recorded until the loan is disbursed.
3. Tax Credit Exception. Notwithstanding the foregoing subsections 1 and 2, HUD will not require an escrow of tax credit equity (*e.g.*, proceeds from LIHTC, New Market Tax Credit Program, or historic rehabilitation tax credits), as dictated by the Housing and Economic Recovery Act of 2008 (“HERA”) and 24 CFR 200.54. *See also* Sections 19.2.09.F and 14.14 for guidance regarding Equity Bridge Loans in tax credit projects.

## 19.2.10 Bond-Financed Projects

- A. General. All private activity volume cap financing associated with an FHA-insured Project, whether new or previously issued, must be disclosed at the time of firm application and memorialized in the *Firm Commitment*. This financing may be structured as traditional private placement bonds, or as a tax-exempt loan, provided that the obligation arises from the allocation of a state’s private activity volume cap.

**Note:** This Section 19.2.10 regularly uses traditional bond terminology for convenience but applies to all private activity volume cap financing associated with an FHA-insured Project.

- B. Firm Commitment. The *Firm Commitment* will indicate if the bonds are taxable or tax-exempt, and if they are cash-collateralized. As a condition of the *Firm Commitment*, all bond documents must comply with HUD’s legal and programmatic requirements for bond transactions. HUD will regularly review and collect the bond documents that appear on the applicable Closing Checklist and will conduct a limited review consistent with this Section 19.2.10. Upon review, the RC Director and/or HUD Closing Attorney may request additional documents and information, when they determine that additional information is necessary to complete HUD’s review.
- C. Lender’s Certificate. The use of bonds and, if paid with loan proceeds, the cost of issuance of the bonds, must be reflected in either the *Lender’s Certificate* (form HUD-92434M) or the

*Request for Endorsement of Credit Instrument (Certificate of Lender)* (form HUD-92455M). To use short-term, tax-exempt, cash collateralized bonds in connection with 4% Low Income Housing Tax Credits, the Lender must certify that the transaction complies with the National Housing Act. This certification appears as a subsection of both the *Lender's Certificate* and *Request for Endorsement of Credit Instrument (Certificate of Lender)*. When bonds are structured as a tax-exempt loan, Lender's Counsel, subject to review and approval by the HUD Closing Attorney, is authorized to modify the bond terminology used in the applicable HUD certificate to be consistent with the terminology used in the tax-exempt loan documents.

- D. Tax-Exempt Bond/IRS Code 142(d) Projects. Projects financed with the proceeds from tax-exempt bonds pursuant to the Internal Revenue Code, Section 142(d), must meet minimum low-income occupancy restrictions. Project owners will typically record restrictive covenants against the project to ensure compliance with occupancy and use requirements. Such restrictive covenants must be subordinated to the *FHA Security Instrument, Regulatory Agreement* and Program Obligations, as discussed below.
- E. Restrictive Covenants/Tax Regulatory Agreement. The *HUD Rider* must be included in any bond document containing a restrictive covenant, either by attaching and incorporating the form by reference, or by incorporating the form provisions into the bond document itself. In bond financing, such restrictive covenants are often contained in the tax regulatory agreement. Inclusion of the *HUD Rider* is HUD's uniform method for ensuring, consistent with Program Obligations, appropriate subordination, supremacy of HUD requirements, invalidity of any cross-default provisions, and that a default under the bond regulatory agreement will not result in a claim against the Project, mortgage Loan proceeds, Project rents, any reserve or deposit required by HUD in connection with the mortgage loan transaction, or other restricted income of the Project. See Section 19.2.09.E for further discussion.
- F. Borrower's Counsel Opinion. For all bond transactions, the *Opinion of Borrower's Counsel* must include opinion 10. Borrower's counsel may rely on the bond counsel's opinion to provide opinion 10, if bond counsel is able to provide opinion 10 according to the requirements listed in the following subsection G. If the bond counsel opinion does not provide opinion 10 consistent with these requirements, Borrower's counsel may not rely on the bond counsel opinion and must undertake its own due diligence and provide opinion 10 without reference to a supplemental bond counsel's opinion.
- G. Bond Counsel's Opinion. In bond financed transactions, HUD requires submission of a bond counsel's opinion attesting to enforceability of the bonds, and the tax-exempt status of the bond financing (if applicable). The HUD Closing Attorney will review the bond counsel opinion on a limited basis to confirm the inclusion of these required confirmations. Additionally, when Borrower's counsel relies on the bond counsel's opinion in providing *Opinion of Borrower's Counsel* opinion 10, bond counsel must use the *Opinion of Borrower's Counsel* definitions of Primary Loan Documents and Source Documents in providing opinion 10. HUD does not require the bond counsel's opinion to be addressed to

HUD or name HUD as a party relying on the opinion.

- H. HUD Note – Prepayment Prohibitions. For tax-exempt bond financings, the *FHA Note* may be drafted using the optional provisions that prohibit prepayment.
- I. HUD-Required Language for Trust Indenture/Funding Loan Agreement. The trust indenture/funding loan agreement must include the language required by 24 CFR 207.261. This required language obligates the bond trustee/fiscal agent to return certain excess funds held in bond accounts to the FHA Lender in the event of an FHA mortgage insurance claim. The HUD Closing Attorney will collect the trust indenture/funding loan agreement and conduct a limited review to confirm the inclusion of the required regulatory language and the primacy of HUD’s requirements in the event of a conflict. See subsection L., below.
- J. Bond Disbursement Agreement and Bond Loan Agreement. If the bond financing includes a separate disbursement agreement or loan agreement, the HUD Closing Attorney will collect the agreement(s), and conduct a limited review to confirm the supremacy of HUD’s requirements, and that HUD’s Loan documents control in the event of a conflict. See subsection L., below.
- K. Bond Note. If the bond financing includes a separate promissory note, the HUD Closing Attorney will review the bond note for compliance with HUD requirements. As with all subordinate financing, HUD’s surplus cash/residual receipt requirements and forms apply, except for bond financing that is cash-collateralized and therefore exempt from HUD’s surplus cash/residual receipts requirements.
- L. Supremacy of HUD Requirements and Conflicts. HUD requires that HUD program obligations control over any conflicts in the bond financing documents. In addition to opinion 10 of the Opinion of Borrower’s Counsel, the HUD Closing Attorney will complete a limited review of the bond financing documentation to verify that there are contractual provisions providing for the supremacy of HUD’s requirements in the event of a conflict. Practically, this review may be achieved through review and confirmation of a conflicts provision in the trust indenture/funding loan agreement, alone, if all other bond financing documentation is incorporated therein (*e.g.*, by reference). Alternatively, if some bond financing agreements stand alone, or involve different parties, the HUD Closing Attorney may require conflicts provisions in those agreements also. To assist the HUD Closing Attorney, Lender’s Counsel and bond counsel may provide the HUD Closing Attorney with a written explanation as to what contractual provisions provide for the supremacy of HUD’s Loan documents, and that the provisions in HUD’s Loan documents control in the event of a conflict with the bond financing documents.

Sample Conflicts Provision:

*FHA Federal Laws and Requirements Control. Notwithstanding anything in this [title of agreement] to the contrary, the [Parties] to this [title of agreement] acknowledge that this [title of agreement] and any obligations of the [title of the*



borrower under the bond financing documents] hereunder, are subject and subordinate to the [title used for the FHA-insured Loan documents]. In the event of a conflict between [title of agreement] and [title used for the FHA-insured Loan documents], the conflicting provisions in the [title used for the FHA-insured Loan documents] are controlling.

## 19.2.11 Low-Income Housing Tax Credit (LIHTC) Financed Projects

- A. Firm Commitment Condition. The use of Low-Income Housing Tax Credits (“LIHTC”) in FHA-insured Multifamily loan transactions must be disclosed with the Project loan application. Additional Conditions to the *Firm Commitment* will include the tax-credit equity pay-in schedule and a requirement that all LIHTC documents be acceptable to HUD. See Sections 14.5 and 14.8. HUD will review and collect all LIHTC-related documents that appear on the Closing Checklists. Additional documentation will rarely be required, however, the RC Director and HUD Closing Attorney may request additional documents and information, if, based on a review of the firm application or draft closing package, they determine that additional information is required to complete their review.
- B. Subordination of Restrictive Covenants. As a condition of receiving an allocation of LIHTCs pursuant to Section 42 of the Internal Revenue Code, Borrower will execute and record a Land Use Restriction Agreement (“LURA”) or similarly named restrictive covenant imposing affordability restrictions on the Project. The LURA must incorporate the *Rider to Restrictive Covenants* (see section 19.3.09), which subordinates the LURA among other objectives. See Section 19.2.09.E for further discussion. The LURA should be recorded no later than Final Endorsement or Initial/Final endorsement, as applicable. If the LURA cannot be recorded by Final (or Initial/Final), a draft LURA with the *HUD Rider* must be submitted with the closing package for HUD review and approval prior to Endorsement. Additionally, Borrower must certify to HUD that the approved draft will be recorded as soon as practicable. In such cases, Lender must include the certification and the approved draft LURA in the Closing Docket. If, between the time of HUD’s approval and the recordation of the *HUD Rider*, the state financing agency allocating the tax credits requires further modifications to the previously reviewed draft, such changes must be resubmitted to the HUD Closing Attorney in blackline format for further review and consideration. Copies of the recorded LURA, consistent with the finally approved draft, must be submitted to the RC Director and HUD Closing Attorney as soon as possible after recording.
- C. Borrower's Attorney's Opinion (Tax Credits). All LIHTC transactions require opinion 11 of the *Opinion of Borrower's Counsel*. Borrower’s counsel may rely on a tax credit counsel opinion that provides opinion 11 if, and only if, the tax credit counsel opinion uses the *Opinion of Borrower’s Counsel’s* definitions of Primary Loan Documents and Source Documents, and a copy of the tax credit counsel opinion is provided to HUD. If the tax credit counsel opinion does not provide opinion 11 in the form described above, Borrower’s counsel must undertake its own due diligence and independently provide form opinion 11.

D. LIHTC Equity Pay-In. Pursuant to Section 14.13, the LIHTC investor must contribute at least 20% of the total tax credit equity to the project at the time of Initial Endorsement (with the remaining 80% to be subsequently available). Note that Section 14.13 allows 10% of the required total equity pay-in to be funded with an equity bridge loan at Initial Endorsement. The required minimum equity installment evidences the tax credit investor's commitment to the Project. Tax credit equity installments must be made in accordance with either the disbursement agreement attached to the *Building Loan Agreement* (HUD-92441M) (for new construction and substantial rehabilitation), or the tax credit equity pay-in schedule attached to the *Escrow Agreement for Deferred Repairs* (HUD-92476.1) (for loans closed pursuant to 223(f)).

1. Lender must submit satisfactory evidence of an agreement that obligates the tax credit investors to make timely and periodic payments to the Borrower of the tax credit equity (typically the limited partnership agreement), which the Borrower will use for Project completion costs.
2. See Sections 19.2.09.F and 14.14 for additional guidance on equity bridge loans.

**Note:** Pursuant to Housing and Economic Development Recovery Act of 2008 ("HERA"), and 24 CFR 200.54, HUD cannot require 100% of the tax credit equity be escrowed at closing.

E. Equity Investor Certification. LIHTC syndicators and equity investors (collectively, the "Equity Investor") are not required to submit a *Previous Participation Certification* (HUD-2530). In lieu of a *Previous Participation Certification*, Equity Investors may submit the *Identification and Certification of Eligible Limited Liability Investor Entities* ("LLCI Certification"), included in Housing Notice 2016-15, *Processing Guide for Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs Participants*. Any Equity Investor submitting the LLCI Certification also must provide HUD with an organizational chart. Only the Equity Investor, and not its members or partners, is required to submit the *LLCI Certification*.

F. LIHTC Rider. The *Rider to Security Instrument - LIHTC Projects* ("LIHTC Rider"), found in Section 19.3.02, may be used in any LIHTC transaction. The *LIHTC Rider* may be used regardless of whether the parties to the transaction request pre-approval of a special limited partner. Special Limited Partner ("SLP") as used herein refers to any affiliated special limited partner, special investor member, or other entity seeking pre-approval. If pre-approval is not requested, the provisions relating to pre-approval of such entity must be stricken from the *LIHTC Rider*.

G. Pre-Approval of Special Limited Partners. A LIHTC investor may request HUD pre-approval for the SLP to take control of the Borrower as the interim general partner or managing member ("GP/MM") of the Borrower under certain triggering default conditions set forth in the Borrower's limited partnership agreement or operating agreement. Transfers of control of the Borrower require HUD consent prior to transfer, however HUD approval

may be given in advance subject to the requirements below.

**Note:** This process is exclusively for SLPs seeking pre-approval. Unless the Borrower requests pre-approval, HUD will treat the SLP as a passive investor. Once granted, pre-approval applies only to the SLP and the particular project for which pre-approval was requested and granted. HUD's pre-approval of the SLP as an Interim Replacement GP/MM (defined further below) is evidenced by the RC Director's and the Closing Attorney's approval of the *Security Instrument* with the *LIHTC Rider* attached, including pre-approval provisions.

Additionally, if HUD pre-approves a transfer of control to the SLP, no further HUD approval for the SLP's takeover at the time of removal of the existing GP/MM is required, subject to the limitations of the *LIHTC Rider*. As stated in the *LIHTC Rider*, HUD's pre-approval of the SLP to act as an interim GP/MM is for a limited duration. If the SLP seeks to act as a long-term replacement GP/MM, the Borrower and Lender must apply for HUD approval through the transfer of physical asset ("TPA") review process.

1. Requirements to Pre-Approve SLP.

- a. General. Attaching the *LIHTC Rider* with pre-approval provisions included provides evidence of and gives effect to HUD's pre-approval. The pre-approval provisions may be included in an executed *LIHTC Rider* and attached to the *Security Instrument* if the items below are received and approved by the RC Director and the HUD Closing Attorney. The RC Director may waive receipt of specified documents if HUD previously received the documents during pre-approval review of a different Project.
- b. Synopsis of the Transaction. Equity Investor must provide a written request for HUD to pre-approve the SLP as a temporary replacement GP/MM. This request must include an overview of the transaction and contain an organizational chart depicting the relationship between the proposed interim GP/MM and the parent organization requesting pre-approval. This request may be sent via email.
- c. Previous Participation Review. The SLP must submit all documents required for the Previous Participation Review (aka the 2530 review). See 200 CFR Part 200, Subpart H; and Notice H 2016-15, *Processing Guide for Previous Participation Reviews of Prospective Multifamily Housing and Healthcare Programs Participants*.
- d. Organizational Documents.
  - i. Organizational Documents of Borrower. The SLP pre-approval request must include a reference list of the SLP takeover provisions in the Borrower's organizational documents. The HUD Closing Attorney

will review the takeover provisions, including triggering events, that permit the removal of the Borrower's GP/MM and replacement of the GP/MM with the SLP. The HUD Closing Attorney will discuss the takeover provisions with the RC Director and confirm the RC Director's approval. The organizational documents must state that upon removal of the existing GP/MM the SLP will act as the Interim Replacement GP/MM in accordance with and subject to the terms of HUD's pre-approval of the SLP and the *LIHTC Rider*.

ii. Organizational Documents of SLP. The SLP pre-approval request must include the SLP's organizational documents. The Closing Attorney will review the SLP organizational documents to confirm the SLP's formation and good standing, that there is no identity of interest with the Borrower's GP/MM, and there are no restrictions in the SLP organizational documents that would prohibit the SLP from acting as the Borrower's interim GP/MM (e.g., neither the stated purpose of the entity nor any other provision restricts the SLP from taking control of the Borrower as the interim GP/MM or restricts the SLP to passive real estate investment).

e. Legal Opinion. Borrower/SLP must submit a legal opinion of Borrower's counsel giving the opinion that removal of the existing GP/MM and substituting in the SLP as the new GP/MM does not cause the dissolution of the Borrower under applicable state law or the Borrower's organizational documents. The attorney giving the opinion must be licensed by the state bar in the state where the Borrower is organized and may not have an identity of interest with the Borrower.

f. Evidence of Determinative Criteria. SLP must submit evidence of the determinative criteria, discussed below.

