

# Appendix F: Legal Forms

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## Detailed Guidance for the PAE's Attorney Closing Document Preparation

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This section is dedicated to specific information and guidelines for the PAE's attorney regarding closing document preparation.

**A. Ground Leaseholds.** Ground leaseholds must conform to the FHA Lease Addendum Form FHA-2070.

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

**B. Organizational Documents of Mortgagor Entity.** Organizational documents are required to be submitted at closing. They must expressly indicate that the duration of the ownership entity is at least coextensive with the term of the FHA-insured Section 223(a)(7) **the FHA-insured Section 223(a)(7) mortgage and any HUD-held secondary mortgage financing**, that the terms of the Regulatory Agreement as modified by the M2M Modification of the Existing Regulatory Agreement take precedence in the event of

any conflict with the terms of the organizational documents, that the ownership entity has authority to enter into the transaction and to comply with the requirements of the applicable mortgage insurance program and that unless previously approved otherwise by HUD, the mortgagor is a single asset entity.

1. If the mortgagor entity applying for the FHA-insured financing is newly created, the operating partnership agreements, articles of incorporation, or articles of organization must include provisions stating that:

a. If any of the provisions of the organizational documents conflict with the terms of the Note, Mortgage, Security Agreement, or FHA Regulatory Agreement, the provisions of the Note, Mortgage, Security Agreement or FHA Regulatory Agreement control.

b. No provision required by HUD to be inserted into the organizational documents may be amended without prior OMHAR/HUD approval, for so long as FHA is the insurer or the holder of the Note.

c. No provision in the organizational documents that results in any of the following will have any force or effect without the prior written consent of OMHAR/HUD:

1). Any amendment that modifies the term of the mortgagor entity;

2). Any amendment that activates the requirement that a HUD previous participation certification be obtained from any additional partner, or an additional member of a limited liability company;

3). Any amendment that in any way affects the Note, Mortgage, Security Agreement, or the Regulatory Agreement;

4). Any amendment that would authorize any member of a limited liability company, other than the Managing Member or pre-approved Successor Managing Member to bind the company for all matters concerning the project which required HUD consent or approval;

5). A change in the Managing Member/General Partner or pre-approved Successor Managing Member of the mortgagor entity; or

6). Any change in a guarantor of any obligation to the Secretary.

d. The mortgagor entity is authorized to execute a Note, Mortgage, or Security Agreement in order to secure a loan to be insured by the Secretary and to execute the Regulatory Agreement and other documents required by the Secretary in connection with the insured Section 223(a)(7) mortgage.

e. Any incoming partner/member/owner must as a condition of receiving an interest in the partnership/company agree to be bound by the Note, Mortgage, Security Agreement, Regulatory Agreement, and any other documents required in connection with the Section 223(a)(7) insured mortgage loan to the same extent and on the same terms as the other partners/members/owners.

f. Notwithstanding any other provisions, upon any dissolution, no title or right to possession and control of the Project, and no right to collect the rents from the Project, shall pass to any person who is not bound by the Regulatory Agreement in a manner satisfactory to the Secretary.

2. *Corporate Mortgagor.*

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

3. *Partnership Mortgagor.*

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

4. *Limited Liability Company Mortgagor.*

- a. Certified copy of Articles of Organization and Operating Agreement or Code of Regulations and all amendments thereto;
- b. Certificate of Continued Existence. If the mortgagor is a foreign limited liability company holding a license, and a Certificate of Continued Existence from the State with jurisdiction, or, alternatively, a legal opinion from an attorney licensed to practice in the State in which the project is located to the effect that

the limited liability company is qualified to do business and hold title to real estate in that State;

- c. Enabling resolution which authorizes the loan and designates the appropriate Managing Member to execute the loan documents; and
- d. Incumbency Certificate with authorized Member's signature

**C. Section 223(a)(7) Mortgage (Deed of Trust) and Security Agreement.**

1. Section 223(a)(7) Mortgage (or Deed of Trust). The Section 223(a)(7) insured mortgage/deed of trust must be a first lien on the entire property. The property also includes major kitchen appliances financed from mortgage proceeds. The Mortgage (or Deed of Trust) must be the one approved for use by HUD's Office of General Counsel for the State/Commonwealth in which the project is located.

