OGC/MFH Training: Revised MFH Loan Closing Documents

4/2/15

1. Sources of Information
2. Notice, 79 Fed. Reg. 40131 (July 11, 2014); 79 Fed.Reg. 18305 (April 1, 2014);

78 Fed. Reg. 64524 (Oct. 29, 2013)

1. HUDClips
2. HUD.gov>Program Offices>Housing>Multifamily>MultifamilyHousing-Renting
3. HUD.gov>Program Offices>General Counsel>Frequently Asked Questions
4. Date to Start Using New Forms: firm commitments issued on or after August 10, 2014
5. How to Identify New Forms:
6. Effective Date in lower right hand corner of the document (06/14)
7. Expiration Date in top right hand corner (6/30/2017)
8. Significant Changes
9. New Documents – not used in the past
10. Consolidated Certifications (HUD-91070M)
11. New Document Numbers for Previously Used Forms
12. Surveyor Instructions and Report (HUD-91073M), replaces HUD-92457M and HUD92457A-M.
13. Escrow Agreement for Off-site Facilities (HUD-91071M), replaces FHA 2446.
14. Substantive Changes to the Body of the Document

**Note** (HUD-94001M)

-Sec. 8: adds a reference to the parties who signed Sec. 50 of the Regulatory Agreement, thereby ending the need to name those parties in this document.

-Sec. 9(a), Alternative B, GNMA funded loans: clarifies that nothing should be contained in the Rider to the Note except the prepayment premium schedule.

-Sec. 9(c)(1): removes Lender’s choice and establishes less than 30 days prior to Maturity as the date upon which no payments on the loan can be considered a prepayment

-Sec. 9(c)(4): adds that payments of either interest or loan fees and charges which exceed that permitted by law and used to reduce the balance of the insured loan, does not constitute a prepayment of the loan.

-Sec. 9(h): adds a catch-all for when HUD can permit prepayment of a loan insured under Sec. 223(f), in addition to the standard requirement that the Borrower execute a 5 year rental housing use agreement.

-Endorsement Panel: replaces former panel that was used for all types of loans and creates individual panels for each type of insured loan.

-Endorsement Panel: per 2/19/15 FAQ, the HUD signature line will be revised in next set of document revisions, but can be revised in each closing to refer to HUD signer as Authorized Representative.

**Security Instrument** (HUD-94000M)

-deletes entire Table of Contents

-Sec. 1(v): expands definition of Loan Documents to include all closing documents (old = Note, SI, Reg. Agree only)

-Sec. 1(w): expands definition of Mortgaged Property to include after acquired property

-Sec. 1(w): permits listing of non-project funds in accounts that are not included within definition of Mortgaged Property. (exp. Equity contributions, gifts)

-Sec. 2: adds sentence that recognizes the existence of UCC financing statements that will be released at or after closing.

-Sec. 2: adds language requiring Borrower to notify Lender of any event that would require amendment to UCC to retain perfection of security interest.

-Sec. 4(f)(1): deletes requirements concerning SNDAs for commercial leases, which leaves Notice H2011-07 as the governing document.

-Sec. 6: adds a reference to the parties who signed Sec. 50 of the Regulatory Agreement, thereby ending the need to name those parties in this document.

-Sec. 7(a)(1)(ii): changes maximum monthly service charge payable by Borrower to HUD for HUD held notes from the lesser of that required by law or 1/12 of ½ percent to the lesser of that required by law or by Program Obligations.

-Sec. 9: changes Lender’s obligation to declare a default under the insured loan when there is a default under the Regulatory Agreement from optional to mandatory at HUD’s direction.

-Sec. 19(a): clarifies that flood insurance must cover both the buildings and all items contained within the building that were paid for out of loan proceeds.

-Sec. 19(f): clarifies that repayment of the insured loan from insurance proceeds is not a voluntary prepayment and not subject to prepayment penalties under the Note.

-Sec. 19(g): clarifies that Lender shall provide evidence to HUD that the insured property is not repairable before applying insurance proceeds to pay off the insured loan.

-Sec. 31(a): changes portion of the definition of Business Day from a reference to when Lender s not open for business to when the Federal Government is not open for business.

-Sec. 32: adds sentence requiring any loan servicer be HUD-approved.

-Sec. 36(a): adds sentence in which Borrower acknowledges that it is not a third party beneficiary to HUD’s contract of mortgage insurance with Lender.

**Regulatory Agreement** (HUD-92466M)

P.1: removes reference to whether the project is elderly or non-elderly and removes reference to whether the Borrower is for-profit, non-profit, or limited distribution.