H. Determinative Criteria for SLP Pre-Approval. The RC Director will approve the SLP as a temporary replacement GP/MM unless the RC Director, with the advice of the HUD Closing Attorney, reasonably determines that the SLP would not be an appropriate temporary replacement general GP/MM, or that such pre-approval is otherwise not in HUD's interest. In making such determination, the RC Director and the HUD Closing Attorney may consider the following factors:

1. The number of projects the SLP and/or affiliated entities have under asset management.
2. The number of times SLP and/or affiliated entities have replaced general partners/managing members and the results of such replacement. Specific examples should be provided and considered.

3. The SLP's process for monitoring projects and determining whether replacement of the general partner/managing member is appropriate.
  4. How the asset management unit of the SLP and/or affiliated entities is staffed in relation to the number of projects it oversees.
- I. Post-Closing Requirements for HUD Pre-Approval of SLP. If the closing timeline does not allow for this process to be completed prior to closing, pre-approval can be granted, and documents submitted after closing. Because the modified language set forth below makes approval conditional, the language may be used even if some, or all, of the required information has not been submitted to HUD prior to closing.
1. Requirements and Determinative Criteria. The same requirements for HUD pre-approval apply both before and after closing.
  2. Revise LIHTC Rider. Revise paragraph 2(c) of the *LIHTC Rider* to the following:
 

Borrower has requested that HUD and Lender pre-approve the temporary replacement of the Borrower's general partner/managing member (GP/MM) with [SPECIAL LIMITED PARTNER ENTITY] ("Interim Replacement GP/MM") to act as an interim general partner/managing member in the event Equity Investor removes Borrower's GP/MM for cause in accordance with Borrower's organizational documents. If HUD grants Borrower's request, HUD will send a letter to Interim Replacement GP/MM giving effect to, and providing evidence of, such pre-approval. Approval of such Interim Replacement GP/MM is expressly limited to a period not to exceed 90 days, which commences on the date of such removal, provided that HUD, in its sole discretion, may extend such 90-day period by an additional 30 days.
  3. Notice of Decision. If HUD grants Borrower's request and pre-approves the SLP, HUD will send the Investor and SLP a letter indicating such pre-approval. Sample language for an approval letter follows below. It is the Equity Investor's responsibility to safeguard such evidence of pre-approval. If HUD denies Borrower's request for SLP pre-approval, HUD will send written notice to the Equity Investor and SLP that the SLP has not been pre-approved and that paragraph 2 of the *LIHTC Rider* is inoperable as the preconditions of the paragraph have not been met. This notice does not preclude the SLP from curing any deficiencies and re-submitting a revised request for pre-approval.
  4. Sample language for post-closing letters, if necessary
    - a. Sample language for letter granting SLP pre-approval post-closing:
 

This letter authorizes [Special Limited Partner Entity] to serve as the interim general partner/managing member of [Name of Borrower] (the "Borrower") in accordance with the terms set forth in, and expressly limited by, the *Rider to*

*Security Instrument LIHTC Properties* (“LIHTC Rider”) attached to that certain [*Name of Security Instrument*] dated as of [date]. HUD’s review of the request for pre-approval has been conducted in accordance with the SPL review process.

Should [Special Limited Partner Entity] wish to serve as general partner/managing member for more than the interim period specified in the LIHTC Rider, it must: (1) submit a request for approval to serve as replacement general partner/managing member, (2) certify that none of the documents submitted pursuant to this preapproval request have changed (*i.e.*, organizational documents have not been further amended, etc.), and (3) complete an updated Previous Participation Clearance through HUD’s APPS system or Form HUD-2530.

b. Sample language for letter denying SLP pre-approval post-closing:

This letter denies pre-approval of [Special Limited Partner Entity] to serve as the interim general partner/managing member of [Name of Borrower] (the “Borrower”). [Special Limited Partner Entity] had requested such pre-approval in accordance with the terms set forth in the Rider to Security Instrument LIHTC Properties (“LIHTC Rider”) attached to that certain [*Name of Security Instrument*] dated as of [date]. [Special Limited Partner Entity] has not met the requirements necessary for such pre-approval. Accordingly, paragraph 2 of the LIHTC Rider to Security Instrument has no force or effect.

## **19.2.12 Escrow Agreements**

- A. General Requirements. As set forth in this Guide, certain escrow agreements may be required. See Section 19.2.17.C for guidance when letters of credit are used in lieu of cash to satisfy escrow agreement deposit requirements.
- B. Escrow Agreement for Deferred Repairs (HUD-92476.1M). For projects with non-critical or deferred repairs, Borrower must make a deposit with Lender into an escrow account for deferred repair costs to be established at Initial/Final Endorsement in an amount specified in the Firm Commitment. Lender must hold these escrowed funds as stated in the agreement until all required repairs are complete, which must be within 12 months (or other term approved by HUD) of the Initial/Final Endorsement. The Borrower may request release of these funds after completion of the repairs and with written approval of HUD. See Section 12.17.

*Modifications:* In refinance transactions, the *Escrow Agreement for Deferred Repairs* may be modified, as described in the form, to serve as an *Escrow Agreement for Latent Defects* if there are no deferred repairs to be completed post-closing but the *Firm Commitment* requires a latent defects deposit. The *Escrow Agreement for Deferred Repairs* may also be modified

as described in the agreement to accommodate LIHTC pay-in equity schedules consistent with programmatic requirements.

**Note:** The New York Building Loan Agreement is used in place of the *Escrow Agreement for Deferred Repairs* (HUD-92476.1M) for refinance transactions in New York, available at: [https://www.hud.gov/program\\_offices/administration/hudclips/forms/hud9/riders-addendums](https://www.hud.gov/program_offices/administration/hudclips/forms/hud9/riders-addendums).

- C. *Escrow Agreement for Operating Deficits* (HUD-92476a-M). If an operating deficit is anticipated, the *Firm Commitment* will require that Borrower make a deposit with Lender to establish an escrow for Operating Deficits. This form also includes a provision for a debt service reserve, which may be required for certain refinance transactions. See Section 7.14, 8.14.F; and 12.15.D).
- D. *Escrow Agreement for Working Capital* (HUD-92412M). If required by the *Firm Commitment*, Borrower must make a deposit with Lender to establish an escrow for working capital. See Sections 8.14.E and 12.15.C).
- E. *Escrow Agreement for Incomplete Construction* (HUD-92456M). At or before Final Endorsement, Borrower must deposit (or cause to be deposited with Lender) an amount not less than 150% of the estimated costs to complete all Incomplete Work (“Items of Delayed Completion”). This amount must not exceed two percent (2%) of the mortgage amount. The Lender must submit, and the RC Director will review and approve (or reject) the items to be completed as identified in the attachment to the *Application for Insurance of Advanced of Mortgage Proceeds* (HUD-92403). See Section 12.7.
- F. *Escrow Agreement for Latent Defects* (HUD-92414M). For New Construction or Sub-Rehabilitation Projects, at or before Final Endorsement, General Contractor must ensure the correction of any Latent Defects through the establishment of an escrow to cover the cost of repair or remediation of Latent Defects discovered within twelve months of the Date of Final Completion. See Section 12.16.S. HUD does not require the establishment of this escrow if the General Contractor has provided assurance for completion of latent defects using a performance bond (using form HUD-92452M). See Section 12.16.S.1.
- G. *Escrow Agreement of Sponsor to Furnish Additional Funds* (HUD-92476M). For Insurance Upon Completion Projects, HUD may require the assurance of funds to meet an Operating Deficit in the form of a Sponsor Escrow (in the form of cash or irrevocable letter of credit) or a Sponsor Bond (in the form of a surety bond). The Sponsor must complete *Agreement of Sponsor to Furnish Additional Funds* (HUD-92476M), and the Sponsor and Surety must complete *Bond Guaranteeing Sponsor’s Performance* (HUD-92477M). See Section 12.16.C.7.

### **19.2.13 Additional Closing Requirements**

- A. Permits and Governmental Approvals. Lender’s Counsel must submit evidence satisfactory to the RC Director demonstrating that Borrower has obtained all building permits, other local permits, governmental approvals, and architectural plans required by the applicable building official(s) to construct or to rehabilitate the Project and/or improvements. The permits, plans, and approvals must be final (issued by the date of closing) and unconditional, unless otherwise approved by the RC Director in consultation with the HUD Closing Attorney.
- B. Zoning and Building Code Compliance.
1. *Zoning Compliance*. Borrower must provide evidence that the applicable zoning laws and regulations permit the operation of multifamily housing of the type covered under the applicable section of the NHA. This evidence may take the form of a zoning endorsement to the title policy (e.g., ALTA Series 3 Endorsement, as appropriate) or a supplemental letter from appropriate local authorities stating that the Project is zoned for the applicable type of multifamily housing at the time of occupancy and that there are no known zoning violations associated with the Project. *See also* opinion 6 of the *Opinion of Borrower’s Counsel* (HUD-91725M).
  2. *Building Code Compliance*. If required by the *Firm Commitment* or applicable closing checklist, Borrower must provide evidence of compliance with local building code requirements. HUD will accept a supplemental letter, deemed acceptable by the RC Director in consultation with the HUD Closing Attorney, from the building code enforcement office that there are no known building code violations and/or a certification from the Borrower or project architect that no changes have occurred since the issuance of certificates of occupancy.
  3. *Samples*. Sample building code and zoning code assurance letters are included in Part 3 of this Chapter. *See* 24 CFR 200.72 and Part II of form HUD-91070M, *Consolidated Certifications - Borrower*.
  4. *Certificate of Occupancy*. Borrower must provide a certificate of occupancy when required by the *Firm Commitment*, applicable closing checklist, or if a certificate of occupancy is issued for the Project and is not currently included in HUD’s Washington Docket.
- C. Evidence of Utility Access and Service. When required by the *Firm Commitment* or applicable closing checklist, Borrower must submit recent letters or agreements confirming utility services for the Project and a utility access endorsement to the Title Policy, where available. *See* Section 19.2.07.D. *See also Instructions to Opinion of Borrower’s Counsel* (HUD-91725M-INST), and *Request for Endorsement of Credit Instrument – Certificate of Borrower* (HUD-92455M).
- D. Property Insurance. The RC Director will provide Lender with the *Property Insurance Requirements* (HUD-92447) and *Property Insurance Schedule* (HUD-92329) at issuance of the *Firm Commitment*.



1. Lender is solely responsible for determining whether the property insurance requirements set forth in *Property Insurance Requirements*, including public liability, vehicle liability, flood and casualty insurance requirements, have been satisfied. See Section 3.9. Lender must certify to compliance with the applicable insurance requirements in the *Lender's Certificate and Request for Endorsement of Credit Instrument*.
  2. After issuance of the *Firm Commitment* and prior to Final Endorsement, the RC Director may determine that revisions to the *Property Insurance Schedule* are necessary due to changes in the plans, specifications or cost of construction. The RC Director will notify the Lender of the changes. Lender must then ensure that the proper property insurance is obtained, and that *Property Insurance Schedule* is properly updated and resubmitted to HUD.
  3. Flood Insurance. If required by the *Firm Commitment*, Lender must provide evidence of payment of the flood insurance premium at least three (3) business days prior to closing.
  4. At closing, the HUD Closing Attorney will not collect certificates of insurance, unless requested to do so by the RC Director.
- E. UCC Searches. UCC searches must be completed no more than 60 days before closing, and the resulting search reports must be submitted to the HUD Closing Attorney for review at least three (3) business days prior to closing. If a Lender requires other searches, the HUD Closing Attorney and/or RC Director may also request to review such searches. The RC Director may authorize the HUD Closing Attorney to rely on searches completed more than 60-days prior to closing when an unanticipated delay in closing results in stale searches. HUD requires, but does not collect UCC searches for single-purpose Borrower entities formed within the 60-day period prior to closing.

UCC filing searches for the Borrower as debtor must be conducted in the official records of the county in which the Property is located (or other applicable jurisdiction for land records) and in the Office of the Secretary of State where Borrower is organized.

All UCC filings identified in the UCC search results will be evaluated by the RC Director and HUD Closing Attorney to determine whether the UCC filing(s) adversely impact the Loan (*e.g.*, evidence conflicts with HUD's Program Obligations). Unless approved by HUD in writing, UCCs that are unrelated to the Loan must be terminated and must not be shown as exceptions to the Title Policy (*e.g.*, the UCC filing from the loan(s) being refinanced with a 223(f) or (a)(7)). The FHA Lender's financing statement for the Loan may be filed in advance of closing, and if so, may be identified in the UCC search results.

F. Certifications.

1. The Closing Checklists include a variety of certifications that must be collected prior

- to HUD's endorsement of the *Note*, including:
- a. *Agreement and Certification* (HUD-93305M);
  - b. *Borrower's Oath* (HUD-92478M);
  - c. *Consolidated Certifications – Borrower* (HUD-91070M) (collected at closing if not collected by the RC Director at the time of Firm Application);
  - d. *Lender's Byrd Certificate* (using standard language for federally insured loans and loan guarantees).
2. Any agreement, undertaking, statement or certification required by this Chapter 19 must specifically state that it is “made, presented, and delivered for the purpose of influencing an official action of the FHA, and of the Commissioner, and may be relied upon by the Commissioner as a true statement of the facts contained therein.” See 24 CFR 200.62.
3. If signed in counterpart, the signature page(s) of all required documents must include the following HUD warning language:

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 USC 1001, 1010, 1012; 13 USC 3729, 3802; 24 CFR Parts 25, 28 and 30; and 2 CFR Parts 180 and 2424.

- G. Certified Closing Statement. Lender must submit a final detailed statement of all sources and uses identifying total development costs and disbursements (the “Certified Closing Statement”). This statement must be consistent with the *Firm Commitment* and be certified to and signed by Lender and Borrower. The statement must list the amounts to be paid to satisfy Borrower's obligations for existing or other indebtedness, acquisition, repairs, discounts, permits and approvals, financing fees, legal expenses, organizational expenses, title and recording costs, and like items, and any Lender-required escrows for taxes, insurance or other items. If funds are processed through a title company or other escrow officer, the escrow officer must sign the Lender's Certified Closing Statement, or provide an additional Certified Closing Statement that is consistent with the Lender's Certified Closing Statement. The RC Director will review and approve the Certified Closing Statement prior to endorsing the *Note* and provide written notice to the HUD Closing Attorney of said approval. Lender's Counsel must provide the HUD Closing Attorney with two hard copies of the HUD approved Certified Closing Statement, except when instructed otherwise by the HUD Closing Attorney. Additional Agreements. Borrower must disclose any additional agreements affecting the Project or the Loan. This requirement includes, but is not limited

to, disclosure of:

1. Easements and joint use agreements;
2. Construction agreements between the Borrower and the General Contractor and other agreements that are required to be disclosed pursuant to the Identity of Interest Amendment to the *Construction Contract* and Section 19.2.16.H;
3. Indemnifications, guarantees, and hold-harmless agreements executed by Borrower;
4. Rights of first refusal, options to purchase, reversionary interests, etc.; and
5. Any document or information that would otherwise require reprocessing of the HUD *Firm Commitment*, increase Borrower's cash requirements, or increase the General Contractor's bond requirement; and
6. Tax abatement and deferral agreements. See Section 7.15.

Lender's Counsel must provide copies of these agreements to HUD for approval prior to execution and executed copies must be submitted at closing. These agreements cannot alter or amend HUD form documents or alter the obligations of the parties thereto without the written approval of the RC Director.

### **—Additional Document and Diligence Requirements for Insurance of Advances for New Construction and Substantial Rehabilitation**

#### **19.2.14 Building Loan Agreement**

##### A. General.

1. The *Building Loan Agreement* (HUD-92441M), sets out the agreement and terms under which Lender will loan funds to Borrower for insured advances for new construction and substantial rehabilitation (*e.g.*, Section 221(d)(4)).
2. The RC Director determines whether the disbursement agreement and any Retainage Reduction Rider are consistent with Program Obligations, including 24 CFR 200.54 (discussed below), the *Firm Commitment*, and construction draw and progress schedules.
3. The Building Loan Agreement in Section 4(a) permits use of a Retainage Reduction Rider. The Retainage Reduction Rider may be used in certain situations approved by the RC Director. See Section 12.15.E. The Retainage Reduction Rider is not a HUD form, but it must be reviewed by the RC Director and HUD Closing Attorney for

programmatic and legal sufficiency, respectively.

