

Chapter 16

Cash Flow Structures,
Deposit Account Control Agreements
(DACAs), and Deposit Account
Instruction Service Agreements (DAISAs)

16.1

Introduction

This chapter sets forth general principles to guide HUD staff review of proposed cash flow structures, Deposit Account Control Agreements (DACAs), Deposit Account Instructions and Service Agreements (DAISAs) and lease cost/debt service payment methods. It is the requesting parties' responsibility to establish structures and submit documents that comply with applicable ORCF Section 232 Program rules and that are acceptable to HUD. Operators of healthcare facilities typically generate accounts receivable that arise from governmental healthcare insurance programs (e.g., Medicaid, Medicare, Veterans' Administration Programs, or other governmental entities) ("Governmental Receivables") as well as from commercial insurers, private payors, or miscellaneous revenue ("Non-Governmental Receivables").

- A. **Governmental Receivables.** Healthcare insurance programs typically require that Government Receivables be paid directly to the healthcare provider and/or electronically deposited into a deposit account subject to the provider's control (as opposed to the Lender's control). These programs typically also limit the ability to directly assign such receivables. HUD expects that Governmental Receivables will be initially deposited into a separate account that will be subject to the control of the provider and governed by a Deposit Account Instructions and Services Agreement (DAISA).
- B. **Non-Governmental Receivables.** HUD expects that Non-Governmental Receivables will be initially deposited into an account that is subject to a Deposit Account Control Agreement (DACA) (sometimes referred to as a "Blocked Account Agreement"). HUD also expects that the DAISA will provide that funds from the DAISA account will be periodically (i.e. daily unless otherwise approved by HUD) swept from the DAISA account into the DACA account.
- C. **Cash Flow Structures.** Depending on the structure and nature of a particular transaction, the cash flow chart typically includes the placement and number of DAISA and/or DACA accounts, the type of DACA used, and the manner in which lease costs/HUD mortgage loan debt service are made. Occasionally state law or a particular healthcare program may affect

how a particular transaction can be structured. Regardless of the cash flow structure, the deposit accounts must comply with any applicable HUD Program Obligations, including any requirements that such accounts be federally insured (or if balances exceed such insurance limits, be held at an institution subject to any ORCF Section 232 Program regulatory exceptions). This may be of particular concern where commingled accounts, with large daily balances, are proposed (see below, in Section 16.4.G). Deposit accounts must not be held outside the United States, and must be denominated in U.S. currency.

[NOTE: Submission and approval of the cash flow chart and the use of at least one DACA (and DAISA, if there are governmental receivables) is required regardless of whether AR financing is proposed.]

- D. **Lockboxes.** A lockbox is a mechanism that allows a financial institution to collect and process account receivables by having an operating entity's payments sent directly to a location accessible by the financial institution. Lockboxes are often used when payments to multiple operating entities are made to the same account.

16.2

Submission and Review

ORCF will evaluate cash flow structures, DACAs and DAISAs pursuant to the guidance provided in this chapter for the following programs:

- A. Section 232 for new construction or substantial rehabilitation,
- B. Section 232 pursuant to Section 232/223(f)¹ for purchase or refinance,
- C. Section 232 pursuant to Section 232/223(a)(7) or Section 232 pursuant to 223(f) pursuant to 223(a)(7) for refinancing,
- D. Section 241(a) for supplemental loans in connection with a 232 loan under one of the categories described above, and
- E. Section 223(d) operating loss loans in connection with a 232 loan under one of the categories described.

Review of cash flow structures, DACAs and DAISAs may take place at various times, such as during the firm application process, post-closing or at a later point in time during the life of the FHA-insured loan.

F. During the Firm Application Process:

- 1. **Section 232/223(a)(7) and Section 232/223(f)** – HUD expects review to take place as part of the review of the application and document submission for closing.
- 2. **Section 232 New Construction** – HUD will generally not require DACAs or

¹ Negative working capital (accounts payable exceeding accounts receivable) must not be included as existing indebtedness in proposed Section 232 refinance transactions.

DAISAs to be put in place until the project reaches 70% completion. The application and initial closing submission should still include the cash flow chart and, when available, any AR Loan Documents. DACAs and DAISAs must be in place, in any event, by the earlier of: i) the date of final closing, or ii) the closing of any AR Loan.