P.1: add reference to a Residual Receipts Rider to the Regulatory Agreement, if applicable. Rider is at Sec. 5.5 of Multifamily Closing Guide.

Sec. 1(d): adds definition of Construction Contract

Sec. 1(j): changes reference to location of definition of Goods and Services from Sec. 24 to Sec. 22.

-deletes definition of Limited Dividend Borrower.

-Sec. 1(r): adds definition of Loan

-Sec. 1(s): changes definition of Mortgaged Property to include after-acquired property.

-deletes definition of Non-profit Borrower.

-Sec. 1(s): permits listing of non-project funds in accounts that are not included within definition of Mortgaged Property

-removes definition of Public Body Borrower

-Sec. 1(bb): clarifies the definition of Reasonable Operating Expenses.

-deletes definition of Residual Receipts.

-Sec. 2, Funds for Construction or Repair: creates separate paragraphs with check boxes for construction funds and repair funds

-Sec. 4: incorporates Borrower obligations under the Lender’s Certificate into the Regulatory Agreement

-Sec. 5, Commencement of Construction or Repairs: creates separate paragraphs with check boxes for new construction/substantial rehab and for refinance repairs

-Sec. 7, Required Permits: creates separate paragraphs with check boxes for new construction/substantial rehab and for refinance repairs

-Sec. 8, Accounting Requirements: creates separate paragraphs with check boxes for new construction/substantial rehab and for refinance repairs

-Sec. 10(b): removes place to insert initial deposit to R4R, which is now only listed in Lender’s Certificate or Request for Endorsement; monthly deposit amount remains

-Sec. 11, Residual Receipts: deleted

-Sec. 13: moves and revises definition of Surplus Cash from Sec. 1 to Sec. 13

-Sec. 14(d): revises rules on distributions by deleting limitations to semi-annual or annual, instead referencing local or state law, and by removing all references to non-profit or limited distribution owners.

-Sec. 15, Borrower Advances: adds a definition of Borrower Advances and revises the terms under which such advances and interest thereon can be repaid.

-Sec. 18: expounds upon financial reporting requirements

-Sec. 21: combines and incorporates previous sections 21-23 requirements concerning the management of the project and lists 7 items specifically required by HUD to be contained in the management agreement.

-Sec. 30: adds a new section in which occupancy restrictions imposed by HUD, or by another party, must or can be listed, respectively.

-Sec. 36(b): removes the time period “during the term of this Agreement” for a violation of the Regulatory Agreement from fraud, material misrepresentation or omission

-Sec. 36(c): changes one of the types of violations of the Regulatory Agreement from impairing HUD’s interest in the property to impairing the value of the property.

-Sec. 37(b)(ii): changes Lender’s ability to declare a default under the mortgage from optional to required upon HUD’s declaring a default under the Regulatory Agreement.

-Sec. 46(a): clarifies definition of Business day to include any day upon which the Federal Government is closed for business, and that unless identified as referring to business days, a time period is considered to refer to calendar days.

-Sec. 49: adds a new section that explains the relationship of HUD, Lender and Borrower, specifically stating no one else is a party or intended beneficiary of HUD contract of mortgage insurance to the Lender.

-Sec. 50: deleted and replaced with an Addendum

-deletes list of attached Exhibits.

-Note: per 2/19/15 FAQ HUD forms 92466 R-1, R-2, R-3 and R-4 (Riders to Regulatory Agreement) are being revised and should not be used with the form HUD92466M, but can still be used with form HUD92466M-11 if applicable.

**Lender’s Certificate**

-Sec. 3: adds requirement that any successor Lender or Servicer must be approved by HUD.

-Sec. 7, Construction Loans: changes date that Lender must submit a draw request to HUD from 5 days prior to disbursing funds to 30 days after disbursal. Removes need for HUD approval of draws.

-Sec. 14(a): removes reference to a separate Security Agreement and replaces it with UCC

-Sec. 15: adds language requiring a PCNA every 10 years from date amortization of loan begins and allows the use of R4R funds to pay for it.

-Sec. 20: moves definition of Financing Charges from Sec. 37 to Sec. 20.

-Sec. 20(b): adds a place for Lender to insert the amount of the Initial Servicing Charge, if applicable.

-Sec. 20(c): adds requirement that Lender list names of parties responsible for paying loan extension fees in an addendum attached to form.

-Sec. 24(b): shortens date that triggers Lender notification to HUD of the failure of Borrower to make a monthly payment from 15 to 10 days after due date.