4. For Section 241 transactions not subject to prevailing wage requirements, the provisions of the *Building Loan Agreement* regarding prevailing wages may be stricken.

B. Project Completion Funds. Section 4(c) of the *Building Loan Agreement* implements the requirement of 24 CFR 200.54 concerning Project completion funding. “Project Completion Funds” are defined in Section 4(c) as the amount deemed by HUD to be sufficient, when added to Loan proceeds to assure completion of the Project and to pay the initial service charge, carrying charges, and legal and organizational expenses incident to the construction of the Project. The precise amount of Project Completion Funds must be shown in Section 4(c). Project Completion Funds must be escrowed with the Lender at closing and shown on the *Lender’s Certificate* (HUD-92434M) with the following two exceptions:

1. Under 24 CFR 200.54(d), HUD will not require the escrow of Project Completion Funds derived from (a) LIHTC equity or (b) New Markets Tax Credits or historic rehabilitation tax credit equity.
2. Under 24 CFR 200.54(a), the RC Director may accept a lesser amount (or an alternative to a cash deposit) for Project Completion Funds supplied by grants or loans from a Federal, State, or local government agency or instrumentality. Section 8.12.C (Grants/Loans from governmental agency or instrumentality) states that this alternative may take the form of an agreement entered among the governmental agency or instrumentality, the Lender, and the Borrower. This agreement must be reflected in the disbursement agreement referenced in Section 4(c) of the *Building Loan Agreement* (discussed in Subsection C below) and comply with Section 8.12.C, including the requirement that the Lender has the following rights:
  - a. The right to approve construction advances after considering any reported noncompliance by the agency or instrumentality if the project is proceeding in compliance with approved plans and specifications.
  - b. A joint review and agreement between the Lender and the governmental agency or instrumentality on the construction progress schedules and allocation of draws.
  - c. Sole authority to resolve differences in the inspection process and the process of disbursing grant/loan proceeds.

C. Disbursement Agreement.

1. The Exhibit C disbursement agreement is generally required under 24 CFR 200.54(b), and must provide that Project Completion Funds are disbursed before Loan proceeds, except for funds from a grant or loan from a Federal, State or local government

- agency or instrumentality, or certain tax credit proceeds, including tax-credit related Equity Bridge Loans. See 24 CFR 200.54(b) and (c). These exceptions must be approved by the RC Director (consistent with the *Firm Commitment*) and must be reflected in the disbursement agreement.
2. The disbursement agreement is required in all new construction and substantial rehabilitation closings, except in certain limited situations, *e.g.*, when all Project Completion Funds are already disbursed prior to Loan proceeds, as part of the initial draw. The disbursement agreement must list all charges referenced in Section 5 of the *Building Loan Agreement*.
  3. If the RC Director determines that a disbursement agreement is not required, *Building Loan Agreement* Sections 4(c) and 5 still require an Exhibit C listing charges and items funded through Project Completion Funds and Loan proceeds. In those limited circumstances, Lender's Counsel is authorized to revise the *Building Loan Agreement* reference to Exhibit C to accurately describe the contents (such as "disbursement charges rider" or "list of mortgageable costs").
  4. All parties directly providing construction financing for the Project must be parties to the disbursement agreement. HUD, as an insurer, is not a party to the disbursement agreement.
  5. The disbursement agreement must include a provision stating that in the event of a conflict between the disbursement agreement and Program Obligations, as defined in the *Building Loan Agreement*, HUD's Program Obligations are controlling in all respects.

### **19.2.15 Owner-Architect Agreement – New Construction/Substantial Rehabilitation**

- A. General Requirements. The AIA Document B108, *Standard Form of Agreement Between Owner and Architect* ("Owner-Architect Agreement") must be used in new construction/substantial rehabilitation closings. The RC Director is responsible for reviewing the substantive terms of the Owner-Architect Agreement, including the review of any changes to the substantive terms negotiated by the parties. The arbitration provision and related references to such provision in the Owner-Architect Agreement must be deleted, unless such deletion is prohibited by state law. Any modifications that delete or reduce the basic design and construction administration services of the project architect are prohibited. Further, there must be no changes that reduce, delegate, or leave a gap in the basic responsibilities of the parties involved. In uncommon circumstances where it becomes necessary to address special negotiated arrangements, any requested modifications must be approved by the RC Director, and noted in the B108 by striking out any inapplicable language, inserting additional provisions in Article 12, and must be shown in the form Additions and Deletions report. The proposed modifications must be supported by a detailed

Project-specific written justification and submitted to the RC Director for review and consideration. The HUD Closing Attorney will be available to consult with the RC Director concerning any proposed modifications. See Sections 5.2 and 5.5 for HUD’s requirements regarding the Owner-Architect Agreement.

- B. *HUD Amendment to AIA Document B108* (HUD-92408M) (“*HUD Amendment*”). The *HUD Amendment* must be incorporated into the B108 Owner-Architect Agreement in Article 13.2. If the design architect and the supervisory architect are different, a separate B108 Owner-Architect Agreement and *HUD Amendment* must be executed for each architect, with appropriate modifications to reflect the responsibilities of each architect. If there is an identity of interest between the Owner and Design Architect, there must be an unaffiliated supervisory architect. See Section 5.2.
- C. Professional Liability Insurance. The *Firm Commitment* and Section 5.2.C require that the Design Architect and the Architect administering the *Construction Contract* each be covered by an errors and omissions liability insurance in an amount consistent with insurance industry practice and approved by the RC Director. An insurance agent’s certificate of insurance, substantially in the form prescribed in Appendix 5.H.3, must be provided at or prior to Initial Closing.

## **19.2.16 Construction Contract – New Construction/Substantial Rehabilitation**

- A. Construction Contract. The *Construction Contract* (HUD-92442M) must be used for new construction/substantial rehabilitation closings. The *Construction Contract* must be used in conjunction with the most recent edition of the AIA A201, *General Conditions of the Contract for Construction* (the “AIA A201”), approved for use in the HUD Multifamily programs. The RC Director will review the substantive terms of the construction contract documents. The AIA A201 may not be altered, except the standard binding arbitration provisions in the AIA A201 must be stricken, unless prohibited by applicable state law.

The *Construction Contract* provides alternative options for either “Lump Sum” or “Cost Plus” compensation.

1. “Lump Sum” may be used only when no identity of interest exists between Borrower and General Contractor.
  2. “Cost Plus” may be used in any case and must be used when an identity of interest exists between Borrower and General Contractor.
- B. Prevailing Wage Rates. The *Supplementary Conditions to the Construction Contract* (HUD-92554M) is incorporated by reference in the *Construction Contract*. At Initial Closing, the HUD Closing Attorney will review the Closing Docket *Construction Contract* to confirm the DBLS selected wage rates, where applicable and applied in conformity with the National

Housing Act, are attached and accurately referenced. See Section 19.1.06, *infra*, for further guidance concerning wage decisions and MHP coordination with DBLS.

- C. Identity of Interest Disclosure. The *Construction Contract* requires the attachment of an exhibit identifying any identity of interest relationship between the owner, contractor, subcontractor or architect. If there is no identity of interest, indicate “none” in the exhibit (see Appendix 8 of Handbook 4430.1 and the MAP Guide Appendices).
- D. Cost Breakdown. The *Contractor’s and/or Mortgagor’s Cost Breakdown* (HUD-2328) contains a schedule of values of classes of work, equipment and materials, and must be incorporated into the *Construction Contract* as Exhibit B to the *Building Loan Agreement* (HUD-92441M). The cost breakdown will be attached to the *Firm Commitment*.
- E. Completion of Forms.
1. The *Construction Contract* may be dated the same date as the other closing documents or any date prior to the endorsement date of the *Note* when adequate title coverage is provided. Where Contractor’s assurance of completion is provided in the form of performance and payment bonds, the *Construction Contract* must be dated on or before the date of the surety bonds.
  2. The reference to drawings and specifications in Article 2.A of the *Construction Contract* must be identical to the reference in Section 2 of the *Building Loan Agreement* and will be taken from the *Firm Commitment*. However, if the drawings and specifications are modified subsequent to the issuance of the *Firm Commitment* and before Initial Closing, a reference to the most recent version that will govern construction and that is approved in writing by all necessary parties (including HUD) should be used in the *Construction Contract* and *Building Loan Agreement*. See Section 5.8.C.4 regarding the initialing and signing of drawing and specifications.
  3. The completion date in Article 3 is the date determined using the number of months for construction stated in the *Multifamily Summary Appraisal Report* (HUD-92264).
  4. For Section 241 Loan transactions, the provisions of the *Construction Contract* regarding wage decisions may be deleted if Davis-Bacon Labor Standards do not apply. See Section 19.2.25.C.2.
- F. Liquidated Damages. Article 3.E of the *Construction Contract* calls for the insertion of a liquidated damages amount, as determined by the RC Director. The following calculations are set forth for informational purposes:

Liquidated damages shall equal 1 cent for each  $\frac{1}{4}$  per cent of construction interest rate for each \$1000 of mortgage amount divided by the number of units. Written arithmetically and expressed in dollars (not cents) the formula should read:  $(\$01) (\text{construction rate}/.0025) (\text{mortgage amount}/1000)/(\text{number of units}) = \text{Liquidated}$

Damages \$/Unit/Day. This may be simplified and restated as: \$4 x construction rate x mortgage amount/1000/number of units = Liquidated Damages \$//Unit/Day.

**Note:** The parties may negotiate and agree to a higher amount of liquidated damages.

G. Cost Certification. If a cost certification is not required, the provisions set forth in Article 13 of the *Construction Contract* may be stricken. See Chapter 13.

H. Side Agreements. Article 1 of the *Construction Contract* requires all side agreements, including documents defining business agreements between identity of interest parties on transactions involving Builder's and Sponsor's Profit and Risk Allowance ("BSPRA"), between the Borrower and General Contractor be disclosed to HUD and provided to the HUD Closing Attorney with the *Construction Contract*. Such side agreements must include language that in the event of a conflict between the side agreement and the *Construction Contract*, the *Construction Contract* will prevail. The HUD Closing Attorney will ensure the required conflicts language is included but will not otherwise review the side agreement.

**Note:** HUD policy is that the A201 may not be altered or amended, except with regard to the arbitration provisions in the form. See Section 19.2.16.A. As such, side agreements may only address matters outside of the material terms of the Construction Contract, and may not negate the rights, obligations, or any other material terms of the Construction Contract, including the form A201.

## 19.2.17 Assurance of Completion and Related Requirements

A. General Requirements. Assurance of project completion by the General Contractor must be provided for the protection of HUD and Lender in an amount and means as specified in the *Firm Commitment* and to meet state and local requirements protecting material suppliers, mechanics, and subcontractors. Applicable assurances must be listed in the *Lender's Certificate* (HUD-92434M). Lender or Borrower may impose additional or more stringent requirements than HUD.

1. *Performance Bond-Dual Obligee* (HUD-92452M) protects against financial loss caused by the failure of the General Contractor to build the Project in accordance with the terms and conditions of the *Construction Contract*. The *Performance Bond* must name Lender and HUD as obligees. The RC Director, in consultation with the HUD Closing Attorney, may approve the addition of a subordinate lender as an additional obligee on the *Performance Bond*. In such cases, an agreement setting forth the rights of, priorities of and/restrictions on each lender to call on the *Performance Bond* may be necessary. In all cases, the Lender and HUD must have the first priority right to call on the *Performance Bond*. When GNMA securities are issued in connection with the Project Loan, GNMA may be allowed as an additional obligee. No equity investor in the Borrower entity may be named as an obligee.



2. *Payment Bond* (HUD-92452A-M) guarantees that certain labor and material bills associated with the project will be paid. The *Payment Bond* must name Lender, HUD, and Borrower as obligees. GNMA may be added as an additional obligee on the *Payment Bond*; however, subordinate lenders and equity investors may not be included as additional obligees.
  3. *Completion Assurance Agreement* (HUD-92450M). As an alternative to performance and payment bonds, a *Completion Assurance Agreement* (HUD-92450M) may be provided. It must be executed by the Borrower, Lender, and General Contractor. The General Contractor must fund its obligations with a cash deposit or letter of credit. The RC Director, in consultation with the HUD Closing Attorney, will review the substantive terms of any *Completion Assurance Agreements*.
- B. Surety Requirements. Sureties must be on the accredited U.S. Treasury list, Circular 570, available online at [www.fms.treas.gov/c570/c570.html](http://www.fms.treas.gov/c570/c570.html), and published annually in the *Federal Register* on or about July 1. Bonds must not exceed limits listed in Circular 570. An original power-of-attorney from the surety company to its agent must be attached to each *Performance and Payment Bond*. A facsimile transmission (or PDF file sent via email) addressed to the HUD Closing Attorney must be received on the day of closing from the surety company (not local agent's office) confirming the agent's power-of-attorney to bind the surety company as of the date the bonds are executed and delivered to Lender and HUD. The facsimile or PDF transmission must identify the agent, date of bonds, amount of each bond, obligee(s), principal, FHA project name and number, and name and title of sender. The bonds cannot be dated prior to the date of the *Construction Contract* to which they refer, but they may be dated the same date as that contract, or a later date.
- C. Letters of Credit. Letters of credit may be used instead of cash for all assurances of completion and escrows required at Initial and Final Endorsement, or during construction, except for up-front cash escrows and the estimated costs of deferred Section 223(f) repairs that are required to be withheld in cash from mortgage Loan proceeds and placed in escrow. Acceptance of a letter of credit is at the Lender's option, but when used, copies of the letters of credit must be attached to the escrows and assurance agreements they collateralize. Lenders are responsible for ensuring that letters of credit are current. Enforceability and acceptability of letters of credit are the responsibility of the Lender, and HUD will neither review the letter of credit nor render an opinion on its sufficiency. See 24 CFR 200.63. Additional requirements for letters of credit are detailed in Section 8.4.D.
- D. Assurance of Completion for Off-Site Improvements. When the *Firm Commitment* requires Borrower to fund construction of elements outside the Project's property boundaries, HUD may require submittal of one or more of the following items, each at the discretion of the RC Director and in such form and substance as may be acceptable to the RC Director:
1. Plans and specifications for the off-site improvements;
  2. Contracts or other agreements governing the construction of the off-site

- improvements;
3. *Off-Site Bond* (HUD-92479M);
  4. *Escrow Agreement for Off-Site Facilities* (HUD-91071M);
  5. A letter of credit;
  6. Evidence of the locality's plans for off-site improvements (if the municipality or other governmental locality will be responsible for completion of those improvements); and
  7. Other evidence as deemed appropriate by the RC Director.

### **19.2.18 Building Components Stored Off-Site**

A. Introduction. Generally off-site construction is non-mortgageable and not included in the *Construction Contract*. See Section 5.11 and appendix 5E. However, when building components are initially stored off-site but will be integrated on-site into the construction of the HUD-insured Project during the construction period, those components may be mortgageable provided the program participants meet the requirements of this section and Appendix 12B, Contractor's Monthly Requisition and Related Matters, paragraph B (Components Stored Offsite).

#### **B. HUD-Insured Advance Requirements for Building Components Stored Off-Site.**

1. The HUD Closing Attorney's role includes, at the RC Director's request, review of legal documents submitted in connection with requests for approval of insured advances to pay for building components stored off-site.
2. The UCC Financing Statement(s) filed at Initial Endorsement must perfect a first-lien security interest in all existing building components stored offsite until the components are moved onsite and integrated into the building(s) construction. Borrower and Lender are responsible for determining if, and when, additional filings are necessary to maintain a first-lien security interest on components stored offsite, including components acquired after initial endorsement, and for ensuring that such filings are properly filed/and recorded.
3. The *Construction Contract* (HUD-92442M) must include the rider entitled "Amendment to the Construction Contract for Components Stored Off-site," and be entered into at Initial Closing. See Appendix 12C.
4. The *Construction Contract*, including the offsites amendment, must be 100% secured by performance and payment bonds.
5. A bill of sale evidencing Borrower's title to the off-site components and an itemized

invoice thereof must be submitted with each request for payment for those components on the *Contractor's Requisition Project Mortgages* (HUD-92448).