3. **Section 232 Substantial Rehabilitation** – HUD generally requires the submission of cash flow charts, DACAs and DAISAs as part of the application and document submission for initial closing.
4. **Section 241(a) Supplemental Loans and 223(d)** - Operating Loss Loans in connection with 232 loans in any of the above categories– HUD generally requires the submission of cash flow charts, DACAs and DAISAs as part of the application and document submission for initial closing.

G. **Post-closing.** See Asset Management Chapter 10 for guidance, except for the following:

1. **Transfers of Physical Assets or change in Operator.** Reviews are required in connection with a transfer of physical assets (TPA) or change in Operator. The TPA occurring in conjunction with an FHA-insured loan closing should be directed to the HUD Underwriter assigned to the project.
2. **After a Cut-Off Time has occurred involving AR Financing.** Once a Cut-Off Time occurs, FHA Lender can require the establishment of separate deposit accounts into which payments with respect to Accounts arising after the Cut-Off Time are to be deposited consistent with the terms of the Intercreditor Agreement. The Lender shall diligently exercise its rights under the applicable contractual documents so as to best protect the FHA-insured collateral.

H. **Portfolios.** In all the above instances, it should be determined if a portfolio acceptance letter applies and whether an overall cash flow chart was approved during portfolio review, so that it can be determined:

1. If the proposed structure is consistent therewith, and
2. If a DACA and/or DAISA form has been previously approved in conjunction with the portfolio approval.

If a project involves accounts receivable financing and is part of a portfolio that requires a portfolio review, review of the proposed cash flow structure will generally take place at the time of the portfolio review and a cash flow chart should be submitted at that time. Review of the associated documents, including DACAs, DAISAs, Intercreditor Agreement (for AR

Financed Projects), etc. may take place when the projects are assigned to an ORCF Underwriter.

- I. In all of the above instances, if an existing AR Lender is being replaced, the parties must make arrangements acceptable to HUD for termination of any existing DAISAs or DACAs in favor of such AR Lender.
- J. **Exceptions.** ORCF understands that in the case of Section 232/223(a)(7) applications, there may be justification for ORCF to waive strict adherence to its current policies with regard to executing DACAs.
 1. Waivers may be considered for a DACA on a Section 232/223(a)(7) application if the subject facility seeking refinance pursuant to 223(a)(7) is operated by a non-IOI Operator and was finally endorsed prior to the issuance of HUD Housing Notice 2008-09.
 2. FHA Lenders, at the time of the Section 232/223(a)(7) transaction, must obtain a DACA on the Operator's receivable bank account. Otherwise, the Lender must request a waiver. ORCF may grant the waiver subject to the following conditions (these provisions will be added to the Healthcare Regulatory Agreement – Borrower (Form HUD-92466-ORCF) (Borrower's Regulatory Agreement) and Healthcare Regulatory Agreement – Operator (Form HUD-92466A-ORCF)):
 - a. A special condition will be added to the firm commitment requiring a mortgage debt service reserve (amount to be determined by ORCF) to be in place until a DACA can be placed on the Operator's receivable bank account,
 - b. At lease renegotiation (excluding renewals that only involve an extension of the term) or termination, a DACA will be required of the Operator,
 - c. If accounts receivable financing is utilized in the future, a DACA will be required on the Operator's receivable bank account.

16.3

Cash Flow Charts

HUD recognizes that healthcare facility Operators, particularly when master leases, accounts receivable financing, and portfolios are involved, employ a variety of cash management systems and cash flow structures. On all Section 232 transactions, the Operator must submit to HUD a cash flow chart that depicts the flow of funds arising from operation of the project, from receipt through payment of project/lease costs and FHA-insured loan debt service. Once the cash flow chart is approved by HUD and the FHA Lender, it is attached to the Operator Security

Agreement (Form HUD-92323-ORCF) as an exhibit. (Borrowers that are also Operators are required to sign the Operator Security Agreement.)