-Sec. 29 and 30: reduces number of attachments by deleting a list of all non-HUD form closing documents submitted for the closing and by deleting a certification from the Borrower concerning obtaining permits, licenses, and other necessary approvals.

**Request for Endorsement** (HUD-92455M)

-Sec. 2: removes reference to a separate Security Agreement and replaces it with UCC.

-Sec. 6: adds requirement that any successor Lender or Servicer must be HUD approved

-Sec. 11: moves definition of Financing Charges from Sec. 11 to Sec. 21

-Sec. 15(c): adds an additional choice for amount of non-critical repair escrow (110%), adds sentence in which to list 50% cash out escrow required in 223(f) closings, and removes requirement of attaching the escrow agreement as an exhibit.

-Sec. 15(d): adds a section to list required deposit to R4R account

-Sec. 15(e): adds a section to list required deposit to Residual Receipts account

-Sec. 19: adds language requiring a PCNA every 10 years from date amortization of loan begins and allows the use of R4R funds to pay for it

-Sec. 21(b) and (c): delete listings of construction loan financing fee and extension fees, as well as permanent placement fee and discounting fee, respectively and replaces them with places to enter an initial service fee and a placement fee.

-Sec. 29 and 30: reduces number of attachments by deleting a list of all non-HUD form closing documents submitted for the closing and by deleting a certification from the Borrower concerning obtaining permits, licenses, and other necessary approvals

-Sec. 35: adds a section to list Exhibits attached to the RFE.

Note: starting in Part I(C), the numbered paragraphs no longer revert to No. 1, so Part C contains paragraphs 15-20 and Part I(D) contains paragraphs 21-35.

**Request for Final Endorsement** (HUD-92023M)

-p.1: adds new paragraph and exhibit where Lender states and lists documents that confirm that Borrower has obtained all government licenses, permits and approvals to own and operate the project, to carry out its obligations under the loan documents and under Federal law.

**Surveyor Instructions and Report** (HUD-91073M), replaces HUD-92457M and HUD92457A-M.

-Certification language required to be on the survey has changed from special HUD language to standard ALTA/ACSM 2011 minimum standard detail requirements language (see bottom of page 1 of form).

-Certification language (special HUD language) formerly required to be on the survey has been moved to be on the Surveyor’s Report (see bottom of page 2 of form).

**Consolidated Certifications** (HUD-91070M)

-will replace separate certifications for: Byrd Amendment, Title VI Compliance, Low Income Housing Tax Credit, Equal Employment Opportunity, and Affirmative Fair Housing Marketing.

-this form will become part of Firm Application requirement, not closing checklist

**Agreement and Certification** (HUD-93305M)

-removes HUD from being a party/signatory to the document

-Sec. 14: adds a new section in which to insert additional certifications required by the Firm Commitment, if any.

**Borrower’s Oath** (HUD-92478M)

-deletes Section 2, which confirmed no discrimination against children under 18 years of age, unless it was a senior only building under Regulatory Agreement (i.e. no familial status discrimination unless it is a HOPA project). -Note: no familial status discrimination is now covered in the Consolidated Certifications.

-Note: there is still much confusion on HOPA and familial status discrimination due to the Ted Toon memo on age-restricted housing waivers.

**Subordination Agreement** (HUD-92420)

-Sec. 1(p): adds an Exhibit B, containing a list of the subordinate loan documents

-Sec. 4(a): clarifies that either a new title policy or an endorsement to an existing title policy is acceptable to ensure HUD’s lien position.

-Sec. 4(c): clarifies that submission of a set of subordinate loan documents is not required for Sec. 223(a)(7) refinances.

-Sec. 10: add requirement for consent of subordinate lien holder to modifications or refinancings of HUD-insured debt that would increase the original principal amount or the interest rate, or decrease the original maturity date of the loan.

**Surplus Cash Note** (HUD-92223M)

-Sec. 2: clarifies that only 75% of Surplus Cash can be used to repay the surplus cash loan.

**Building Loan Agreement** (HUD-92441M)

-Sec.5: allows for an alternative schedule (Exhibit C) of how loan funds and how Borrower funds will be disbursed if no Disbursement Agreement is used.

**Construction Contract** (HUD-92442M)

-Art. 15: adds a new article that requires HUD approval of any mediated or non-binding arbitrated dispute settlement agreement to be effective. This does not change the rule that binding arbitration provisions be stricken from the construction contract and owner-architect agreements.

-signature page: removes requirement for 6 original signatures.