6. Lender must provide an unconditional written certification to HUD certifying that the *Security Instrument* and filed UCC Financing Statement(s) create a "first lien" on all building components stored off-site. This Lender's certification must be supported by an opinion from the Lender's Counsel stating that they have reviewed the *Security Instrument*, UCC-1 Financing Statements, and any associated documents, as necessary, relating to the off-site building components and that such documents create a valid security interest in the collateral and that when the financing statements are duly filed, the secured and additional secured party will have the first lien on the building components.
7. Other HUD requirements for insured advances to pay for building components stored off-site are found in the Appendix 12B.

### **19.2.19 Lender's Certificate (for New Construction or Substantial Rehabilitation)**

- A. For new construction/substantial rehabilitation projects, the Lender must make certain certifications and acknowledgements to HUD, as set forth in the *Lender's Certificate* (HUD-92434M), dated as of the day of closing. As required by the *Lender's Certificate*, the Lender must:
  1. Make all required certifications and acknowledgements to HUD;
  2. Properly disclose all required escrows, deposits, fees, charges, and financial obligations; and
  3. Attach, or provide separately, all appropriate exhibits, addenda and related items, including but not limited to exhibits described in the *Lender's Certificate*.
- B. The RC Director is responsible for reviewing the *Lender's Certificate* and determining that the financial amounts disclosed are appropriate and correct.

### **19.2.20 Final Closing Documents – General Requirements**

- A. General Requirements. The closing procedures of this Section apply to Final Closings (*and supplement* Sections 19.1.02 and 19.2.01).
- B. Maximum Insurable Mortgage Form. *Maximum Insurable Mortgage* (HUD-92580), sets forth HUD's determination of the maximum insurable mortgage and may also contain, without limitation, the following:

1. A listing of items from the *Mortgagor's Certificate of Actual Cost* (HUD-92330) that remain "to be paid," and a description of the arrangements to hold such amounts in escrow pending resolution of any open matters (see Schedule 1(A) of form HUD-92580);
  2. Any additional mortgage insurance premium, if there is a mortgage increase;
  3. Any reduction to the Loan amount if there is a mortgage decrease; and
  4. A description and status of funds placed in escrow at Initial Closing.
- C. Modifications to Original Loan Terms. Modifications to the original Loan terms, such as an increase or decrease to the original Loan amount, require new documents, and must be submitted with the final closing package.
1. RC Director's Authority. The RC Director is authorized to approve modifications of the *Security Instrument* for Projects in development (*i.e.*, at or prior to Final Closing) where necessary to reduce the interest rate, reduce the mortgage Loan amount, correct the legal description, and for other purposes.
  2. HUD Closing Attorney's Role. The HUD Closing Attorney will review proposed modifications to Loan documents and provide a written statement, which may be via e-mail, to determine whether the documents are legally sufficient.
- D. Modification Documents.
1. Modification/Consolidation Agreement. Lender's Counsel must prepare a modification agreement (non-form), by and between Borrower and Lender, formatted for recordation, and including:
    - a. A HUD acknowledgment signature block, which evidences HUD's acknowledgment and consent to the modification;
    - b. If the original Loan amount is increased, consolidation language to: (1) evidence that the original *Note* and the supplemental note (discussed below) represent and are deemed one indebtedness; (2) evidence that the initial *Security Instrument* and the supplemental security instrument (discussed below) represent and are deemed one security instrument; and (3) modify the original *Security Instrument* to provide for cross-default with the supplemental security instrument; and (4) evidence that the original *Security Instrument* retains first lien priority; and
    - c. The following provisions (in all cases):
 

*Nothing in this Modification Agreement waives, compromises, impairs or prejudices any right HUD may have to seek recourse for any*

*breach of that certain Regulatory Agreement executed by the parties hereto, recorded on even date with the Security Instrument, which breach may have occurred prior to or may occur subsequent to the date of this Agreement. If HUD initiates an action for breach of said Regulatory Agreement and recovers funds, either on HUD's own behalf or on behalf of the Project or Borrower, HUD, in its sole discretion, may authorize those funds to be applied to the payment of amounts due and payable under the Note, or the Security Instrument, or as a partial prepayment of the Note.*

*Nothing in this Agreement in any way impairs the Note or the Security Instrument or any other security now held for the indebtedness evidenced by the Note, as amended, and secured by the Security Instrument, or alters, waives, annuls, varies or affects any provision, conditions or covenants therein, nor affects or impairs any rights, powers or remedies under the Note, Security Instrument, or Regulatory Agreement, nor changes the priority of the lien created by the Security Instrument or the encumbrance of the Regulatory Agreement, except as specifically provided herein, it being the intent of the parties that the terms and provisions of the Note, Security Instrument, and the Regulatory Agreement, continue in full force and effect except as modified hereby.*

2. Allonge (Mortgage Decrease). If the amount of the original FHA-insured Loan is decreasing, state law may require an allonge to the *Note*. If so required, Lender's Counsel will prepare an allonge (non-form) and Lender is responsible for ensuring that the allonge is attached to the original *Note*. If state law does not require an allonge, the modification agreement can be used to modify the terms of the *Note*.
3. Supplemental Note and Security Instrument (Mortgage Increase).
  - a. Supplemental Note. If the amount of the FHA-insured Loan increases, Lender's Counsel must prepare a supplemental note using the form *Note* (HUD-94001M) and captioned or titled "Supplemental Note." The supplemental note must contain a cross-default provision to the original *Note*. The principal amount of the supplemental note must be the increase to the FHA-insured Loan amount (not for the new total insured Loan amount). The amount of the monthly payments to principal in the supplemental note must be sufficient to amortize the increased amount over the *Security Instrument* term. The other terms and provisions of the supplemental note must be the same as those in the original *Note*.
  - b. Supplemental Security Instrument. If the amount of the FHA-insured Loan increases, FHA Lender must prepare a supplemental security instrument using the form *Security Instrument* (HUD-94000M) and titled "Supplemental

Security Instrument.”

The supplemental security instrument must contain a cross-default provision to the original *Security Instrument*. The supplemental security instrument secures repayment of the supplemental note and must encumber the entire Mortgaged Property. The reference to the *Regulatory Agreement* in the supplemental security instrument must be to the original *Regulatory Agreement* executed and recorded at Initial Closing. The other terms and provisions of the supplemental security agreement must be the same as those in the original *Security Instrument*.

- E. Borrower’s Attorney’s Opinion. If there have been any modifications to the FHA Loan documents or other matters that require an attorney’s opinion, particularly in the case of a mortgage increase, Borrower’s attorney must give an opinion that specifically supplements the opinion given at Initial Closing and addresses any modifications to the Loan documents that the HUD Closing Attorney has found to warrant an updated opinion, including without limitation:
1. The enforceability of the documents evidencing any modification to the insured Loan’s terms, including a modification agreement, consolidation agreement, supplemental note, supplemental security instrument, supplemental UCC-1 Financing Statement, or any and all of the foregoing, and the continued first-priority position of the insured Loan’s lien;
  2. Any land use restrictive agreements or extended use agreements, or any other restrictive covenants, that have been placed on the property since Initial Closing, including those connected with Low Income Housing Tax Credits, if not covered in the initial opinion; and
  3. Disclosure of any material modifications to the documents covered by the opinion given at Initial Closing, including any amendments or changes to the legal description.
- F. Title Evidence at Final Endorsement. Prior to Final Endorsement, FHA Lender must present to HUD a new title insurance policy or a date-down title endorsement (such endorsement or policy must be submitted as a *pro forma* for HUD’s review prior to Final Closing). Any endorsement package must extend title insurance coverage to the date of the Final Endorsement of the *Note* and assure continuing first-lien priority of the *Security Instrument*. The required title evidence must be delivered to Lender, with a duplicate original and one copy delivered to the HUD Closing Attorney. The required title evidence must:
1. Show what, if any, matters have been recorded against title to the insured property since Initial Closing; copies of such items must be submitted to HUD for review prior to Final Closing. The RC Director and HUD Closing Attorney will review any exception to title not shown in the Title Policy accepted at Initial Closing to

determine whether it affects the value, marketability, or insurability of the Loan. Any new title exception that is deemed unacceptable by the RC Director must be extinguished as a matter of record and removed from the title insurance policy, or its effect insured over through affirmative title coverage (notation, endorsement, etc.) acceptable to the RC Director;

2. Bring the effective date of the title policy forward to the day of Final Endorsement;
3. List any modification agreement or supplementary Loan documents on Schedule A of the title policy and insure the full amount of the FHA-insured Loan, inclusive of amounts secured by the *Security Instrument* and any supplements and/or modifications, in first lien position. Should the title insurance company be unable to provide such endorsement, or should the endorsement show any lien intervening between the original FHA-insured *Security Instrument* and the Supplemental Security Instrument, HUD will not endorse the Note for insurance at the increased amount;
4. Delete or amend any other matters covered by the initial title insurance policy, as appropriate, such as updating the exception for unpaid property taxes and deleting the pending disbursements clause; and
5. Adjust the amount of title policy coverage, if the mortgage Loan amount has changed.

G. Final As-Built Survey & Surveyor's Report. The as-built Survey and the *Surveyor's Report* must show that the most recent field work was made, or last updated, no more than 120 days prior to final closing. The survey must be prepared, signed, and sealed by a licensed surveyor and include the certification required by the *HUD Survey Instructions and Surveyor's Report* (HUD-91073M).

H. Updated Organizational Documents of Borrower. Borrower must provide:

1. A certification signed by the Borrower as to incumbency, which either:
  - a. Confirms that no changes have been made to the Borrower's organizational documents, including incumbency, delivered to HUD at Initial Closing; or
  - b. Identifies any changes made to the Borrower's organizational documents that were delivered to HUD at Initial Closing and attaches copies of the amendments or other documents effecting such changes.
2. Current authorizing resolution, if required, or certification by an appropriate officer of Borrower that the authorizing resolution given at Initial Closing covers the Final Closing and is still in effect (including any increase in the Loan amount).

I. Lender's Current Payment Letter and Certification. Lender must submit a letter dated the day of Final Endorsement confirming that:

1. The loan is current;
2. No event has occurred that, with the giving of notice or passing of time will constitute an Event of Default under the HUD Loan Documents; and
3. Any required confirmations from the *Lender's Certificate* (HUD-92434M) that Lender could not make at Initial Closing.

J. Guarantee Following Completion. .

1. *Construction Contract* (HUD-92442M) contains guarantees against any defects due to faulty materials or workmanship that appear within one year following substantial completion. See Sec. 19.2.16 for discussion of requirements at Initial Closing.
2. The Contractor must provide assurance of performance under such guarantee, as follows:
  - a. *Bond.* If the *Performance Bond-Dual Oblige* (HUD-92452M) was used, no action is required, as it remains in effect for two (2) years from the date on which final payment under the construction contract becomes due. As a part of this assurance, the surety will be required to perform when the General Contractor fails to refund any overpayment to Borrower, a requirement of the *Construction Contract* (HUD-92442M) at Article 4.C (Option 1 for Cost Plus Contract).
  - b. *Cash/Letter of Credit Assurance.* If the *Completion Assurance Agreement* ((HUD-92450M, "CAA"), was used at Initial Closing, the remaining escrow funds may be released in accordance with its terms, except that any amounts held to protect against latent defects must remain in escrow during the latent defects period, also pursuant to the terms of the CAA.
3. The guarantee funds are to be kept separate from any escrow that may have been provided to assure completion of any incomplete construction items.

### 19.2.21 Preparing for Final Closing when On-Site Facilities Are Incomplete

- A. Conditions for Approval of the Final Advance of Mortgage Loan Proceeds. It is desirable that all on-site construction be 100% complete before approval of a final advance of mortgage Loan proceeds. There may, however, be circumstances in which it is desirable that approval of a final advance occurs before 100% completion of on-site construction, as discussed below.
- B. Exceptions to General Rule. When the completion and installation of on-site facilities is



adequately assured in the discretion of the RC Director, and the RC Director believes the Borrower will diligently pursue the completion of the on-site facilities, the RC Director may approve the final advance of mortgage Loan proceeds, if:

1. All on-site sewer, water, electrical, and gas facilities are completely installed and connected.
2. Other on-site facilities such as streets, walks, curbs, and gutters are useable and safe, if incomplete, and all buildings have all weather vehicular and pedestrian access.
3. Adequate facilities for ingress and egress are provided.
4. Applicable escrow agreements are in force to assure the completion of the facilities.

C. Application for Insurance of Advance of Mortgage Proceeds. *Application for Insurance of Advance of Mortgage Proceeds* (HUD-92403) is used both during the course of construction and at the conclusion of construction for the final advance. When construction is not yet complete, any form *Application for Insurance of Advance of Mortgage Proceeds* submitted for processing will not be treated as approval of a final advance, nor will the submission of the *Request for Final Endorsement of Credit Instrument* (HUD-92023M) be in order. Instead, *Application for Insurance of Advance of Mortgage Proceeds* may be treated as an ordinary application for advance of mortgage Loan proceeds and approved in an amount which, when added to previous advances of mortgage Loan proceeds, will not exceed 90% of the total advances to which the Borrower will be entitled at 100% completion (or such greater percentage as may be permitted pursuant to any Retainage Reduction Rider attached to the *Building Loan Agreement*).

D. Approval of a Final Advance. If minor items of on-site construction are incomplete, approval of a final advance will be given only in cases in which:

1. All on-site items in the entire Project are completed, based on the final *HUD Representative's Trip Report* (HUD-95379), except those which qualify as items of delayed completion because:
  - a. They are minor; and
  - b. The RC Director determines that immediate completion is inadvisable or impossible, due to weather or other conditions beyond control of the contractor.
2. Funds are placed in escrow to assure completion of such minor items as provided in the certificate of mortgage Loan insurance on *Application for Insurance of Advance of Mortgage Proceeds*, and in the footnote on form *Request for Final Endorsement of Credit Instrument* (HUD-92023M); and
3. All off-site utilities such as sewer, water, electrical, and gas facilities are installed and

connected, and the buildings are served by safe and adequate all-weather facilities (either permanent or temporary) for the ingress and egress of pedestrians and vehicular traffic, including fire apparatus, and all other construction requirements have been acceptably accomplished or acceptably assured; and

4. The aggregate estimated cost of completing the above items does not exceed 2% of the principal amount of the mortgage Loan.
- E. Escrow for Completion. With respect to all incomplete items, the amount held in escrow for completion must be at least one and one-half (1 ½) times the estimated cost of completion. The amount of any escrow must be sufficient to assure an incentive to complete the work, taking into consideration a possible rise in cost. Such escrow will be held by Lender in accordance with the terms of *Escrow Agreement for Incomplete Construction* (HUD-92456M) (See Section 19.2.12.E) and the RC Director will ascertain that the items to be completed are properly identified by the attachment to the *Escrow Agreement for Incomplete Construction*.

## **19.2.22 Preparing for Final Closing when Off-Site Facilities Are Incomplete**

- A. General Rule. Unless all off-site utilities and facilities are completely installed and connected, as applicable, and the required ingress and egress is provided, HUD will not process a request for the final advance of mortgage Loan proceeds. In such cases, the RC Director will invoke the provisions of the *Building Loan Agreement* (HUD-92441M) and *Construction Contract* (HUD-92442M) wherein it is provided that the required holdback will be retained until 100% completion of facilities, including off-site facilities, and will endeavor to obtain completion at the earliest possible time.
- B. Exception to General Rule. If the RC Director determines, in their sole discretion, that the completion and installation of off-site facilities is adequately assured (see Section 19.2.17.D ), the RC Director may approve the final advance of mortgage Loan proceeds, if the Borrower, through its contractor, diligently pursues the completion of off-site facilities and if the following conditions are met:
1. All off-site sewer, water, electrical, and gas facilities are completely installed and connected;
  2. Other off-site facilities such as streets, walks, curbs, and gutters are useable and safe, even if incomplete, and all buildings have all weather vehicular and pedestrian access;
  3. Adequate facilities for ingress and egress are provided;
  4. Applicable escrow agreements are in force to assure the completion of the facilities;

and

5. Provide the RC Director with written confirmation of off-site completion under terms consistent with applicable escrow agreements.