The Appendices to this Chapter include sample cash flow charts showing the completion of Section 232 project cash flow charts. HUD expects a cash flow chart submitted pursuant to Section 232 to address and depict the following:

- A. All of the accounts through which project funds flow, or which are related to the project, (including investment accounts, if any) must be shown. The account into which Government Receivables are initially deposited and the account into which Non-Government Receivables are initially deposited must be identified.
- B. The depository bank name, account number and all parties named on each account must be depicted. If anyone other than the Operator is named on the account, the parties must explain who such person is and its relationship to the Operator. If the DAISA account is not in the name of the Operator, the parties must further demonstrate that such arrangement is permitted by the applicable governmental healthcare programs.
- C. Which accounts will be subject to DAISAs or DACAs, the parties to each, and the nature of each DACA (immediate control versus future notification) must be depicted (see below, in Section 16.6 for an explanation of the distinction between these two types).
- D. If AR financing is involved, the flow of AR loan disbursements and repayments must be shown. The cash flow chart must also show whether or not funds will go through any AR Lender account (e.g. for daily pay-downs) and the account into which AR loan draws (and any remittances of excess funds not necessary for pay-down) will be deposited.
- E. How lease costs/FHA loan debt service will be paid must be addressed and any tenant or master rent accounts that are proposed should be depicted. A “tenant rent account” is an account established solely for the purpose of funding lease costs, through AR loan draws or otherwise.
- F. If there is AR financing involving multiple projects, the cash flow chart must depict the above as to all projects within the AR line.
- G. If a master lease is involved, the chart must depict the Master Tenant’s position in the cash flow process (including any Master Tenant accounts and any deposit account agreements proposed to govern such accounts). Alternatively, the cash flow chart must demonstrate and the Intercreditor Agreement must address in a manner acceptable to HUD how the rent will be paid, and the Borrower(s) and Master Tenant must agree to the arrangement as evidenced by their signature on the ICA. .

A. **Definitions.** In cash flow structures, there are two categories of deposit accounts discussed: “upstream” accounts and “downstream” accounts.

1. An “**upstream**” account is any account through which funds flow prior to reaching a particular account.
2. A “**downstream**” account is any account through which funds flow after leaving a particular account.

B. **General provisions.** In many instances, HUD requires only a single DAISA account and a single DACA account, provided that such DACA account represents the account into which all of the non-Government Receivables are initially deposited and into which the DAISA funds are swept.

1. Typically, accounts which are “downstream” of an account subject to a DACA in favor of FHA Lender do not require a DACA in favor of the FHA Lender. In other words, if the cash flow chart shows that *all of the funds* being deposited into an account have already passed through a DACA account, then a separate DACA on such other account(s) is usually not required. There may be exceptions to this depending on the nature of the cash flow structure.
For example, a DACA is not required on “downstream” payroll accounts that are funded solely with funds that have first gone through an account subject to a DACA to which FHA Lender is a secured party.
2. A DACA would not be required on accounts into which funds that belong solely to residents, as opposed to the Healthcare Facility/Operator, are deposited (provided that any portion of any resident funds that are deposited into such accounts and to which the facility or Operator becomes entitled shall be promptly deposited into a DACA account to which FHA Lender is a party at the earliest point permitted by applicable law and the facility’s contracts with residents).

C. **Exceptions.** HUD may determine that a DACA is required on additional accounts:

1. For underwriting reasons,
2. If a Tenant Rent Account is used,
3. For a Master Tenant account (the account into which the lease payments from the individual facility Operators are made),
4. On an operating account, if a DACA upstream of the AR Lender account is used; such an upstream DACA typically calls for a daily sweep of funds into AR Lender’s account. Such an upstream DACA may have an alternative instruction as to where to sweep the funds at such time as AR Lender no longer is entitled to exercise control of the account under the Intercreditor Agreement (usually to the operating account). Further, due to the daily sweep of such upstream account, the bulk of funds will generally be in the downstream operating account;

5. On a Borrower Representative Account (described below),
6. If the AR Lender is also the depository, additional DACA's may be required to evidence such bank's agreement that it will waive or limit any rights of set-off, recoupment, banker's lien or contractual security interest in such other accounts (with the exceptions set forth below, in Section 16.6); and
7. In such other instances that may be appropriate given the structure of the transaction.

D. Types of Cash Flow Structures:

1. If the project is a single "stand-alone" project, involving just one FHA mortgage loan and one Operator, the cash flow chart will typically be as set forth on Appendix 16.1.
2. There are different types of AR financing, and the flow chart must make clear which type is contemplated. In one type, the AR loan borrower (typically, the Operator) simply draws on the AR loan when needed and pays it down as necessary to stay within its loan limits. The funds do not flow through an account held in the name of the AR Lender. AR Lender might also be the depository bank, but the accounts are held in the Operator's name. AR Lender, in its capacity as secured party, can access such funds only on a default (through enforcement of its DACA or set-off rights). These type arrangements are often seen where an Operator does not need a steady stream of loan availability in order to maintain its liquidity but rather is using the line as needed to protect against more minor cash flow shortfalls. A sample flow chart showing this can be found at Appendix 16.1.
3. In another type of AR Loan, the project's revenues flow through an AR Lender account, where they are applied by AR Lender to the outstanding balance of the AR loan on an ongoing basis. In this type of arrangement, it is usually contemplated that the Operator will be routinely making draws and that AR loan draws will be funding most, if not all, operating expenses. A sample flow chart showing this can be found at Appendix 16.2.