**Escrow Agreement for Off-site Facilities** (HUD-91071M)

-replaces form FHA 2446

-Sec. 2(b): removes requirement that use of a letter of credit be approved in the Firm Commitment.

-Sec. 3: clarifies definition of Latent Defects

**Escrow Agreement for Non-critical Deferred Repairs** (HUD-92476.1M)

-Sec. 2: adds alternative amounts of additional escrow required over and above estimated cost or repairs for different insurance programs (20% 223(f), 10% 223a7, other).

-Sec. 8: adds a reference to Sec. 9 (excess repair money and reduction of maximum insurable loan where repair cost needed to support amount of loan) as an exception to how any remaining balance of escrowed funds are released.

-Sec. 8: deletes specific sources of the remaining balance of escrowed funds, thereby making this paragraph applicable to any remaining funds regardless of their source

-Sec. 9: adds requirement that a supplemental cost certification must be submitted and a new Maximum Insurable Mortgage calculation must be made if repair costs are less than estimated.

-Sec. 9: clarifies that using excess escrowed funds to reduce the outstanding balance of the loan does not constitute a prepayment.

**Escrow Agreement for Working Capital** (HUD-92412M)

-Sec. 2: requires that in new construction, the escrow amount is split equally between working capital and construction contingency.

**Opinion of Borrower’s Counsel** (HUD-91725M)

-Doc. A: changes word “Principal” to “General Partner, Managing Member, or Manager”

-Doc. A(4): adds a subsection in which the authorizing resolution should be described.

-Doc. V: add a space to list secondary financing documents

-Opinion No. 1: removes distinction between the situation where the Borrower’s attorney prepared or did not prepare the Borrower’s organizational documents and removes all alternative language previously associated with the former, allowing all attorneys to rely on the good standing certificate.

-Opinion 7: add “material” to the type of default not caused under other agreements by the loan documents

**Instructions to Opinion of Borrower’s Counsel** (HUD-91725M-INST)

-p.2, 2nd full paragraph: removes 241(a) supplemental loans as a type of loan for which the form Opinion can be adapted and used.

-p.3, List of Documents: instructs attorney to add documents reviewed that are not listed in form.

-Doc. A: changes word “Principal” to “General Partner, Managing Member, or Manager”

-Doc. W: adds a new document entitled, “First Lender Consent”, for times when a secondary financing lien is approved.

-Doc. CC: adds a new document entitled, “Survey Affidavit of No Change” to be used in 223(a)(7) refinances when a new survey is not required.. This document is found at Sec. 5.6 of the 2014 Multifamily Closing Guide.

-deletes requirement for a certificate of no changes from the surveyor or an architect.

-Doc. GG: deleted section entitled, “On-site Escrow Deposit”

-Opinion No. 1: per 2/19/15 FAQ, the first 3 sentences of this instruction are deleted to be consistent in removing distinctions and choices previously contained in form HUD91725M for attorneys who drafted entity formation documents and those who did not.

-Opinion No. 1: where a good standing certificate cannot be obtained, the attorney can modify the paragraph to state what due diligence (s)he did or that (s)he is relying on the due diligence of another attorney concerning the organizational status of Borrower, General Partner, Managing Member or Manager.

-Confirmation re: Liens: removes word “encumbrances” and focusses solely on liens.

**Exhibit A to Opinion of Borrower’s Counsel (a.k.a. Certification of Borrower)** (HUD-91725-CERT)

-removes signature line from immediately following Opinion 8, so that Borrower only signs once, after final certification.

1. No Changes to Document

Completion Assurance Agreement (HUD-92450M)

Supp. to Building Loan Agreement (HUD-92441M-SUPP)

Supp. to Construction Contract (HUD-92554M)

Lease Addendum (HUD-92070M)

HUD Amendment to AIA Document B108 (HUD-92408-M)

Payment Bond (HUD-92452A-M)

Performance Bond – Dual Obligee (HUD-92452M)

Bond Guaranteeing Sponsors’ Performance (HUD-92477M)

Off-Site Bond – Dual Obligee (HUD-92479M)

Escrow Agreement for Incomplete Construction (HUD-92456M)

Escrow Agreement for Operating Deficits (HUD-92476a-M)

Escrow Agreement for Latent Defects (HUD-92414M)

Agreement of Sponsor to Furnish Additional Funds (HUD-92476M)

Request for Approval of Advance of Escrow Funds (HUD-92464M)

Residual Receipts Note (Nonprofit Borrowers) (HUD-91710M)

Residual Receipts Note (Limited Dividend Borrowers) (HUD-91712M)