2. Security Agreement and Financing Statement. The appropriate Uniform Commercial Code documentation (chattel mortgage where applicable) must be used as the security instrument for nonrealty equipment and furnishings in accordance with State/local requirements. The mortgagor's attorney's opinion should address the situation in which the owner is an out-of-state entity and UCC Financing Statement needs to be filed in the owner entity's home state.

- a. HUD should be named as an additional secured party, as its interest appears, under the Security Agreement and the UCC Financing Statements.
- b. The documents must be filed and/or recorded as specified by State/local law, which may include the appropriate local court, register of deeds, Secretary of State/Commonwealth or the State/Commonwealth corporation commission.
- c. Attach a property description (list(s) of major movable equipment) to the financing statement covering all the nonrealty equipment and furnishings. Furnishings do not need to be identified individually or with identification or serial numbers, unless it is customary in the jurisdiction to do so.
- d. The legal description attached to the financing statement should be identical with that used in the Regulatory Agreement.
- e. The financing statement should provide that it encumbers property that also is encumbered by a mortgage lien or real estate and should state the maturity date of the mortgage as follows:

The real property described in Exhibit A is subject to a mortgage/deed of trust recorded in Book \_\_\_\_\_, Page \_\_\_\_\_ of the \_\_\_\_\_ County Register of Deeds/Recorder's Office on \_\_\_\_\_, \_\_\_\_\_.

Final payment date on said mortgage/deed of trust is \_\_\_\_\_, \_\_\_\_\_. Record title owner of said

real estate is \_\_\_\_\_. This financing statement also relates to an obligation secured by a Security Agreement of even date herewith.

- 3. Liens. The property, including any non-realty equipment and furnishings covered by the mortgage/deed of trust, must be free and clear of all liens other than the insured mortgage, the mortgage restructuring and/or contingent repayment mortgage.
- 4. Standard Exculpatory Language to be added to the FHA State/Commonwealth form Mortgage/Deed of Trust:

Notwithstanding any other provision contained herein or in the Note, it is agreed that the execution of the Note shall impose no personal liability upon the mortgagor for payment of the indebtedness evidenced thereby and in the event of a default, the holder of the Note shall look solely to the property subject this Mortgage/Deed of Trust and to the rents, issues and profit thereof in satisfaction of the indebtedness evidenced by the Note and will not seek or obtain any deficiency or personal judgment against the mortgagor except such judgment or decree as may be necessary to foreclose or bar its interest in the property subject to this Mortgage/Deed of Trust and all other property mortgaged, pledged, conveyed or assigned to secure payment of the Note; provided, that nothing in this condition and no action so taken shall operate to impair any obligation of the mortgagor under the Regulatory Agreement herein referred to and made a part hereof.

**D. Mortgage (Deed of Trust) Note.** The Mortgage (Deed of Trust) Note must be in the form approved by HUD's Office of General Counsel for use in the State/Commonwealth in which the project is located. The mortgage/deed of trust is insured under the same Section of the National Housing Act as the existing insured first mortgage pursuant to Section 223(a)(7), e.g., Section 221(d)(4) pursuant to Section 223(a)(7) and PAE's counsel should insert the statutory reference in the endorsement panel of the Note along with the following standard language:

**For purposes of compliance with Section 223(a)(7)(D) of the National Housing Act, the contract of mortgage insurance regarding FHA Project No. [Old Project Number] is transferred to FHA Project No. [New Project Number], and said contract of mortgage insurance is hereby amended to reflect the terms, conditions and provisions of the National Housing Act as evidenced by the Federal Housing Commissioner's endorsement for insurance of this Note dated \_\_\_\_\_, \_\_\_\_\_, executed by \_\_\_\_\_, (Maker), and payable to \_\_\_\_\_, in the amount of \$ \_\_\_\_\_.**

- 1. The principal amount of the insured Note must be the same as that which is set out in the firm commitment for mortgage insurance, but shall not exceed the original principal amount of the existing insured first mortgage Note.