### **—Additional Requirements for Acquisition/Refinance and Other FHA Insurance Programs**

#### **19.2.23 223(f) Loans**

- A. General. Section 223(f) of the National Housing Act authorizes insurance of mortgages for acquisition of an existing project or refinance of existing indebtedness and may involve limited repairs or alterations to the Project. See Chapters 14 and 17, and Section 5.1.C, 5.1.F and 19.2.13.
- B. Promissory Note (HUD-94001M).
  1. Endorsement of Note. In a Section 223(f) closing, there is one “Initial/Final” closing at which HUD endorses the *Note* for the total sum of the Loan to be disbursed.
  2. Endorsement Panel. Note that for a 223(f) project, the total sum of the Loan will be listed on the endorsement panel. Additionally, the correct designation of a Section 223(f) loan is “Insured under Section 207 pursuant to Section 223(f) of the National Housing Act, as amended”.
  3. Prepayment Provisions. Loans insured under 223(f) must include Section 9(h), which prohibits prepayment of the *Note* within five years of endorsement unless approved by HUD, as required by statute. Section 3.7.I (Prepayment Provisions and Prohibition) also includes conditions under which Housing may override any prepayment prohibitions. Lenders may include their own prepayment provisions, schedules, and limitations in Rider 1 that are consistent with Program Obligations, and must include the following language at its outset: “This Rider 1 is subject to the restrictions and requirements for prepayment set forth in Paragraph 9 of the Note.” See also Sections 11.8(B)-(C).
  4. Loan Term. The Loan term is set forth in the *Firm Commitment*. See also Sections 3.1.F and 8.9.
- C. Evidence of Zoning and Building Code Compliance. If required by the *Firm Commitment* or applicable closing checklist, the evidence of zoning and building code compliance must comport with the requirements of Section 19.2.13, *supra*.
- D. Utilities. Assurance of utility access is not required for Section 223(f) loan closings, unless

required by the *Firm Commitment* or applicable closing checklist. See Section 19.2.13. for guidance on evidencing utilities when required.

- E. *Request for Endorsement of Credit Instrument (HUD-92455M)*. This form is used for Section 223(f), 223(a)(7) and Insurance Upon Completion projects. It includes the Certificate of Lender, a Certificate of Borrower, and a Certificate of General Contractor, and should be modified to strike the Certificate of General Contractor and references to construction for Section 223(f) transactions.
- F. *Short-Form Cost Certification*. Borrowers with a Loan value exceeding 80% LTV must submit a modified form of cost certification (*Borrower's Certificate of Actual Cost (HUD-2205-A)*) prior to endorsement. See Section 13.4 (projects with LIHTC financing are Exempt from Cost Certification Requirements) and 13.12 (no cost certification is required for Section 223(f) transactions where the mortgage is 80% of value or less).
- G. *Repairs and Alterations*. See Chapter 5 for definitions.
  - 1. *Life Safety Repairs*. Life Safety repairs address hazards to life and health and must be completed prior to endorsement. See Section 5.10.J. Lender and Lender's Counsel must submit evidence documenting that all Life Safety repairs identified in the *Firm Commitment* have been completed, and the RC Director must determine sufficiency of the documentation prior to closing.
  - 2. *Accessibility Repairs*. Accessibility repairs correct accessibility deficiencies. If accessibility repairs are identified in the *Firm Commitment*, they must be completed "as soon as possible." See Section 5.10.J for additional guidance. When HUD permits the completion of Accessibility repairs after endorsement, the repairs must be covered by the *Escrow Agreement for Deferred Repairs (HUD-92476.1M)* (use New York Building Loan Agreement in New York state).
  - 3. *Non-Critical Repairs*. If Non-critical repairs are identified in the *Firm Commitment*, Borrower must complete them prior to closing or establish an escrow with Lender and execute the *Escrow Agreement for Deferred Repairs* (use New York Building Loan Agreement in New York state).
  - 4. *Architects and General Contractors*. HUD requires the hiring of architects and general contractors for Projects with aggregate repairs and alterations exceeding \$15,000 per unit, and some lower-cost Projects with Level 2 and 3 Alterations. See Section 5.3.C. for requirements and exceptions. Additional documentation may also be required by the *Firm Commitment*. See 19.2.23.I, below, for form documentation requirements related to these services.
  - 5. *Substantial Rehabilitation*. Construction work that constitutes "Substantial Rehabilitation" as defined in Section 5.1 D must be processed in accordance with Section 3.2.

6. *Architectural Issues.* See Sections 5.2, 5.3, 5.10.

7. *Cost.* See Section 5.12 for cost estimation guidance for 223(f) transactions.

- H. Latent Defects Guarantee. The *Firm Commitment* will include a condition requiring a guarantee against latent defects when the total cost of repair, inclusive of Critical, Non-Critical and Deferred Repairs, exceeds Housing’s minimum threshold to require assurances. See Section 5.10.L.4 (The minimum repair threshold at the time of publication was \$400,000). The RC Director should inform the HUD Closing Attorney when the cost of repairs exceeds the current Latent Defect Guarantee threshold. When a Latent Defect Guarantee is required, the Lender must withhold an amount equal to 2½ percent (or greater percentage if required by the *Firm Commitment*) of the total repair cost from the *Deferred Repair Escrow* in accordance with the terms of *Escrow Agreement for Deferred Repairs* (HUD-92476.1M). If the *Firm Commitment* does not require a *Deferred Repair Escrow*, the Latent Defect Assurance must be funded by cash or letter of credit, or a surety bond, in an amount equal to 2½ percent of the total repair cost (or greater percentage if required by the *Firm Commitment*) of the total repair cost. If Borrower provides for the Latent Defects Guarantee with a surety bond, they must use *Surety Bond Against Defects Due to Defective Materials and/or Faulty Workmanship* (HUD-3259), and a surety that is on the U.S. Treasury Listing of Approved Sureties with adequate bonding capacity (Department Circular 570). The surety bond must run for a period of at least two years from the date of completion of repairs.
- I. Projects with Expanded Work. Section 223(f) transactions involving Level 2 or Level 3 Alterations or per-unit repair and alteration costs of \$15,000 or more (“223(f) with Expanded Work”), often involving Low-Income Housing Tax Credits, are closed as standard 223(f) transactions, with the following possible additional requirements as set out in the *Firm Commitment*. Projects meeting this expanded work criteria must be closed using the Expanded Work Closing Checklist.
1. Construction Contract. If a General Contractor is required by Section 5.3.C., Lender’s Counsel must submit the AIA Document A107-2017 Owner-Contractor Agreement, with the additions and deletions report attached. The HUD Closing Attorney will review for completeness (dates, parties, signatures, description of work) and for material additions and deletions to the contract that should be reviewed by the RC Director for programmatic acceptability. Deletions that absolve one party from primary responsibility are not permitted.
  2. Owner/Architect Agreement. If a project architect is required by Section 5.3, Lender’s Counsel must submit AIA Document B104-2017 Owner-Architect Agreement, with the additions/deletions report attached. The HUD Closing Attorney will review for completeness (dates, parties, signatures, description of work), and for material additions and deletions to the contract that should be reviewed by the RC Director. The AIA B104 form may not be altered in general, except for the deletion of binding arbitration and mediation provisions. Deletions that absolve one party

from primary responsibility are not permitted.

If there is an identity of interest between the owner and design architect, there must be an unaffiliated supervisory architect with a separate AIA Document B104-2017 agreement between the Borrower/Owner and the non-IOI supervisory architect. See Section 5.2.

3. Dimension Drawings. The Lender will collect and distribute the drawings and specifications in the same fashion as the instructions stated in Section 5.8.E.
4. Building Permits. Lender's Counsel must submit evidence satisfactory to the RC Director demonstrating that Borrower has obtained all building permits, other local permits, governmental approvals, and architectural plans required by the applicable building official(s) to complete the Expanded Work. The HUD Closing Attorney will review for completeness (finality, dates, parties, signatures, description of work). The permits, plans, and approvals must be final (issued by the date of closing) and unconditional, unless otherwise approved by the RC Director in consultation with the HUD Closing Attorney.
5. Other Closing Requirements. The following guidance addresses common questions regarding HUD's policy and form completion for 223(f) transactions with Expanded Work. See also Section 223(f) with Expanded Work Closing Checklist.
  - a. *Regulatory Agreement*. Selections in paragraphs 2, 5, 7, and 8 are to be selected as for a "Refinance."
  - b. *Request for Endorsement of Credit Instrument*. (HUD-92455M). Any references to construction and the Certificate of General Contractor are to be stricken.
  - c. *Agreement and Certification* (HUD-93305M). The General Contractor should not be a party to the Agreement and Certification.
  - d. *Borrower's Oath* (HUD-92478M). Paragraph 4 shall be stricken.
  - e. *Davis- Bacon Wage Rate Determination*. Davis-Bacon prevailing wages are not required under the National Housing Act.
  - f. *Escrow Agreement for Deferred Repairs* (HUD-92476.1M) is used to assure completion of repairs and alterations, and may be revised as appropriate to incorporate a disbursement agreement or LIHTC equity pay-in schedule where the escrow is not being fully-funded at the closing.
  - g. *Surety*. Payment and Performance Bonds are generally not required unless otherwise indicated by the Firm Commitment.

- J. Additional requirements may be applicable depending on the transaction. See e.g., Section 3.7.

## 19.2.24 223(a)(7) Loans

- A. General. Section 223(a)(7) of the National Housing Act authorizes refinancing of an existing FHA-insured Loan. The 223(a)(7) Loan can be used to reduce the interest rate, provide funds for repairs, or extend the term of the Loan. The rationale for the latter two objectives must be documented by HUD. Loans financed pursuant to Section 223(a)(7) are insured under the same section of the National Housing Act as the original loan, i.e. Section 221(d)(4), pursuant to Section 223(a)(7). Therefore, the original principal amount of the 223(a)(7) Loan cannot exceed the original unpaid principal balance of the FHA-insured loan being refinanced. If there has been a partial payment of claim on the FHA-insured loan, the 223(a)(7) cannot exceed the amount of the modified FHA-insured loan. Further instructions for 223(a)(7) loan applications are included in Chapter 18.
- B. Five-Year Lockout. Projects with loans insured under Section 223(f) are eligible for refinancing under Section 223(a)(7). If the Project's statutory 5-year prepayment lockout period has not expired at the time of refinance from 223(f) to (a)(7), the Borrower must enter into a *Use Agreement-Section 207 pursuant to Section 223(f) Rental Housing Prepayment subject to Section 223(f)(3)* (HUD-93150) in order for HUD to permit the prepayment and refinancing of the existing Section 223(f) loan.
- C. Refinances of Second Mortgages. Section 223(a)(7) may be used to refinance an FHA-insured subordinate mortgage (e.g., 241(a)). For projects with FHA-insured first, and one or more subordinate mortgages, HUD will permit the refinancing of multiple loans into a single Section 223(a)(7) loan.
- D. Procedures Distinguished from Section 223(f) Procedures. Generally, underwriting and closing of the Section 223(a)(7) loan is similar to the procedures used for Section 223(f). Closing procedures for Section 223(a)(7) loans that differ from Section 223(f) include:
1. Previous Participation Clearance using the *Previous Participation Certification* (HUD-2530), is not required for existing principals and affiliates who have already obtained clearance. New Controlling Participants must obtain HUD-2530 clearance.
  2. A new project number is assigned to the Section 223(a)(7) project.
  3. Standards for the maximum mortgage and the mortgage term are set forth in Section 18.3(B). Note that if expenses exceed those allowed for Section 223(a)(7) underwriting, the application must be converted to a Section 223(f) loan or, for substantial rehabilitation, a Section 221 loan. Use form HUD-92476.1M when establishing an escrow for deferred repairs, and require a 110% deposit (i.e., the required Additional Deposit Amount is to be 10% of the estimated cost of the Repair

Work; in contrast, for 223(f) loans, the required Additional Deposit Amount is to be 20% of the estimated cost of the Repair Work).

4. A new *Regulatory Agreement* must be executed at closing, referencing the same Section of the Act as the original loan, with the addition of “pursuant to Section 223(a)(7).”
5. The Section 223(a)(7) program is based upon the premise that the original insurance obligation is transferred to the new Section 223(a)(7) Loan. Please see HUD-94001M, *Note*, in which the endorsement panel for Section 223(a)(7) loans contains provisions specific to Section 223(a)(7), including the transfer of the Contract of Insurance from the prior FHA project number to the new Loan, and including the following:
  - a. 207/223(f) becomes “§ 207/§ 223(f) pursuant to § 223(a)(7)”;
  - b. 221(d)(4) becomes “§ 221(d)(4) pursuant to § 223(a)(7)”.
6. Survey Affidavit of No Change. Notwithstanding the other provisions of this Chapter relating to survey requirements, a new survey and *Surveyor’s Report* is not required if:
  - a. The title company will issue the policy with no new survey exceptions;
  - b. A copy of the HUD-approved as-built survey is available in the original HUD loan file (or provided by Borrower); and
  - c. Either (a) no changes have been made to the land or buildings since the original survey was filed, or (b) minor changes are proposed to the land and/or buildings, and the RC Director determines that such changes are acceptable without a new survey.

If the RC Director does not require a new survey, Lender’s Counsel must submit a *Survey Affidavit of No Change* certifying to no material change, in a format similar to the sample included at Section 19.3.04, to document the lack of changes, together with a copy of the survey from the original loan file.

## **19.2.25 Section 241(a) Supplemental Loans**

### **A. Introduction.**

1. Section 241(a) of the NHA, 12 U.S.C. § 1715z-6(a), authorizes FHA-insurance of supplemental loans to finance project improvements, additions, and equipment. A Section 241(a) loan provides subordinate financing without altering the first-lien



priority of the existing FHA-insured loan. See Section 3.6 for additional details.

2. Except as discussed in this Section, closing procedures are generally the same for loans insured pursuant to Section 241(a) as they are for Section 221(d)(4) closings. Some loan documents may not be applicable, depending upon the facts of the transaction. The RC Director will determine inapplicability of documents, if any, in consultation with the HUD Closing Attorney.

B. Effect on Existing Financing.

1. First Lender's Consent to Secondary Encumbrance. The lender in any existing FHA-insured loan ("First Lender") must provide written consent for the Borrower to obtain the supplemental loan, even when the First Lender is also the Lender of the supplemental loan. The consent must grant Borrower permission to further encumber the First Lender's security with the subordinate loan (including the supplemental loan Security Instrument, UCC-1 Financing Statements, and HUD Regulatory Agreement) and any other new secondary financing (*i.e.*, HOME funds, etc.).
2. Consent of Existing Subordinate Lenders. If any existing subordinate financing on the Project requires written consent from the subordinate lender before Borrower may further encumber the Project, Lender's Counsel must submit copies of such written consent evidencing the subordinate Lender's authorization for the Borrower to obtain the 241(a) supplemental loan..
3. Modification of Legal Description in Underlying First Loan Documents. If the supplemental loan will finance construction on or acquisition of a separate parcel of land, the additional parcel(s) must be made part of the legal description for the land on the first loan. This addition of land requires modification of the first loan documents to expand the legal description wherever it appears, *i.e.*, in the Security Instrument, Regulatory Agreement, UCC-1 Financing Statements (both county-recorded and state-filed), and lender's title policy (which itself must be modified both to reflect the modification of the existing loan and to revise the legal description). The same expanded legal description will be used for the supplemental loan.

**Note:** No change in the legal description is necessary if no new land is being added, *e.g.*, adding floors to an existing building, expanding the existing building into an area already included under the first mortgage, or rehabilitation of existing units

C. Additional Requirements for 241(a) Supplemental FHA Loans.

1. GNMA Requirements. If the first loan was securitized through GNMA, Lender's Counsel must provide written assurance from the First Lender that it has complied with all GNMA requirements for the addition of the supplemental loan.
2. Davis-Bacon Requirements. Under NHA Section 241(b)(5), supplemental loans are

subject to Davis-Bacon labor standards if: (a) the existing loan is FHA-insured and subject to Davis-Bacon labor standards (*e.g.*, the first lien mortgage is currently insured as a 221(d)(4)), or (b) the existing loan is a HUD-held mortgage originally insured under a program that was subject to Davis-Bacon labor standards.

Conversely, supplemental loans are not subject to Davis-Bacon labor standards if the existing loan is currently FHA-insured under a section of the act that is not subject to Davis-Bacon wage rates under Section 212 of the NHA (*e.g.*, loans currently insured as 223(f)s or (a)(7)s).