E. Cash Flow Structures & Governmental Receivables. Regardless of type, Governmental Receivables must flow through a DAISA account before going through the AR Lender's account.

1. For the cash flow structure type outlined above, in Section 16.4.D.3, funds may also go through a project specific, or commingled "upstream" DACA account prior to reaching the AR Lender account. See Appendix 16.3 for a specific example of this scenario.
2. An upstream DACA account must not be the project operating account. Rather, the project operating account may be an account that is downstream of the AR Lender. Thus, if such an upstream DACA is used, it may call for a periodic (often daily) sweep of funds into the AR Lender account until such time as AR Lender is no longer entitled to give a Control Notice (i.e. until such time as the right to give the Control Notice shifts to FHA Lender). The sweep of funds to AR Lender must not be

permitted once FHA Lender is entitled to give the Control Notice. The parties must plan in advance how funds will flow into the downstream operating account once the AR Lender is no longer in the picture.

3. In any instance where there is no upstream DACA, there must be a downstream DACA at the first account which funds go through after leaving the AR Lender's account.
 4. If the AR Lender requires a DACA on a downstream account, the FHA Lender should generally also be a party. See Appendix 16.2 for a specific example of this scenario.
- F. In the rare case where a project receives no Governmental Receivables (i.e. 100% private pay), the cash flow structure will only have a DACA.
- G. **Commingled Accounts:** If it is proposed that funds from more than one project will flow into an account (a "commingled account," as shown in Appendix 16.4) the parties must demonstrate that:
1. Systems must be in place which will permit the identification of funds belonging to each project at all times. Under the Operator's Regulatory Agreement if HUD determines that deposits cannot be reliably and readily traced by facility, HUD may direct Operator to deposit such funds in a segregated account.
 2. Operator compliance with the financial reporting required under 24 CFR 5.801 will also necessitate that the Operator(s) maintain accounts in a manner that will allow HUD and the FHA Lender to discern the funds attributable to each facility.
 3. Generally, HUD does not permit Governmental Receivables from different projects to be initially deposited into a commingled account. Any proposal to commingle Governmental Receivables from different projects, in addition to meeting the above standards, must demonstrate that such commingling is permitted or required by the applicable healthcare program payor rules.
 4. The use of commingled accounts is subject to HUD's written approval and must be identified on the cash flow chart, which must show all the facilities whose funds are proposed to flow through such account. An approved commingled account would be subject to the provisions of a DACA in accordance with Section 16.6. The Operators involved must be affiliated. Generally, accounts that commingle FHA-insured facilities with non-FHA insured facilities will not be permitted. Generally, the use of commingled accounts in connection with a master lease structure may be acceptable. The Operator Security Agreement and A/R Financing Certification (Form HUD-90020-ORCF) require that the account into which Governmental Receivables are

initially deposited be separate from the account into which Non-Governmental Receivables are initially deposited. So this sort of commingling is rarely permitted.

- H. Borrower Representatives on AR Line:** Occasionally AR Loan Documents (or documents for a centralized deposit account held by one of the Operators or an affiliate) may call for a single person or entity (usually called the “Borrower Representative”) to be the sole party authorized to make draws on behalf of multiple Operators; and may also call for such draws to all be initially deposited into a commingled account in the name of the Borrower Representative and/or for such draws to be deposited into separate project accounts as directed by Borrower Representative. Generally, this is encountered where an AR Loan includes many Operators (or will include, if it anticipates adding additional FHA facilities in the portfolio). Sometimes the Borrower Representative is proposed to be one of the Operators, and sometimes it is proposed to be a separate entity that is affiliated with the Operators. The cash flow chart must always depict any such proposed arrangement and any Borrower Representative accounts. Such arrangements raise a number of considerations and must be acceptable to HUD.