2. The term of the insured Note must be the same as included in the firm commitment for mortgage insurance, so long as the maximum term set out in the firm commitment does not exceed the unexpired term of the existing insured first mortgage, unless OMHAR determines that the insurance of a mortgage for an additional term inures to the benefit of the applicable insurance fund and has approved an additional term not more than twelve years in excess of the unexpired term of the existing insured first mortgage and **the duration of the ownership entity is at least coextensive with the term of the FHA-insured Section 223(a)(7) mortgage and any HUD-held secondary mortgage financing.**

3. The mortgage term starts on the date of commencement of amortization.

4. Prepayment Provisions. Except as specifically permitted herein, and subject to the conditions in paragraph 5 below, the Note must contain the following prepayment provisions:

a. For-Profit Ownership Entity.

1). Prepayment must be permitted in whole or in part so long as 30 days advance written notice is given to the mortgagee of the mortgagor's intent to prepay, except as is provided in paragraph 4.e. below.

2). Prepayments must be permitted for up to 15 percent of the original principal amount in any one calendar year without a prepayment charge. Prepayments exceeding 15 percent may be subject to a charge agreed to by the mortgagor and mortgagee and included in the mortgage.

b. Nonprofit Ownership Entity.

1). Upon prior consent of the FHA Commissioner, the mortgage debt may be prepaid in full.

2). The Commissioner may approve partial payment to reduce succeeding monthly payments over the remaining portion of the original mortgage term.

3). The Commissioner may also approve partial prepayments made after 30 days written notice. Prepayments exceeding 15 percent of the original principal amount may be subject to a reasonable charge on such excess agreed to by the mortgagor and mortgagee and included in the mortgage.

c. State and Local Bond Financed Project. Subject to compliance with paragraph 5 below, projects funded from tax-exempt or taxable bonds issued by State or local government bodies may include the following prepayment restrictions and prepayment penalty charges:

1). A prepayment restriction period (lockout) shall not exceed ten (10) years from the date of commencement of amortization, and

2). A prepayment penalty may be charged after expiration of the lockout stated in paragraph (1) above, provided the charge:

a). During the first year following the lockout does not exceed five (5) percent of the unpaid principal balance of the insured Note, and

b). Declines on a graduated basis (to the extent practicable, the decline in the penalty percentage should be the same each year), and

c). Does not exceed one (1) percent at the end of the fifth year following the lockout period.

d. Other Bond Obligations or GNMA Mortgage-Backed Securities. The term "Other Bond Obligations" refers to any agreement under which the insured mortgagee has obtained the mortgage funds from third party investors and has agreed in writing to repay such investors at a stated interest rate and in accordance with a fixed repayment schedule. Mortgages funded with the proceeds of GNMA mortgage-backed securities or "other bond obligations acceptable to OMHAR/HUD" may include the following prepayment restrictions and prepayment penalty charges, subject to compliance with paragraph 5 below:

1). A lockout not to exceed ten (10) years from the date of commencement of amortization;

2). A penalty charge provided the charge:

a). Does not exceed ten (10) percent at the end of the first year following the date of commencement of amortization,

b). Declines on a graduated basis, and

c). Does not exceed one (1) percent at the end of the tenth year following the date of commencement of amortization.

d). If the initial penalty is three (3) percent or less, the HUD override language, set out in paragraph 5 below, is not required.

3). A combination lockout and penalty charge in which:

a). The lockout period does not exceed ten (10) years from the date of commencement of amortization, and

b). The prepayment penalty does not exceed one (1) percent at the end of the tenth year following the date of commencement of amortization.

e. Section 223(a)(7) mortgages containing both bond financing, other than state or local government and GNMA Mortgage-Backed Securities may be subject to both a lockout provision and a penalty charge as set out in paragraph (d) above.

f. For all other Section 223(a)(7) mortgages prepayment lockout provisions are not permitted.

g. Prepayment provisions which are preprinted in the FHA form Note may be deleted if this Guide authorizes alternative provisions which supersede the printed provisions.