3. Cross-Default Clause in Supplemental Loan Documents. The Firm Commitment will require a cross-default clause in the supplemental loan *Note* and *Security Instrument* providing that a default under the first lien mortgage is a default under the supplemental mortgage. See NHA 241(b)(6) and 24 CFR 241.555(a). Conversely, the supplemental loan is not cross-defaulted to the first lien mortgage.
- D. HUD Form Documents for 241(a) Supplemental Loans. Lender's Counsel is responsible for preparing the Section 241(a) closing documents to address the supplemental nature of the 241(a) Loan, including that the 241(a) *Security Instrument* will be subordinate to the lien of the existing FHA-insured loan. Modifications are necessary to remove certain references (*i.e.*, the absence of other liens), to clarify that the supplemental loan does not violate the terms of HUD's form documents, and to highlight that various rights of a subordinate lender may be subject to the prior rights of a senior lender (even when the two lenders are the same), etc.

**Note:** The OGC Multifamily Mortgage Division will maintain a set of template documents for use in 241(a) transactions while HUD prepares the documents for OMB approval through the PRA process. Lender's Counsel may contact the MMD to obtain the current templates. Templates include the supplemental security instrument, lender's certificate, note, building loan agreement, agreement and certification, and regulatory agreement. Once published with an OMB approval number, preparers should use the OMB-approved forms.

## 19.2.26 Section 213 Cooperative Housing Loans

- A. Mortgage insurance for cooperative housing projects insured under Section 213 of the National Housing Act is underwritten and closed through Traditional Application Processing (TAP). The provisions of this Chapter apply to the closing of a Section 213 loan.
- B. Lender's Counsel should prepare the draft closing submission based on the Section 213 checklist posted to HUD's website:  
[https://www.hud.gov/OGC\\_Multifamily\\_Closing\\_Documents\\_Checklist](https://www.hud.gov/OGC_Multifamily_Closing_Documents_Checklist).
- C. When a share sale waiver is requested prior to firm commitment, the RC Director will request and OGC will assign a HUD Closing Attorney to complete a legal review of the required documentation.

**Note:** The authorizing statute for Section 213 insurance is codified at 12 USC 1715e. Regulations governing the Section 213 program are located at 24 CFR Part 213. Basic administrative requirements for cooperative housing insurance and more specific requirements for specialized types of cooperative housing are published in HUD Handbooks 4550.1 through 4550.6.

## **19.2.27 Insurance Upon Completion Loans for New Construction and Substantial Rehabilitation**

- A. General. Insurance Upon Completion (IUC) involves new construction or substantial rehabilitation where FHA insurance is not provided until the project's construction is completed – there are no insured advances during the construction period. Consequently, many requirements are different than a typical 221(d)(4) Initial Closing with insurance of advances. FHA may insure a loan under Sections 220, 221(d)(4) and 231 of the NHA as an Insurance Upon Completion (IUC) loan once Certificates of Occupancy have been issued for all units in the Project.
- B. Firm Commitment. HUD must issue a *Firm Commitment* with IUC-specific conditions prior to the start of construction. The *Firm Commitment* will remain valid and outstanding until Final Endorsement of the permanent mortgage loan. There is no Initial Closing. Required documents for IUC closings are listed in Section 12.16.C.
- C. Construction Requirements.
1. Prior to commencement and during construction, Borrower is responsible for ensuring that the project complies with both HUD new construction/substantial rehabilitation Program Obligations, and applicable state and local laws, including zoning. See 24 CFR 200.72 and Part II of *Consolidated Certifications - Borrower* (HUD-91070M). The Borrower and Borrower's counsel must be able to confirm compliance at Final Endorsement. See Opinion 6 of *Opinion of Borrower's Counsel* (HUD-91725M), and Section (4) of *Borrower's Oath* (HUD-92478M).
  2. At least 21 days prior to the start of construction, Lender's counsel must submit drafts of the following documents for HUD review and approval:
    - a. *Construction Contract* (HUD-92442M), including the attachments to the Construction Contract (the AIA-201 and *Supplementary Conditions to the Construction Contract* (HUD-92554M));
    - b. Evidence of site control, and the right to legally access the site for purposes of construction;
    - c. HUD-approved set of contract drawings and specifications (see Appendix 5E); and

- d. *Agreement and Certification* (HUD-93305M).
3. The HUD Closing Attorney and the RC Director will review and approve the required pre-construction documentation.
4. The HUD pre-construction conference must be completed prior to the start of construction, wherein HUD staff will review the applicable Davis-Bacon wage rates and labor documentation requirements and procedures. *See* Sections 12.2 and 19.1.07.
5. Assurance of Completion is not required for IUC closings. *See* Section 8.13.D. At final endorsement, the general contractor must address latent defects with *Escrow Agreement for Latent Defects* (HUD 92414M).
6. Contractor Guarantee Required. Between Project Substantial Completion and endorsement of the *Note*, Contractor's work must be covered by a guarantee against defects due to faulty materials and/or poor workmanship. Article 3.B. of the *Construction Contract* (HUD-92442M) defines Project Substantial Completion and Article 3.D. stipulates warranties commence with completion of each portion of the work.
7. *Building Loan Agreement* (HUD-92441M) is not required for IUC closings.

#### D. Closing.

1. Preparation for Insurance Upon Completion Closings. HUD's administrative requirements for IUC closings are detailed in Sections 8.13 and 12.16. Final Endorsement occurs after completion of construction, cost certification, and issuance of Certificates of Occupancy for all units. *See* Chapter 13 for HUD's Cost Certification requirements.
2. Form Document Requirements Specific to IUC Closings. This section supplements Section 8.12 and 12.16 of this MAP Guide.
  - a. Checklist. The complete list of documents required for IUC closings is provided in the *Insurance Upon Completion Checklist*, available on HUD's website at [https://www.hud.gov/OGC Multifamily Closing Documents Checklist](https://www.hud.gov/OGC_Multifamily_Closing_Documents_Checklist).
  - b. Security Instrument. The term of the *Security Instrument* commences on the date of HUD's endorsement. The *Security Instrument* is not recorded prior to completion of construction.
  - c. Note. The *Note* must be dated the same date as the *Security Instrument*. The amount of the *Note* cannot exceed the principal balance of the mortgage loan that would have been outstanding if all payments to principal due before the

date of Final Endorsement (including required advance amortization payments, if any) had been paid.

- i. Endorsement of Note. At the Initial/Final Endorsement of an IUC loan, FHA will endorse the *Note* HUD-94001M) for the total sum of the insured Loan. HUD is not insuring advances on a construction loan, so there is no Initial Endorsement of the *Note*. The *Note* contains a separate endorsement panel for IUC closings. The RC Director will not endorse the *Note* until the Lender provides written evidence that all principal payments due and payable on the existing loan have actually been paid and the existing mortgage loan is otherwise current.
- d. Title Policy. The title insurance policy must be dated the same day as the endorsement of the *Note*.
- e. Regulatory Agreement. The *Regulatory Agreement* must be recorded immediately following recordation of the *Security Instrument*.
- f. Builder's Warranty. In addition to the *Construction Contract*, the General Contractor must enter into *Escrow Agreement for Latent Defects* (HUD-92414M) with Lender and Borrower for the benefit of HUD and provide one of the following at endorsement to assure correction of any latent defects:
  - i. *Cash Escrow*. A cash escrow deposit equal to 2.5% of the principal amount of the Security Instrument, to be retained in escrow by Lender for a period of 15 months; or
  - ii. *Letter of Credit*. An irrevocable, unconditional letter of credit issued to Lender by a banking institution; or
  - iii. *Surety Bond*. *Surety Bond Against Defects Due to Defective Materials and/or Faulty Workmanship* (HUD-3259), by a surety on the U.S. Department of Treasury's Listing of Approved Sureties (Department Circular 570), in the amount of 10% of the *Construction Contract*, and effective for two years after Project Substantial Completion.

In cases when the latent defect escrow amount is small because total repair cost is minimal (e.g., \$200,000 or less), the RC Director has the discretion to waive the latent defect escrow.

- g. Request for Endorsement. *Request for Endorsement of Credit Instrument, Certificate of Lender, Borrower and General Contractor* (HUD-92455M) is required. The form Certification of General Contractor must be given.
- h. Operating Deficit Escrow. If an operating deficit is projected on *Multifamily*

*Summary Appraisal Report* (HUD-92264), the sponsors, at closing, must provide funds to meet the deficit in the manner set forth in Section 8.14 (Determining the Estimated Cash Requirements for Completing the Project). *Escrow Agreement for Operating Deficits* (HUD-92476a-M) must be used and requires a specified sum to be held for a limited number of months after closing, in accordance with Program Obligations.

- i. Contractor's Prevailing Wage Certificate. The Contractor must submit *Contractor's Requisition Project Mortgages* (HUD-92448) to Lender, with the section entitled "Contractor's Prevailing Wage Certificate" completed.
- j. Cost Certification. The Borrower's cost certification is reviewed by the RC Director, who will prepare *Maximum Insurable Mortgage* (HUD-92580) to determine the final amount of the *Note*. See Chapter 13 for further guidance.
- k. Ancillary Agreements. Other ancillary agreements are required as set forth in remainder of this MAP Guide and in IUC Checklist.
- l. Excess (Unused) Mortgage Proceeds. Provisions for excess or unused proceeds are included in *Agreement and Certification* (HUD-93305M).
- m. Labor Relations. The RC Director must confer with the Office of Davis-Bacon and Labor Standards (DBLS) and provide OGC the RC Director with written confirmation of DBLS's approval to proceed to closing. See Section 19.1.06 for further guidance.
- n. Subordination of Restrictive Covenants. HUD has specific requirements concerning restrictive covenants resulting from bond financing and low-income housing tax credit financing (See Sections 19.2.10 and 19.2.11, respectively). Regardless of the timing of recordation of such covenants and related documents, HUD requires that they meet FHA requirements before Final Endorsement of the *Note* for insurance, even if compliance requires amendment of already existing agreements. Consequently, Borrower and Lender should ensure that these documents, if applicable, meet FHA requirements before commencement of construction.

## Part III: Sample Language, Certifications, and Riders

### 19.3.01 HUD-Required Provisions for Borrower's Organizational Documents

The Borrower's organizational governing document (partnership agreement, operating agreement, or by-laws, as applicable) must provide that the Borrower will be in existence at least as long as the term of the Loan and must include the following provisions (that may automatically terminate when the Loan is no longer insured or held by HUD):

Notwithstanding any clause or provision in the [*identify both the formation document(s) and the governing document(s)*] to the contrary, and so long as the United States Department of Housing and Urban Development ("HUD"), or its successors or assigns, insures or holds any loan to [*Borrower*] ("the HUD-insured Loan"), including the loan secured by a [*insert type of security instrument used in Project state, e.g., mortgage*] lien on [*insert project's name and FHA project number*] in [*insert city, county and state*] (the "Project") the following provisions apply:

*Terms.* The terms listed below shall have the following definitions:

"Borrower" means [*insert name of FHA Borrower*].

"Lender" means the entity identified as "Lender" in the first paragraph of the Security Instrument, or any subsequent holder of the HUD-insured Note.

"HUD Regulatory Agreement" means the Regulatory Agreement between Borrower and HUD with respect to the Project, as the same may be supplemented, amended or modified from time to time.

"Security Instrument" means the mortgage or deed of trust from Borrower in favor of Lender, as the same may be supplemented, amended or modified.

"HUD-insured Note" means the Note executed by Borrower, and described in the Security Instrument, including all schedules riders, allonges and agenda, as such Note may be amended from time to time.

*Requirements.*

1. If any of the provisions of Borrower's organizational documents conflict with the terms of the HUD-insured Note, Security Instrument, or HUD Regulatory Agreement ("HUD Loan Documents"), the provisions of the HUD Loan Documents shall control.

2. No provision required by HUD to be inserted into the organizational documents may be amended without HUD's prior written approval. Additionally, if there is a conflict between any HUD-required provisions inserted into this Agreement and any other provision of this Agreement, the terms of the HUD-required provisions will govern; and if there is a conflict between any of the provisions in the [insert appropriate document, *i.e.*, Articles of Organization] and any HUD-required provisions of this Agreement, the HUD-required provisions will govern.
3. Unless otherwise approved in writing by HUD, Borrower's business and purpose shall consist solely of the acquisition, ownership, operation and maintenance of the Project and activities incidental thereto. Borrower shall not engage in any other business or activity. The Project shall be the sole asset of the Borrower entity, which shall not own any other real estate other than the aforesaid Project.
4. None of the following will have any force or effect without the prior written consent of HUD:
  - a. Any amendment that modifies the term of Borrower's existence;
  - b. Any amendment that triggers application of the HUD previous participation certification requirements (as set forth in Form HUD2530, Previous Participation Certification, or 24 CFR § 200.210, et seq.);
  - c. Any amendment that in any way affects the HUD Loan Documents;
  - d. Except as permitted under section 10 below, any amendment that would authorize any member, manager, partner, owner, officer or director, other than the one previously authorized by HUD, to bind the Borrower entity for any matters concerning the Project which require HUD's consent or approval;
  - e. A change that is subject to the HUD TPA requirements contained in Chapter 13 of HUD Handbook 4350.1 REV-1;
  - f. Any change in a guarantor of any obligation to HUD (including those obligations arising from violations of the HUD Regulatory Agreement); and
  - g. Any grant of a security interest in any of Borrower's assets or mortgaged property.
5. Borrower is authorized to execute a Note and Security Instrument in order to secure a loan to be insured by HUD and to execute the HUD Regulatory Agreement and other documents required by the Secretary in connection with the HUD-insured loan.
6. Any incoming member/partner/owner of Borrower must, as a condition of receiving an interest in the Borrower entity, agree in writing to be subject to the HUD Loan Documents and all other documents required in connection with the HUD-insured loan, to the same extent and on the same terms as the other members/partners/owners.



7. 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 or entity that is not bound by the HUD Regulatory Agreement in a manner satisfactory to HUD.
8. The key principals of Borrower identified in the HUD Regulatory Agreement are liable in their individual capacities to HUD to the extent set forth in the HUD Regulatory Agreement.
9. Borrower shall not voluntarily be dissolved or converted to another form of entity without the prior written approval of HUD.
10. Borrower has designated \_\_\_\_\_ [insert name, individual must be 2530 Previous Participation Certified] as its official representative for all matters concerning the Project that require HUD consent or approval. The signature of this representative will bind Borrower entity in all such matters. Borrower may, from time to time, appoint a new representative to perform this function, provided that the individual so appointed is 2530 Previous Participation Certified, and within three business days of doing so, will provide HUD with written notification of the name, address, and telephone number of its new representative. When a person other than the person identified above has full or partial authority with respect to management of the Project, Borrower will promptly provide HUD with the name of that person and the nature of that person's management authority.
11. Any obligation of the [Corporation / Partnership / Limited Liability Company] to provide indemnification under this [Operating Agreement / Partnership Agreement / Bylaws] shall be limited to (i) amounts mandated by state law, if any, (ii) coverage afforded under any liability insurance carried by the [Company / Partnership] and (iii) available "surplus cash" of the Borrower as defined in the HUD Regulatory Agreement. Until funds from a permitted source for payment of indemnification costs are available for payment, the [Corporation / Partnership / Limited Liability Company] shall not (a) pay funds to any members, partners, officers and directors, or (b) pay the deductible on an indemnification policy for any members, partners, officers and directors.
12. *[To be included in Projects with LIHTC financing, only]* No amendment or change to the obligations or rights of the tax credit investor(s), as approved by HUD, *[insert title of the entity or individuals, or defined term used in the governing doc.]*, may be made without the prior written consent of HUD and Lender.



### 19.3.02 Rider to Security Instrument – LIHTC Projects

This Rider (“Rider”) is attached to and amends the Security Instrument entered into between [**Borrower**] and [**Lender**], dated as of [**Date**] (“Security Instrument”).

To the extent any provisions of this Rider conflict with any provisions in the body of the Security Instrument, the provisions of this Rider shall prevail. Any terms in the body of the Security Instrument not in conflict with the provisions of this Rider remain in full force and effect.

Notwithstanding anything else in the Security Instrument to which this Rider is attached, Lender and Borrower agree as follows:

1. Definitions. The following terms shall be added to Section 1 (Definitions) of the Security Instrument:

- (a) Any capitalized terms not defined in this Rider shall have the meaning given in the body of the Security Instrument.
- (b) “**Equity Investor**” means \_\_\_\_\_.
- (c) “**Borrower’s GP/MM**” means \_\_\_\_\_.