All documents evidencing the relationship between the Borrower Representative (in its capacity as such) and the Operators must be submitted for HUD’s consideration. The Borrower Representative must not be a creditor of the Operators; i.e. the documents should establish that the Borrower Representative is making such draws as agent for the other Operators and is not borrowing funds in its own capacity then “re-lending” such funds to other Operators. The Borrower Representative must be obligated to make and disburse draws to the respective facilities in a manner consistent with HUD Program Obligations, applicable HUD Regulatory Agreements (Borrower’s Regulatory Agreement, Operator’s Regulatory Agreement or Healthcare Regulatory Agreement – Master Tenant (Form HUD-92337-ORCF), and the Intercreditor Agreement with respect to each Facility. Additionally, the Borrower Representative will be required to sign a certification to disclose the named entity on the accounts managed or controlled by the Borrower Representative.

16.5

Lease Cost/Debt Service Payment Methods

The cash flow chart must show how “Current Impositions” (i.e. the rent, taxes and insurance, and deposits to escrows or reserves required under the Lease or other Borrower-Operator Agreement) will be paid. If the FHA Borrower is also the Operator, there are no lease payments so the chart will show only payment of debt service and deposits to escrows and reserves required by the FHA-insured loan documents. The method detailed in the cash flow chart must be consistent with and match the description in the Intercreditor Agreement. The Operator’s, Borrower’s (and where applicable, Master Tenant’s) execution of the Intercreditor Agreement evidences their agreement to the lease cost payment method, and also evidences the AR loan borrower’s authorization to the AR Lender to direct the proceeds of lease cost draws as provided therein.

- A. Acceptable Payment Methods.** Generally, the following methods are acceptable and consistent with the Intercreditor Agreement:

1. **Direct from AR Lender to FHA Lender.** The Operator directs AR Lender to disburse AR loan advances to pay Current Impositions or the current loan costs directly into an account in the name of the FHA Lender.
2. **Disbursement into Operator Designated Account.** If the proceeds of such an advance are not being paid directly to the FHA Lender, the FHA Lender must be able to receive by automatic debit or otherwise have the right to withdraw from an Operator account amounts at least equal to the Current Impositions or the current mortgage loan costs. If the FHA Lender is only receiving current mortgage loan costs, the Operator should be required to pay excess Current Impositions to the Borrower.
 - a. **Disbursement into Tenant Rent Account.** The Operator may establish a “Tenant Rent Account” whose sole purpose is for payment of Current Impositions and which is funded directly by AR loan draws (or by the Operator). The Operator must be obligated to timely cause to be deposited sufficient funds each month to pay such costs. AR Lender should disclaim any interest in such an account, and it will be subject to a DACA solely in favor of FHA Lender. An example of this scenario can be found in Appendix 16.2.

[NOTE: In this scenario, it is acceptable to use an immediate control DACA (as defined below) which permits the bank, after FHA Lender’s debit for debt service, to remit any excess to the FHA Borrower’s account. FHA Lender should be able to revoke such permission.]
 - b. **Disbursement into Operating Account.** Alternatively, draws for Current Impositions sometimes will be disbursed directly into the project’s general operating account. This alternative is generally acceptable for stand-alone or smaller transactions (so long as the FHA Lender has the ability to debit this account for Current Impositions) and may be less acceptable for more complex transactions. An example of this scenario can be found in Appendix 16.1.
3. **Disbursement into Master Tenant Account.** If a master lease structure is used, such advance may be made directly from AR Lender into the Master Tenant’s account. An example of this scenario can be found in Appendix 16.3.

In this scenario, it may be appropriate to use an immediate control DACA in favor of FHA Lender which permits Master Tenant, after FHA Lender’s debit for debt service, to remit any excess to the respective FHA Borrowers. FHA Lender should be able to revoke such permission.

Sometimes Current Imposition payments are proposed not to be made to the Master Tenant directly but are rather debited by the FHA Lender(s) directly from an Operator designated account. The Master Lease requires that rents be paid to the Master Tenant, who in turn pays the FHA Borrowers. Accordingly, if HUD approves such a proposal:

- a. If AR Financing is involved, the Intercreditor Agreement must evidence approval by Master Tenant and Borrowers of such method of payment.

- b. If AR financing is not involved and HUD approves a structure under which funds do not flow through Master Tenant, Master Tenant's and Borrower's agreement to such method of payment should be documented.