5. Conditions for including Prepayment Penalties and/or Lockout provisions in the Note. Compliance with the following conditions is required when prepayment penalties and/or lockouts are permitted.

a. Rider to the Note. Use of the language set out below is a condition of permitting lockouts for "State and Local Bond Financed Projects, "Other Bond Obligations or GNMA Mortgage-Backed Securities," and for any Note that contains a prepayment penalty that initially exceeds three (3) percent. The following language, must be included in a Rider attached to the Note, allowing HUD to override any prepayment penalty and/or lockout provision(s) in the event of a default:

**Notwithstanding any prepayment prohibition imposed and/or penalty required by this Note with respect to prepayments made prior to [enter first date on which prepayments may be made with a penalty of one percent or less] \_\_\_\_\_, \_\_\_\_\_, the indebtedness may be prepaid in part, or in full, without the consent of the mortgagee and without prepayment penalty if HUD determines that prepayment will avoid a mortgage insurance claim and is, therefore, in the best interest of the Federal Government.**

Mortgagees are permitted to request that PAE's counsel add the statement set out below, immediately following the above paragraph:

**HUD will consider exercising an override of the mortgagee's prepayment penalty and/or lockout provision only if the following conditions are met:**

**1). the project mortgagor has defaulted and HUD has received notice from the mortgagee as required by the regulations;**

**2). HUD determines that the project has been experiencing a net income deficiency, which has not been caused solely by management inadequacy or lack of owner interest, and which is of such a magnitude that the mortgagor is currently unable to make required debt service**

**payment, pay all project operating expenses and fund all required HUD reserves;**

**3). HUD finds that there is a reasonable likelihood that the mortgagor can arrange to refinance the defaulted loan at a lower interest rate or otherwise reduce the debt service payments through a partial prepayment; and**

**4). HUD determines that refinancing the defaulted loan at a lower rate or partial prepayment is necessary to restore the project to a financially viable condition and to avoid a full insurance claim.**

b. Rider to the Mortgagee's Certificate. The mortgagee is required to certify that in the event of a default during the term of the prepayment lockout and/or penalty (i.e., prior to the date on which prepayment may be made with a penalty of one percent or less), it will:

- 1). Request a 3-month extension of the deadline prescribed by 24 CFR 207.258 for filing a notice of its intention to file an insurance claim, and its election to assign the mortgage;
- 2). Assist the mortgagor to arrange a refinancing to cure the default and avert an insurance claim, if HUD grants the requested (or shorter) extension of the notice filing deadline;
- 3). Report to HUD at least monthly on any progress in arranging a refinancing;
- 4). Otherwise cooperate with HUD in taking reasonable steps to avoid an insurance claim
- 5) Require any successors or assigns to certify in writing that they agree to be bound by these conditions for the remainder of the term of the prepayment lockout and/or penalty period;
- 6). Notify HUD of the delinquency where a payment is not received by the 16th day of the month in which it is due.

6. Late Charge Provisions. The mortgagee may collect a late charge for the cost of handling delinquent payments, subject to the following:

- a. Charges must not exceed two cents per dollar of principal and interest more than 15 days in arrears.

b. Late charges must be separately charged to and collected from the mortgagor and cannot be deducted from any total monthly mortgage payment, or collected from any reserve escrow or from any interest accruals thereto.

7. Standard Exculpatory Language for the Section 223(a)(7) Mortgage/Deed of Trust Note:

Notwithstanding any other provision contained in this Note, it is agreed that the execution of this Note shall impose no personal liability on the maker hereof for payment of the indebtedness evidenced hereby, and in the event of a default, the holder of this Note shall look solely to the property described in the Mortgage/Deed of Trust, and to the rents, issues and profits therefrom, in satisfaction of the indebtedness evidenced hereby, and will not seek or obtain any deficiency or personal judgment against the maker hereof except such judgment or decree as may be necessary to foreclose or bar its interest in the property and all other property mortgaged, pledged, conveyed or assigned to secure payment of this Note, except as set out in the Mortgage/Deed of Trust of even date given to secure this indebtedness.