2. Removal of Borrower’s GP/MM.

***[Include this section 2 only if pre-approval of a special limited partner entity as an interim replacement general partner/managing member has been requested and approved. Use in accordance with separately provided guidance on the pre-approval process.]***

Equity Investor may remove the Borrower’s GP/MM in accordance with the terms of the Borrower’s organizational documents, subject to the following conditions:

- (a) Lender and HUD shall receive prior written notice of any such removal and replacement.
- (b) HUD and Lender have approved such organizational documents, including any and all amendments thereto, but only to the extent HUD approval of the Borrower’s organizational documents is required by Program Obligations.
- (c) HUD and Lender have approved the replacement of the Borrower’s GP/MM in accordance with Program Obligations. At Borrower’s request, HUD and Lender have approved [**SPECIAL LIMITED PARTNER ENTITY**] (“Interim Replacement GP/MM”) to act as a temporary replacement general partner/managing member of Borrower, in the event Equity Investor removes Borrower’s GP/MM for cause in accordance with Borrower’s organizational documents. Approval of such Interim Replacement GP/MM is expressly limited to a period of 90 days that commences on

the date of such removal, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days.

- (d) HUD and/or Lender may at any time by written notice to Equity Investor revoke the approvals given in this Section 2 if HUD or Lender becomes aware of any conditions or circumstances that would disqualify or compromise the ability of Interim Replacement GP/MM from acting as an interim general partner/managing member pursuant to Program Obligations.
- (e) After such interim period, any proposed permanent replacement for the Borrower's GP/MM is subject to HUD's consent pursuant to Program Obligations, including any applicable procedure for the transfer of physical assets or transfer of ownership interests.

3. Transfer of Equity Investor.

Equity Investor may transfer all or part of its interests in Borrower upon the following conditions:

- (a) HUD approves any transferee in accordance with Program Obligations, provided that if such transferee is a limited liability investor, as such term is defined in Program Obligations, HUD shall receive the same certifications and organizational charts required by Program Obligations for the admission of a limited liability investor at a transaction's closing.
- (b) HUD and Lender receive prior written notice of such transfer.
- (c) HUD and Lender receive executed copies of (and, to the extent, if at all, required by Program Obligations, have previously approved drafts of), any and all documents necessary to affect such transfer, including any and all amendments to Borrower's organizational documents.

4. Notice.

- (a) Lender agrees that, as long as Equity Investor is a member or partner of Borrower, Lender shall endeavor as a courtesy to Equity Investor to deliver to Equity Investor a copy of any notice of default that is delivered to Borrower. Equity Investor's address for such notice purposes is:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Equity Investor may change the address to which notices intended for it are to be directed by means of written notice given to Lender.

- (b) Any cure of any default by Borrower offered by Equity Investor shall be treated the same as if offered by Borrower.

5. Communication. Borrower agrees that Lender and/or HUD may communicate directly with Equity Investor, when, in Lender and/or HUD's sole discretion, Lender and/or HUD determine that such communication is in the best interest of the Project.

**BORROWER**

**LENDER**

by: \_\_\_\_\_

by: \_\_\_\_\_

### 19.3.03 Rider to Regulatory Agreement for Residual Receipts Requirements

*This sample Rider is drafted for projects subject to residual receipts requirements established through a Section 8 HAP contract. In the event residual receipts requirements are established through another program or document, such as the Section 202 program, revise this Rider as necessary to reflect deal specifics. This Rider is intended to amend the Regulatory Agreement related to the insured mortgage loan, **not** to alter specific program residual receipts requirements.*

This Rider to Regulatory Agreement for Residual Receipts Requirements (“Rider”) is attached to and amends the Regulatory Agreement for Multifamily Projects entered into between \_\_\_\_\_ (“Borrower”) and the United States Department of Housing and Urban Development, acting by and through the Secretary, his or her successors, assigns or designates (“HUD”), dated as of [Date] (“Regulatory Agreement”).

To the extent any provisions of this Rider conflict with any provisions in the Regulatory Agreement, the provisions of this Rider shall prevail. Any terms in the body of the Regulatory Agreement not in conflict with the provisions of this Rider remain in full force and effect.

Notwithstanding anything else in the Regulatory Agreement to which this Rider is attached, Borrower and HUD agree as follows:

1. Any capitalized term used herein and not defined has the meaning given to it in the Regulatory Agreement.
2. Borrower has entered into a [**Housing Assistance Payment Contract** (“HAP Contract”) identified by HAP Contract No. [**HAP Contract No.**], as amended, renewed and/or assigned from time to time].
3. While the Regulatory Agreement would otherwise allow Borrower to make Distributions of Surplus Cash in accordance with the provisions of the Regulatory Agreement, the HAP Contract further limits such Distributions and requires Borrower to maintain a Residual Receipts account, as Residual Receipts is defined in the HAP Contract.
4. Borrower shall establish and/or maintain a Residual Receipts account, and make required deposits into said Residual Receipts account, in accordance with the HAP Contract.
5. Notwithstanding any provision of the HAP Contract, the Residual Receipts account shall be subject to the control of Lender and shall be maintained in accordance with

any applicable requirements of Ginnie Mae, and withdrawals may be made only with the prior written approval of HUD. These funds shall be held in an interest-bearing account, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America, or in such other investment as may be allowed by HUD, which shall be insured or guaranteed by a federal agency and in accordance with Program Obligations.

6. Funds deposited in the Residual Receipts account shall be held in trust for the Project and shall continue to be held in trust for the benefit of the Project upon any sale or transfer of the Project, pursuant to the HAP Contract. Upon termination of the requirement to maintain a Residual Receipts account, any funds held in the Residual Receipts account shall be subject to HUD's direction.
7. In the event that the HAP Contract is terminated or is otherwise no longer of any force or effect with respect to the Project, this Rider shall terminate and be of no further force or effect.

The statements and representations contained in this rider and all supporting documentation thereto are true, accurate, and complete. This certification has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring a multifamily loan, and may be relied upon by HUD as a true statement of the facts contained therein.

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.

**BORROWER**

*(insert signature block)*

**UNITED STATES DEPARTMENT OF HOUSING  
AND URBAN DEVELOPMENT,  
acting by or through the Secretary**

*(insert signature block)*

### 19.3.04 Survey Affidavit of No Change

State of \_\_\_\_\_  
County of \_\_\_\_\_

The undersigned ("Affiant") being first duly sworn on oath does hereby depose, represent and say to the U.S. Department of Housing and Urban Development ("HUD"): as follows:

Affiant is the [insert title] \_\_\_\_\_ of \_\_\_\_\_ ("Borrower") and is fully and well acquainted and knowledgeable concerning the physical characteristics and condition of the real estate legally described on Exhibit A attached hereto and made a part hereof and the buildings, structures and improvements (collectively the "Improvements" ) located thereon;

Said real estate and Improvements are part of the HUD Project named \_\_\_\_\_ and designated HUD Project Number \_\_\_\_\_;

On \_\_\_\_\_, \_\_\_\_\_ ("Surveyor") surveyed said real estate and Improvements and produced a written survey dated \_\_\_\_\_ and identified as job, survey or order number \_\_\_\_\_ of the surveying firm of \_\_\_\_\_ whose address is \_\_\_\_\_

("Survey"). On \_\_\_\_\_ an original of said Survey was delivered to HUD;

On \_\_\_\_\_, the Affiant reviewed said Survey and physically inspected said real estate and Improvements including, without limitation, the perimeter boundaries of said real estate;

The Survey accurately and fully depicts the observable physical conditions of said real estate and the location and condition of all Improvements and any above ground physical indicia of any easements, licenses, roadways, paths or other physical usage located on said real estate as of \_\_\_\_\_ [the date of Affiant's said inspection] including, without limitation, all encroachments thereof on or into easements and set back lines and by Improvements primarily located on adjoining real estate onto the real estate described on **Exhibit A** hereto; EXCEPT [if none, state "NONE"] \_\_\_\_\_.

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



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.

AFFIANT:

By:

\_\_\_\_\_  
Name:  
Title:  
Date:

I, the undersigned, a Notary Public in and for the county and State aforesaid, do hereby certify that \_\_\_\_\_, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that (s)he signed and delivered the said instrument as his/her free and voluntary act and purposes therein set forth.

GIVEN under my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public  
(SEAL)

### 19.3.05 Certification of Architectural/Engineering Fees

[Address to Regional Center Director]

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Dear \_\_\_\_\_:

The undersigned hereby certifies that all architectural, engineering, drafting, land surveyor, testing, laboratory and related services fees and fee balances for the analysis of the property, preparation of reports, and for the project design and preparation of plans and specifications have been fully paid, except as listed below. The undersigned further certifies that there are no other disputed or undisputed claims for such services.

Firm: \_\_\_\_\_

Service: \_\_\_\_\_

Fee: \_\_\_\_\_

Balance: \_\_\_\_\_

Firm: \_\_\_\_\_

Service: \_\_\_\_\_

Fee: \_\_\_\_\_

Balance: \_\_\_\_\_

Firm: \_\_\_\_\_

Service: \_\_\_\_\_

Fee: \_\_\_\_\_

Balance: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

The statements and representations contained in this certification and all supporting documentation thereto are true, accurate, and complete. This certification has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring a multifamily loan, and may be relied upon by HUD as a true statement of the facts contained therein.

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.

**BORROWER**

*(insert signature block)*

### 19.3.06 Building Code Verification

This will confirm that an apartment project known as \_\_\_\_\_, located at \_\_\_\_\_, built in \_\_\_\_\_, and consisting of \_\_\_\_\_ units, which are housed in \_\_\_\_\_ buildings and situated on \_\_\_\_\_ acres ( \_\_\_\_\_ square feet), was built in accordance with the applicable codes at the time of construction and has no code violations on record, except for: [Specify violation, remedy, and status (open/closed). If none, write "None."]

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AUTHORITY}: [-----Insert name of GOVERNING

By: \_\_\_\_\_

Name:  
Title:  
Date:  
Phone: ( )

---

This letter must signed by an individual with binding authority to provide the confirmations set forth therein, such as the Chief Planner, *etc.*

An inspection of the project is not required.

The intent of this certification is to notify HUD that the project, as it stands today, is not under the scrutiny of the governing authority and does not have any violations recorded against it which jeopardize the project's existence. If any violations have existed or do exist, the governing authority should specify the violation and the remedial action taken or required.

Your assistance in this matter is greatly appreciated.

### 19.3.07 Zoning Letter

*\*This letter may be provided in lieu of a zoning endorsement in accordance with Section 19.3.02.C above.*

This will confirm that an apartment project known as \_\_\_\_\_, located at \_\_\_\_\_, built in \_\_\_\_\_, and consisting of \_\_\_\_\_ units, which are housed in \_\_\_\_\_ buildings and situated on \_\_\_\_\_ acres (\_\_\_\_\_ square feet), was adequately zoned as a multifamily project at the time of occupancy and that there are no known zoning violations, except for: [Specify violation, remedy, and status (open/closed). If none, write "None."]

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[Insert name of GOVERNING AUTHORITY]:

By: \_\_\_\_\_

Name:

Title:

Date:

Phone: ( )

---

This letter should must be signed by an individual with binding authority to provide the confirmations set forth therein, such as the Chief Planner, *etc.*

An inspection of the project is not required.

The intent of this certification is to notify HUD that the project, as it stands today, is not under the scrutiny of the governing authority and does not have any violations recorded against it which jeopardize the project's existence. If any violations have or do exist, the governing authority should specify the violation and the remedial action taken or required.

Your assistance in this matter is greatly appreciated.

### 19.3.08 Third Party Obligee Certification

*Use when Lender, bond issuer or bond underwriter exercises the option to defer collection of discounts, financing fees, etc., as approved in writing by HUD. Such deferred collection of these items must be an obligation of a third party and may not be an obligation of the Borrower. See [cross-reference to MAP Guide once finalized.]*

[Address to Regional Center Director]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_:

The undersigned hereby certifies that, under an agreement dated \_\_\_\_\_ between the undersigned and \_\_\_\_\_, a discount or other financing charge of \$ \_\_\_\_\_ in addition to the initial service charge will be paid by \_\_\_\_\_. The undersigned does not now have and will not later assert any claim against the Borrower, Mortgaged Property, mortgage loan proceeds, any reserve or deposit made with the undersigned or another required by HUD in connection with the mortgage transaction, or against the rents or other income from the Mortgaged Property for payment of any part of such discount.

The statements and representations contained in this certification and all supporting documentation thereto are true, accurate, and complete. This certification has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring a multifamily loan, and may be relied upon by HUD as a true statement of the facts contained therein.

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.

LENDER:

By: \_\_\_\_\_

Name:

Title:

Date:

The undersigned does not now have and will not later assert any claim against the Borrower, Mortgaged Property, mortgage loan proceeds, any reserve or deposit made with the undersigned or another required by HUD in connection with the mortgage transaction, or against the rents or other income from the Mortgaged Property for payment of any part of such discount.

THIRD PARTY:

By: \_\_\_\_\_

Name:

Title:

Date:



### 19.3.09 HUD [Rider / Amendment] To Restrictive Covenants

*Use as a Rider when the Restrictive Covenants are executed in connection with a new insured loan closing; use as an Amendment for existing Restrictive Covenants.*

*Note: This document has been submitted to OMB for PRA approval. Once published, preparers should use the OMB-approved form and discontinue use of this sample document.*

This [RIDER] [AMENDMENT] TO RESTRICTIVE COVENANTS is made as of [\_\_\_\_\_, 20\_\_], by \_\_\_\_\_ (“Borrower”) and \_\_\_\_\_ (“Agency”).

WHEREAS, Borrower has obtained financing from \_\_\_\_\_ (“Lender”) for the benefit of the project known as \_\_\_\_\_ (“Project”), which loan is secured by a [name of security instrument] (“Security Instrument”) dated as of \_\_\_\_\_, and recorded in the [Recorder’s Office or other land records office] of \_\_\_\_\_ County, \_\_\_\_\_ (“Records”) on \_\_\_\_\_ as Document Number \_\_\_\_\_, and is insured by the United States Department of Housing and Urban Development (“HUD”);

WHEREAS, Borrower has received [a loan] [an allocation of Low Income Housing Tax Credits] [HOME funds] [tax-exempt bond financing] [other- describe] from the Agency, which Agency [is requiring] [has required] certain restrictions be recorded against the Project; and

[Use if the Restrictive Covenants have already been entered into: WHEREAS, Borrower entered into that certain [\_\_\_\_\_]Insert name of restrictive covenants document] (“Restrictive Covenants”) with respect to the Project, as more particularly described in Exhibit A attached hereto, dated as of [\_\_\_\_\_] and recorded in the Records;]

WHEREAS, HUD requires as a condition of its insuring Lender’s financing to the Project, that the lien and covenants of the Restrictive Covenants be subordinated to the lien, covenants, and enforcement of the Security Instrument; and

WHEREAS, the Agency has agreed to subordinate the Restrictive Covenants to the lien of the Mortgage Loan in accordance with the terms of this [Rider] [Amendment].

NOW, THEREFORE, in consideration of the foregoing and for other consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

(a) In the event of any conflict between any provision contained elsewhere in the Restrictive Covenants and any provision contained in this [Rider] [Amendment], the provision

contained in this [Rider] [Amendment] shall govern and be controlling in all respects as set forth more fully herein.

(b) The following terms shall have the following definitions:

"Code" means the Internal Revenue Code of 1986, as amended.

"HUD" means the United States Department of Housing and Urban Development.

"HUD Regulatory Agreement" means the Regulatory Agreement between Borrower and HUD with respect to the Project, as the same may be supplemented, amended or modified from time to time.

"Lender" means \_\_\_\_\_, its successors and assigns.

"Mortgage Loan" means the mortgage loan made by Lender to the Borrower pursuant to the Mortgage Loan Documents with respect to the Project.

"Mortgage Loan Documents" means the Security Instrument, the HUD Regulatory Agreement and all other documents required by HUD or Lender in connection with the Mortgage Loan.

"National Housing Act" means the National Housing Act, 12 USC § 1701 *et seq.*, as amended.