FHA Lender agrees to apply amounts received on account of Current Impositions toward payment of the FHA Borrower's monthly debt service obligation under the FHA Loan and to fund applicable escrow and reserve requirements, with the balance remaining of the payment so collected, if any, to be remitted by FHA Lender to the FHA Borrower (or such excess may be remitted to the FHA Borrower by the DACA Bank or Master Tenant after the FHA Lender debit if permitted by the DACA or by such other remittance method as may be approved by HUD).

16.6

Deposit Account Control Agreements (DACAs)

A Deposit Account Control Agreement (DACA) is an agreement between a debtor/account owner, a secured party, and the bank maintaining the account that the bank will comply with instructions from the secured party directing the disposition of funds in the deposit account without further consent by the debtor/account owner.

- A. **General Parameters.** Under the Uniform Commercial Code (UCC), a Lender must have a DACA with the depository bank to perfect its security interest in such deposit account as original collateral. There is an exception if the Lender is also the institution where the account is held (i.e. the Lender has possession of the account). However, even if FHA Lender is the depository bank, HUD generally still requires a DACA that clearly describes the priority of the liens.

AR Lender must also agree to limit its ability to assert other security interests, set-off, recoupment, or banker's liens in project accounts held by it as the depository (see Section 16.4).

In the event it becomes appropriate to do so, the FHA Lender shall "spring" any DACAs in a timely manner. In the event that the FHA Lender ultimately assigns the loan to HUD, it shall also assign the DACA to HUD.

- B. **Types of Deposit Account Control Agreements.** There are two primary types of DACA's: future notification, or "springing," DACA's, and immediate control DACA's.
 - 1. **Future Notification DACAs.** In a future notification, or "springing," DACA, the Operator is permitted to use the account as it normally does and to make withdrawals. The bank follows the Operator's instructions as to the account until such time as the secured party notifies the depository bank that it is exercising exclusive control (such a notice is referred to herein as a "**Control Notice**"). Once the Control Notice is given, the bank must follow only the secured party's instructions as to the disposition of funds in the account. Typically, the secured party can only give such a Control

Notice and “spring” the DACA (and any associated lockbox) once an event of default occurs under its loan documents.

- a. The FHA Lender DACA is typically a “future notification” DACA.
- b. The Operator Security Agreement contemplates that, unless otherwise approved by HUD, the FHA Lender DACA will be a future notification type DACA that can be triggered only on default.

2. **Immediate Control DACAs.** In an immediate control DACA, the secured party exercises control immediately and the bank is obligated from the date of the agreement’s execution to comply with the instructions of the secured party, and/or the Operator/account holder is precluded from making withdrawals. (Sometimes a DACA will be labeled “future notification” but the Lender gives the Control Notice at closing or within the document; these are, in effect, immediate control DACAs).

- a. If a Tenant Rent Account is used for the lease cost payment method, it may be appropriate to use an immediate control DACA in favor of FHA Lender on the Tenant Rent Account. Likewise, if a Master Lease is involved and lease payments are being made into a Master Tenant Account, it may be appropriate to use an immediate control DACA in favor of FHA Lender on such Master Tenant account.
- b. Where there is a DACA in place upstream of an AR Lender account, such DACA may call for daily sweeps into the AR Lender’s account and no withdrawals by the Operator.
 - i. Typically, if the FHA Lender is party to this DACA, FHA Lender’s ability to exercise control will still be linked to its future notification if the parties intend that this account serve as a general operating account once AR Lender control terminates.
 - ii. In this scenario, it may be appropriate to require a DACA on the downstream project operating account.

C. **Key elements of DACA.** HUD does not have a required form of DACA, though one or more sample forms are posted as unofficial guidance. These sample forms are only examples, and the responsible parties may use a different form, at their discretion, provided the form used addresses the key elements and is consistent with HUD Program Obligations.

Key elements for DACA’s include those set forth below. Elements that include “must” are expected to be included in all forms. The remaining elements should be included, but HUD has discretion to permit deviations (and additional provisions) that do not materially affect HUD’s interests.

1. **Parties to DACA:**

- a. Where no AR Loan is involved, the FHA Lender must be the only secured party named in the DACA. Parties will generally be the Bank, FHA Lender, and the Operator (or named account holder). The depository bank must be an organization engaged in the business of banking.
- b. Where an AR Loan is involved, both the AR Lender and FHA Lender can be named as secured parties in a single DACA, or a First Lien DACA (in favor of

AR Lender) and a Second Lien DACA (in favor of FHA Lender) may be used.