**E. Regulatory Agreement.** Because Section 223(a)(7) of the National Housing Act does not contain independent insurance authority, projects that obtain a Section 223(a)(7) refinancing will have the new mortgage insured under the same insurance section of the National Housing Act that the pre-existing first mortgage was insured under, pursuant to Section 223(a)(7). Therefore, the project's ownership entity must execute a new form regulatory agreement approved for the mortgage insurance program under which the pre-existing first mortgage was insured. Therefore, PAE's counsel needs to ascertain which form regulatory agreement the project is currently operating under and have the mortgagor entity execute the same form FHA Regulatory Agreement in conjunction with the OHMAR/Mark-to-Market Rider to the Existing FHA Regulatory Agreement and incorporate the new FHA Regulatory Agreement, with the Mark-to-Market Rider attached thereto, into the new Section 223(a)(7) insured mortgage by reference, in order to ensure HUD's regulation of the mortgagor entity.

**Mark-to-Market Closing Checklist for Section 223(a)(7)**

Project Name \_\_\_\_\_ Project No. \_\_\_\_\_  
Project Location \_\_\_\_\_,  
Name of the Mortgagor \_\_\_\_\_  
Name of the Mortgagee \_\_\_\_\_  
Mortgage Amount \$ \_\_\_\_\_  
Date of Insurance Commitment \_\_\_\_\_.

Closing attorney shall obtain five copies of each closing document. The following abbreviations are used below: Original ("Or"), Certified Original ("C"), and Machine Copy ("MC").

1. Commitment for mortgage insurance 1 OR, 5 MC
2. FHA Regulatory Agreement with Mark-to-Market Rider 1 OR, 5 MC  
(Same Form as for pre-existing insured mortgage)
3. Corporate Charter, Articles of Incorporation, and Bylaws; 1 C, 5 MC  
Partnership Agreement, Certificate and Agreement of  
Limited Partnership, or other agreement establishing  
mortgagor (see provisions in instructions to Form 92466).
4. Corporate Secretary's Certificate explaining changes or the 1 OR, 5 MC  
lack thereof) in Articles and Bylaws and/or General Partner's  
Certificate explaining any changes or the lack thereof to the  
Partnership Agreement. (No Form available).
5. Certificate of Good Standing from Sec. of State dated 1 C, 5 MC  
within 30 days of closing.
6. Authorizing Resolution for Corporation or Partnership 1 OR, 5 MC  
(No Form available).
7. Consent of Partners to Refinancing, if required by the 1 OR, 5 MC  
Partnership Agreement.
8. Land Lease - FHA 2070 (if mortgage is a leasehold) 1 C, 5 MC
9. Title Policy for Section 223(a)(7) Mortgage 1 OR, 5 MC
10. Evidence of Compliance with Housing Codes 1 OR, 5 MC  
(Obtain Letter or Certificate from local authority).

11. Release of Original Deed of Trust/Mortgage (See M2M Forms)	1 OR, 5 MC
12. Release of Original Security Agreement (if any) (See M2M Forms)	1 OR, 5 MC
13. Release of Original Regulatory Agreement (See M2M Forms)	1 OR, 5 MC
15. UCC Termination Filings State and County (Obtain State Form)	2 OR, 10 MC
16. Assignment from Original Mortgagee to New Mortgagee of Reserve for Replacements (No Form).	1 OR, 5 MC
17. Rehabilitation Escrow Agreement (M2M Form)	1 OR, 5 MC
18. Mortgagor's Oath (FHA-2478)	1 OR, 5 MC
19. FHA State Form Note	1 OR, 5 MC
20. FHA State Form Deed of Trust/Mortgage	1 OR, 5 MC
21. Security Agreement (If customary - No Form)	1 OR, 5 MC
22. UCC Financing Statements for State/County (Obtain State Form)	1 OR, 5 MC
23. FHA Mortgagor's Attorney's Opinion (Needs to be modified to work for 223(a)(7) closings)	1 OR, 5 MC
24. Mortgagor's Certificate - FHA Form 2433	1 OR, 5 MC
25. Mortgagee's Certificate - FHA Form 2434	1 OR, 5 MC
26. Mortgagee's Anti-Kickback Statement	1 OR, 5 MC
27. Mortgagor's Byrd Amendment Certificate	1 OR, 5 MC
28. Mortgagor's Byrd Amendment Certificate	1 OR, 5 MC
29. Title VI Compliance	1 OR, 5 MC