"Program Obligations" has the meaning set forth in the Security Instrument.

"Residual Receipts" has the meaning specified in the HUD Regulatory Agreement.

"Security Instrument" means the mortgage or deed of trust from Borrower in favor of Lender, as the same may be supplemented, amended or modified.

"Surplus Cash" has the meaning specified in the HUD Regulatory Agreement.

(c) Notwithstanding anything in the Restrictive Covenants to the contrary, [*use for tax credit transactions only*: except the requirements in 26 U.S.C. 42(h)(6)(E)(ii), to the extent applicable,] the provisions hereof are expressly subordinate to (i) the Mortgage Loan Documents, including without limitation, the Security Instrument, and (ii) Program Obligations (the Mortgage Loan Documents and Program Obligations are collectively referred to herein as the "HUD Requirements"). Borrower covenants that it will not take or permit any action that would result in a violation of the Code, HUD Requirements or Restrictive Covenants. In the event of any conflict between the provisions of the Restrictive Covenants and the provisions of the HUD Requirements, HUD shall be and remains entitled to enforce the HUD Requirements. Notwithstanding the foregoing, nothing herein limits the Agency's ability to enforce the terms of the Restrictive Covenants, provided such terms do not conflict with statutory provisions of the

National Housing Act or the regulations related thereto. The Borrower represents and warrants that to the best of Borrower's knowledge the Restrictive Covenants impose no terms or requirements that conflict with the National Housing Act and related regulations.

(d) [*Use for tax credit transactions only:* In accordance with 26 U.S.C. 42(h)(6)(E)(i) (1), in] In the event of foreclosure (or deed in lieu of foreclosure), the Restrictive Covenants (including without limitation, any and all land use covenants and/or restrictions contained herein) shall automatically terminate, [*use for tax credit transactions only:* with the exception of the requirements of 26 U.S.C. 42(h)(6)(E)(ii) above, to the extent applicable, or as otherwise approved by HUD.]

(e) Borrower and the Agency acknowledge that Borrower's failure to comply with the covenants provided in the Restrictive Covenants will does not and will not serve as a basis for default under the HUD Requirements, unless a separate default also arises under the HUD Requirements.

(f) [Except for the Agency's reporting requirement,] in enforcing the Restrictive Covenants the Agency will not file any claim against the Project, the Mortgage Loan proceeds, any reserve or deposit required by HUD in connection with the Security Instrument or HUD Regulatory Agreement, or the rents or other income from the property other than a claim against:

- i. Available surplus cash, if the Borrower is a for-profit entity;
- ii. Available distributions of surplus cash and residual receipts authorized for release by HUD, if the Borrower is a limited distribution entity; or
- iii. Available residual receipts authorized for release by HUD, if the Borrower is a non-profit entity[.]; or
- iv. A HUD-approved collateral assignment of any HAP contract.]

(g) For so long as the Mortgage Loan is outstanding, Borrower and Agency shall not further amend the Restrictive Covenants, with the exception of clerical errors or administrative correction of non-substantive matters, without HUD's prior written consent.

(h) Subject to the HUD Regulatory Agreement, the Agency may require the Borrower to indemnify and hold the Agency harmless from all loss, cost, damage and expense arising from any claim or proceeding instituted against Agency relating to the subordination and covenants set forth in the Restrictive Covenants, provided, however, that Borrower's obligation to indemnify and hold the Agency harmless shall be limited to available surplus cash and/or residual receipts of the Borrower.

(i) **[Use only with Low-Income Housing Tax Credits:** Notwithstanding anything to the contrary contained herein, it is not the intent of any of the parties hereto to cause a recapture of the Low Income Housing Tax Credits or any portion thereof related to any potential conflicts between the HUD Requirements and the Restrictive Covenants. Borrower represents and warrants that to the best of Borrower's knowledge the HUD Requirements impose no requirements which may be inconsistent with full compliance with the Restrictive Covenants. The acknowledged purpose of the HUD Requirements is to articulate requirements imposed by HUD, consistent with its governing statutes, and the acknowledged purpose of the Restrictive Covenants is to articulate requirements imposed by Section 42 of the Code. In the event an apparent conflict between the HUD Requirements and the Restrictive Covenant arises, the parties and HUD will work in good faith to determine which federally imposed requirement is controlling. It is the primary responsibility of the Borrower, with advice of counsel, to determine that it will be able to comply with the HUD Requirements and its obligations under the Restrictive Covenants. **[Use only with tax-exempt bonds]:** No action shall be taken in accordance with the rights granted herein to preserve the tax exemption of the interest on the notes or bonds, or prohibiting the owner from taking any action that might jeopardize the tax-exemption, except in strict accord with Program Obligations.]

The statements and representations contained in this rider and all supporting documentation thereto are true, accurate, and complete. This certification has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring a multifamily loan, and may be relied upon by HUD as a true statement of the facts contained therein.

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.

BORROWER:

AGENCY:

By:

By:

\_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
Name:  
Title:

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

I, the undersigned, a Notary Public in and for the county and State aforesaid, do hereby certify that on this \_\_\_\_\_, \_\_\_\_\_, personally known to me to be the same person whose name is subscribed to the foregoing instrument,

appeared before me this day in person and acknowledged that (s)he signed and delivered the said instrument as his/her free and voluntary act and the free and voluntary act of \_\_\_\_\_ for the purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[seal]

\_\_\_\_\_  
Notary Public

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

I, the undersigned, a Notary Public in and for the county and State aforesaid, do hereby certify that on this \_\_\_\_\_, \_\_\_\_\_, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that (s)he signed and delivered the said instrument as his/her free and voluntary act and the free and voluntary act of \_\_\_\_\_ for the purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[seal]

\_\_\_\_\_  
Notary Public

[Attach Exhibit A – Legal Description]

### **19.3.10 Equity Bridge Loan Rider – LIHTC Projects**

*Use to meet the requirements of Section 14.14 and 19.2.09.F for equity bridge loans used as a substitute for deferred tax credit equity pay-in as approved by HUD in the Firm Commitment.*

This Rider (“Rider”) is attached to and made part of [insert name of equity bridge loan note] (“EBL Note”), made as of \_\_\_\_\_, 20\_\_ by [insert name of equity bridge loan borrower] (“EBL Borrower”) to \_\_\_\_\_ (“Bridge Lender”).

WHEREAS, [insert name of HUD borrower on the HUD Loan] (“HUD Borrower”) has obtained financing from [insert name of FHA lender] (“FHA Lender”) for the benefit of the project known as [insert project name], FHA No: [insert project number] (“Project”), which loan is secured by a [name of security instrument] (“Security Instrument”) dated as of \_\_\_\_\_, and recorded in the [Recorder’s Office or other land records office] of \_\_\_\_\_ County, \_\_\_\_\_ on \_\_\_\_\_ as document number \_\_\_\_\_, and is insured by the United States Department of Housing and Urban Development (“HUD”);

WHEREAS, EBL Borrower has obtained equity bridge loan financing from the Bridge Lender to defer HUD Borrower’s required equity pay-in for the Project;

WHEREAS, as a condition of approving the EBL Note and insuring FHA Lender’s financing for the Project, HUD requires that the terms of the EBL Note and related documents executed by the EBL Borrower (collectively, the “EBL Documents”) be made subject to HUD Requirements, as that term is further defined below.

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

- (a) In addition to the terms defined above, the following terms have meanings set forth below:
  - i. “HUD Loan Documents” means the HUD-insured Note, Security Instrument, HUD Regulatory Agreement, and all other documents executed in connection with the HUD Loan.
  - ii. "HUD Regulatory Agreement" means the Regulatory Agreement for Multifamily Projects (HUD-92466M) entered into by and between HUD Borrower and HUD with respect to the Project, as the same may be supplemented, amended or modified from time to time.

- iii. “HUD Requirements” means, collectively, the HUD Loan Documents, this Rider, and Program Obligations.
  - iv. “HUD Loan” has the same meaning as “Loan” as such term is defined in the Security Instrument.
  - v. “Mortgaged Property” has the meaning specified in the Security Instrument.
  - vi. “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 Security Instrument rather than add or delete provisions from such document. Handbooks, guides, notices, and mortgagee letters are available on “HUDCLIPS,” at [www.hud.gov](http://www.hud.gov).
  - vii. “Residual Receipts” has the meaning specified in the HUD Regulatory Agreement.
  - viii. “Surplus Cash” has the meaning specified in the HUD Regulatory Agreement.
- (b) In the event of any conflict between (i) the EBL Documents and (ii) the HUD Requirements, the HUD Requirements are controlling in all respects.
  - (c) The EBL Documents and all amounts now or hereafter advanced thereunder or secured thereby are specifically subordinate to the HUD Loan Documents and all amounts now or hereafter advanced thereunder or secured thereby.
  - (d) The loan evidenced by the EBL Note is nonrecourse to the HUD Borrower and is not secured by a lien or security interest in the Mortgaged Property.
  - (e) Any payments due under the EBL Documents shall only be payable from [insert if applicable: capital contributions from [partners] [members] of the HUD Borrower, or] non-Project assets. The restriction on payment imposed by this paragraph does not excuse any default caused by failure of the EBL Borrower to pay the indebtedness evidenced by the EBL Note.

(f) [For non-IOI: “Bridge Lender may not”] or [For IOI Bridge Lender: “Neither [Bridge Lender] nor [HUD Borrower’s] [limited partners] [members] may”] assert any claims, even in an event of default, against the following items without the prior written permission of HUD:

- i. the Project;
- ii. the proceeds of the HUD Loan;
- iii. the Mortgaged Property;
- iv. any reserve or deposit with respect to the Project required by Program Obligations; or
- v. any developer fee.

(g) If HUD acquires title to the Project by foreclosure or deed in lieu of foreclosure, the Bridge Lender hereby consents to the discharge of all obligations of the HUD Borrower, if any, under the EBL Documents, and to the termination of the EBL Documents as to the HUD Borrower. The discharge of the HUD Borrower’s obligations under this paragraph neither: (1) excuses or relieves any co-signer, guarantor or any other party from the obligation to repay the indebtedness evidenced by the EBL Note; nor, (2) affects, limits, or impairs the Bridge Lender’s ability to seek a monetary judgment and pursue other remedies against any co-signer, guarantor or other party.

(h) The loan evidenced by the EBL Note may last through the construction or rehabilitation period provided for in the HUD Loan Documents, but will be paid in full no later than: [select the appropriate option and strikethrough remaining inapplicable options]

\_\_\_ [EBL provided by private, for-profit lender on a 221(d)(4)/220 loan] no later than one year after HUD’s final endorsement of the HUD Loan;

\_\_\_ [EBL provided by private, for-profit lender on a 223(f) loan] no later than one year after 100% completion of repairs;

\_\_\_ [EBL provided by not-for-profit, public sector, or quasi-public sector entities on a 221(d)(4)/220 loan] no later than ten years after HUD’s final endorsement of the HUD Loan;

\_\_\_ [EBL provided by not-for-profit, public sector, or quasi-public sector entities on a 223(f) loan] no later than ten years after HUD Borrower’s 100% completion of repairs required by the HUD Loan Documents.



- (i) The EBL Documents may not be amended, assigned, transferred, sold, or otherwise held without the prior written consent of HUD.
- (j) Neither the Bridge Lender nor any of its participants (if any) will have any lien upon or right of set-off against any assets of the HUD Borrower that serve as collateral for the HUD Loan.

The statements and representations contained in this rider and all supporting documentation thereto are true, accurate, and complete. This certification has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring a multifamily loan, and may be relied upon by HUD as a true statement of the facts contained therein.

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.

EBL BORROWER:

BRIDGE LENDER:

By:

By:

\_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
Name:  
Title:

[Jurats to be added]

### **19.3.11 Section 213 Cooperative Program Rider to Regulatory Agreement for Multifamily Projects**

#### **SECTION 213 COOPERATIVE PROGRAM RIDER TO REGULATORY AGREEMENT FOR MULTIFAMILY PROJECTS**

A. The following definition is hereby inserted as subsection mm of Article 1, Section 1 of the foregoing Regulatory Agreement for Multifamily Housing Projects:

“mm: ‘General Operating Reserve Account’ shall mean the account where the funds identified in Section 51 of Rider 1 to this Agreement are held.”

B. The following provisions are hereby inserted as Section 51, 52, and 53, respectively, of the foregoing Regulatory Agreement for Multifamily Housing Projects. To the extent the provisions of the foregoing Regulatory Agreement and this Rider 1 shall conflict, the provision of this Rider 1 shall prevail:

“51. Commencing with occupancy, the Borrower shall establish and maintain a General Operating Reserve Account by allocation and payment thereto monthly of a sum equivalent to not less than 3 percent of the monthly amount otherwise chargeable to the members pursuant to their Occupancy Agreements. Upon accrual in the General Operating Reserve Account of an amount equal to 15 percent of the current annual amount otherwise chargeable to the members pursuant to their Occupancy Agreements, the rate of such monthly allocations may, by appropriate action of the Borrower, be reduced from 3 percent to 2 percent; provided, however, that in the event withdrawals from such Account reduce it below said 15 percent accrual, the rate of such monthly deposits shall immediately be restored to 3 percent. At any time thereafter upon accrual in said General Operating Reserve Account of an amount equal to 25 percent of the current annual amount otherwise chargeable to the members pursuant to their Occupancy Agreements, such monthly deposits may, by appropriate action of the Borrower, be discontinued and no further deposits need be made into the General Operating Reserve Account so long as said 25 percent level is maintained and provided, further, that upon any reduction of such reserve below said 25 percent level, monthly deposits shall be made at the 3 percent rate until the 25 percent level is restored. The General Operating Reserve Account shall remain in a special account and may be in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America, and shall at all times be under the control of the Borrower. The General Operating Reserve Account is intended to provide a measure of financial stability during periods of special stress and may be used to meet

deficiencies from time to time as a result of delinquent payments by individual members, to provide funds for the re-purchase of membership interests of withdrawing members, and other contingencies. Disbursements totaling in excess of 20 percent of the total balance in the reserve as of the close of the preceding annual period may not be made during any annual period without the consent of HUD.

52. The Borrower shall establish and collect monthly carrying charges pursuant to the conditions set forth hereinafter. Monthly carrying charges charged to members shall be made by the Borrower in accordance with a schedule of charges filed with and approved in writing by HUD prior to endorsement of the Note. Such charges shall be in an amount sufficient to meet HUD's estimate of cooperative management expense, operating expense and maintenance expense, debt service, taxes, special assessments and ground rents, if any, reserves, and all other expenses of the Borrower. Thereafter, charges made by the Borrower for its accommodations shall be in accordance with a schedule of charges filed with and approved in writing by HUD and shall be in amounts sufficient to meet the Borrower's estimate of expenses set forth in an operating budget which shall be prepared and submitted to the HUD 60 days prior to the beginning of each fiscal year. The operating budget shall set forth the anticipated income of the project and a sufficiently detailed estimate of expenses which will include separate estimates for administration expense, operating expense, maintenance expense, utilities, hazard insurance, taxes and assessments, ground rent, interest and amortization, mortgage insurance premium, replacement reserve and operating reserve."

53. Borrower shall not, without the written consent of HUD:

- a. Permit the occupancy of any of the residential units except at the charges established in Section 51, and pursuant to an Occupancy Agreement in a form approved by HUD.
- b. Permit the occupancy of any of the residential units except by members of the Borrower, or sublessees approved by the Borrower, and pursuant to a sublease in a form approved by HUD.
- c. Consolidate or merge the Borrower into any other corporation; liquidate or dissolve the Borrower, enter into any reorganization of the Borrower, change the capital structure of the Borrower, or alter or amend the Bylaws of the Borrower.
- d. [For new construction] Contract for the sale of any membership interest or shares of the Borrower except in accordance with a subscription agreement in a form approved by HUD.

[Insert as applicable: 54. Cooperative projects regulated under State or local law must comply with Program Obligations as well as any and all State or local regulatory requirements.]

The statements and representations contained in this rider and all supporting documentation thereto are true, accurate, and complete. This certification has been made, presented, and

delivered for the purpose of influencing an official action of HUD in insuring a multifamily loan, and may be relied upon by HUD as a true statement of the facts contained therein.

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.

**BORROWER**

(insert signature block)