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| 30. EEO Certification (Form 92010)                               | 1 OR, 5 MC |
| 31. Agreement and Certification<br>FHA Form 3306 (If Applicable) | 1 OR, 5 MC |
| 32. Request for Final Endorsement - FHA Form 2455                | 1 OR, 5 MC |
| 33. Mortgage Insurance Premium Check                             | 1 OR, 5 MC |

**INSTRUCTIONS APPLICABLE TO TITLE INSURANCE POLICY FOR FHA-  
INSURED AND HUD-HELD FIRST MORTGAGES, AND  
INSTRUCTIONS APPLICABLE TO ALL TITLE INSURANCE POLICIES FOR  
MORTGAGE RESTRUCTURING SECOND MORTGAGES  
IN THE MARK-TO-MARKET PROGRAM**

**I. General**

**A.** The maximum single risk assumed by any single title insurer may not exceed 25% of that company's capital, surplus, and statutory reserves. Excess amounts may be covered by appropriate reinsurance arrangements with other acceptable title insurance companies.

**B.** All title insurance policies must be written by an insurer that has an acceptable rating from at least one of the following independent rating agencies:

1. a "Baa" or better rating from Moody's Investors Service; or
2. a "BBB" or better rating from Standard and Poor's, Inc.

**C.** All title insurance policies must be written by an insurer authorized to do business in the jurisdiction with the Property is located. This requirement does not apply to policies on IOWA projects, however, such policies must be written by an insurer authorized to do business and issue the policies in the jurisdiction where the policy is issued.

**D.** The title policies must be written by a title insurance company on the standard ALTA Loan Policy Form - Revised 10-17-1992 for all FHA-insured or HUD-held Mortgages (including Mortgage Restructuring Mortgages) or Mortgage Modifications.

**E.** The 1992 ALTA Loan Policy Form "Exclusion From Coverage" paragraph number 7 dealing with "creditor rights" must be deleted in its entirety.

**F.** The 1992 ALTA Loan Policy Form "Conditions and Stipulations" paragraph number 13 entitled "Arbitration" must be deleted in its entirety.

**G.** The title policies must include an Environmental Protection Lien Endorsement (ALTA Form 8.1). Subparagraph (b) of ALTA Form 8.1 may take exception for an entire state statute that provides for environmental protection liens that could take priority over any FHA-insured or HUD-held mortgages, only if specific sections or subsections are referenced.

**H.** The title policies must include the following Special Endorsement:

The Use Agreement for Multifamily Projects Participating in the Mark-to-Market Program Under the Multifamily Assisted Housing Restructuring Act of 1997, recorded prior to the first mortgage, does not constitute a covenant, condition, or restriction, under which the lien of the first mortgage referred to in Schedule A can be divested, subordinated or extinguished, or its validity, priority or enforceability impaired.

**II. Schedule A**

**A.** The amount of the first mortgage title policy must not be less than that of the original principal amount of the new FHA-insured first mortgage indebtedness, or modified FHA-insured or HUD-held first mortgage indebtedness; or in the case of a 100% payoff of the existing FHA-insured or HUD-held mortgage indebtedness without a refinancing, the amount of the title policy must not be less than the original principal amount of the new HUD-held Mortgage Restructuring Mortgage. In those instances where the Mortgage Restructuring Mortgage is the second mortgage the amount of the Mortgage Restructuring Mortgage title policy shall not be less than that of the original principal amount of the Mortgage Restructuring Note.

**B.** The effective date of all title policies must be as of the date of the endorsement of the new FHA-insured Mortgage, or the recordation of the Modification of the existing FHA-insured or HUD-held Mortgage; or, in the absence of a new FHA-insured, or modified FHA-insured or HUD-held Mortgage, the recordation of the Use Agreement and Mortgage Restructuring Mortgage.

**C.** In the case of a new FHA-insured mortgage, either in Schedule A, or by way of acceptable endorsement, the final first mortgage title policy should be issued to: "The Mortgagee and/or Secretary of Housing and Urban Development, their Successors and Assigns as their interests may appear." In all cases either in Schedule A, or by way of acceptable endorsement, the final Mortgage Restructuring Mortgage title policy should be issued to: "Secretary of Housing and Urban Development, his Successors and Assigns." The new insured mortgage, or modified existing insured or HUD-held mortgage, and the Modification of Regulatory Agreement must be listed in Schedule A-1.

**D.** Title Policies must insure that the existing modified first mortgage has been subordinated to the recorded Use Agreement or the Use Agreement is recorded prior to a new first mortgage in a refinancing and in Schedule B, Part II that the Mortgage Restructuring Mortgage constitutes a second (first if total prepayment of existing first

mortgage without a refinancing) lien on the mortgagor's fee simple estate in the mortgaged premises except the first mortgage lien approved by HUD/OMHAR.

**E.** When OMHAR does not require a new survey of the Property, the title insurance policies must include an endorsement that the legal description is the same as shown on a survey submitted at the time of the original closing.

**F.** Any appurtenant easements (such a access or utility easements) must be set forth in the legal description and affirmatively insured under Schedule A as a separate insured interest in land.

**G.** The title insurance policy must include, as an informational note, in Schedule A: the recorded plat number (and recording information), if any, and the property parcel number(s) or tax identification number for the jurisdiction in which the Property is located.

### **III. Schedule B - Part I**

**A.** Standard exceptions, such as, parties in possession, other matters not shown in the public records, and mechanics' and materialmen's liens that may be filed or unfiled, must be deleted.

**B.** If the title insurance policy includes any exception for taxes, assessments or other liens of a similar nature, the policy must insure that such taxes, assessments or other liens of a similar nature, are not yet due and payable.

**C.** OMHAR does not require a new survey if (i) the mortgagor certifies and delivers the most recent existing survey of the property to the new insured mortgagee and to OMHAR, (ii) the owner executes a certification that no changes have been made to the project and the survey continues to accurately depict the property, and (iii) the title insurance policies must include an endorsement that the legal description is the same as shown on the survey submitted and certified to by the mortgagor. Exceptions to specific matters as may be shown on a recorded plat must be specifically described and affirmative coverage must be obtained for any matters listed. The ALTA-9 endorsement will suffice provided that it expressly covers such matters.

**D.** OMHAR retains the right to require a survey; and if OMHAR requires a new survey, the standard survey exception included in the title policy **MUST** be deleted. Exceptions to specific matters as may be shown on a recorded plat must be specifically described and affirmative coverage must be obtained for any matters listed. The ALTA-9 endorsement will suffice provided that it expressly covers such matters.

**E.** All liens, encumbrances, conditions, restrictions, or easements must be included in the policy and must be sufficiently described so that its nature, width and location, can be discerned in the written description. Any exceptions to the easement rights of others to the Property must be listed as an "Easement." If OMHAR requires a new survey, the title policy must insure affirmatively that the improvements do not encroach upon the listed easements, or insure affirmatively against any loss or damage due to encroachment.

**F.** If OMHAR requires a new survey, any easements that are listed in Schedule B - Part I must appear on the survey, noted by deed book and page. If Schedule B - Part I indicates that there are easements that are not specifically located on the survey, the title policy must insure affirmatively against any loss resulting from the exercise, by the party to which the easement is in favor, of its right to use and/or maintain that easement.

**G.** If the title policy contains any exception for mineral rights, it also must include an endorsement offering affirmative protection against loss due to such matters.

**H.** Schedule B - Part I may include an exception for the "rights of tenants in possession as of the date hereof, as tenant's only, under unrecorded residential leases."

#### **IV. Schedule B - Part II**

**A.** Financing statements showing the Mortgagee as the secured party and related assignments to the Secretary of Housing and Urban Development, must be listed in Schedule B - Part II, and shall not be listed as an exception in Schedule B - Part I. The title policy should list the date of the financing statement, the date of recording, the parties set out thereon, and the recordation information for each office in which the financing statement is filed.

**Mark-to-Market Closing Checklist for Section 223(a)(7)**

Project Name \_\_\_\_\_ Project No. \_\_\_\_\_  
Project Location \_\_\_\_\_,  
Name of the Mortgagor \_\_\_\_\_  
Name of the Mortgagee \_\_\_\_\_  
Mortgage Amount \$ \_\_\_\_\_  
Date of Insurance Commitment \_\_\_\_\_.

Closing attorney shall obtain five copies of each closing document. The following abbreviations are used below: Original ("Or"), Certified Original ("C"), and Machine Copy ("MC").

1. Commitment for mortgage insurance 1 OR, 5 MC
2. FHA Regulatory Agreement with Mark-to-Market Rider 1 OR, 5 MC  
(Same Form as for pre-existing insured mortgage)
3. Corporate Charter, Articles of Incorporation, and Bylaws; 1 C, 5 MC  
Partnership Agreement, Certificate and Agreement of  
Limited Partnership, or other agreement establishing  
mortgagor (see provisions in instructions to Form 92466).
4. Corporate Secretary's Certificate explaining changes or the 1 OR, 5 MC  
lack thereof) in Articles and Bylaws and/or General Partner's  
Certificate explaining any changes or the lack thereof to the  
Partnership Agreement. (No Form available).
5. Certificate of Good Standing from Sec. of State dated 1 C, 5 MC  
within 30 days of closing.
6. Authorizing Resolution for Corporation or Partnership 1 OR, 5 MC  
(No Form available).
7. Consent of Partners to Refinancing, if required by the 1 OR, 5 MC  
Partnership Agreement.
8. Land Lease - FHA 2070 (if mortgage is a leasehold) 1 C, 5 MC
9. Title Policy for Section 223(a)(7) Mortgage 1 OR, 5 MC

10. Evidence of Compliance with Housing Codes (Obtain Letter or Certificate from local authority).	1 OR, 5 MC
11. Release of Original Deed of Trust/Mortgage (See M2M Forms)	1 OR, 5 MC
12. Release of Original Security Agreement (if any) (See M2M Forms)	1 OR, 5 MC
13. Release of Original Regulatory Agreement (See M2M Forms)	1 OR, 5 MC
15. UCC Termination Filings State and County (Obtain State Form)	2 OR, 10 MC
16. Assignment from Original Mortgagee to New Mortgagee of Reserve for Replacements (No Form).	1 OR, 5 MC
17. Rehabilitation Escrow Agreement (M2M Form)	1 OR, 5 MC
18. Mortgagor's Oath (FHA-2478)	1 OR, 5 MC
19. FHA State Form Note	1 OR, 5 MC
20. FHA State Form Deed of Trust/Mortgage	1 OR, 5 MC
21. Security Agreement (If customary - No Form)	1 OR, 5 MC
22. UCC Financing Statements for State/County (Obtain State Form)	1 OR, 5 MC
23. FHA Mortgagor's Attorney's Opinion (Needs to be modified to work for 223(a)(7) closings)	1 OR, 5 MC
24. Mortgagor's Certificate - FHA Form 2433	1 OR, 5 MC
25. Mortgagee's Certificate - FHA Form 2434	1 OR, 5 MC
26. Mortgagee's Anti-Kickback Statement	1 OR, 5 MC

Revision dated 9-22-00

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| 27. Mortgagor's Byrd Amendment Certificate                       | 1 OR, 5 MC |
| 28. Mortgagor's Byrd Amendment Certificate                       | 1 OR, 5 MC |
| 29. Title VI Compliance  | 1 OR, 5 MC |
| 30. EEO Certification (Form 92010)                               | 1 OR, 5 MC |
| 31. Agreement and Certification<br>FHA Form 3306 (If Applicable) | 1 OR, 5 MC |
| 32. Request for Final Endorsement - FHA Form 2455                | 1 OR, 5 MC |
| 33. Mortgage Insurance Premium Check                             | 1 OR, 5 MC |