- c. HUD must not be a party to a DACA (unless the loan is held by HUD).
 - d. If a party other than the Operator is named on, or has an interest in, a deposit account in the flow of funds, such arrangement must be acceptable and comply with any restrictions in the FHA-insured loan documents. If required by FHA Lender and/or HUD, such third party must execute such joinders, security agreements, DACA's or other documents to bind such party's interest.
2. **Notification of Security Interests.** The DACA must include a provision notifying the Depository that the FHA Lender has a security interest in the deposit account and all checks, funds, monies or other items now or hereafter deposited therein and any lockboxes associated therewith.
3. **No Other DACAs.** The DACA should include representations to the effect that there are no other control agreements affecting the account and that none will be placed on the account (other than the DACA(s) approved as part of the transaction).

In any instance where a First Lien DACA and Second Lien DACA are used, the First Lien DACA must refer to and permit the Second Lien DACA (and vice versa).

4. **Accounts Covered.** The DACA must identify the account (or accounts) that are subject to the DACA. The account number(s) must match the cash flow chart (and the DAISA must be checked to ensure that it is sweeping funds into an account identified in the DACA). If the DACA covers more than one account, it should provide that FHA Lender can give a Control Notice as to any or all accounts.
5. **UCC Control Language and Execution.** To establish "control" within the meaning of the Uniform Commercial Code, the DACA must provide that Depository Bank will comply with FHA Lender's instructions as to disposition of funds without further consent of the debtor (typically the Operator). This language is referred to as "UCC Control Language". The DACA must be authenticated; i.e. it must be fully executed by all of the parties. Notarization is not required, unless required by state law. Provisions in the DACA allowing Depository Bank to file an interpleader action should not include disputes between depositor and FHA Lender/HUD.
6. **When Each Secured Party Is Entitled to Give Control Notice.** If both AR Lender and FHA Lender are parties to the same DACA, the DACA must clearly set forth when the Depository is obligated to follow the FHA Lender's (as opposed to AR Lender's) instructions, which must be consistent with the "change in control" or termination of DACA provisions in the Intercreditor Agreement.

In any instance where a First Lien DACA and Second Lien DACA are used, the First Lien DACA must terminate or provide for a change in control over to the Second

Lien DACA consistently with the “change in control” and termination provisions in the Intercreditor Agreement.

7. Giving and Implementing Control Notices:

- a. The DACA must clearly set forth the manner for sending a Control Notice and should identify when it is deemed given or received. The manner of giving a Control Notice must include expeditious means (i.e. it should not be limited to delivery by mail, but also include personal delivery or other prompt means).
- b. The depository bank should agree to implement the notice as soon as is reasonably practicable. The key is to be able to identify when the block begins, which must not be subject to significant delay. Implementation periods of longer than three business days after notice will not be acceptable.
- c. Once a Control Notice goes into effect, depository bank must agree to (a) disregard further instructions delivered by the Operator/account holder and block Operator’s/account holder’s access to the account (except for the purpose of making and accepting deposits) and (b) rely solely on instructions of the Secured Party giving the Control Notice.

8. Set-Off, Recoupment, Bank Liens and Security Interests. The depository bank, in its capacity as Depository Bank, must agree to limit any rights of set-off, recoupment, banker’s lien, or contractual security interest in the account and Account Collateral.

Generally, these should be limited to:

- a. If depository bank is also the AR Lender the obligations secured by the AR loan/security agreement, provided any such setoff must be subject to the Intercreditor Agreement;
- b. Its customary and usual fees in its capacity as depository bank related to the DACA account; and
- c. Returned items, customary collecting bank, or similar items related to the DACA account.

Because DAISA funds are swept daily and may be subject to legal restrictions that limit the bank’s ability to debit from such account, the foregoing (b) and (c) may include fees, returned items, etc. related to the DAISA account as well.

9. Termination of DACA:

- a. By Operator: Operator (debtor) should not be able to terminate the DACA (unless via a joint instruction with the Secured Party or Parties).
- b. By depository bank: The depository bank must be obligated to give notice to FHA Lender prior to its voluntary termination. A notice period of at least 30 days is expected (unless for breach, when a shorter period may be acceptable). Longer notice periods are favored.
- c. By secured parties: Either secured party can terminate their interest under the DACA by notice. The provisions on when AR Lender must terminate are controlled by the Intercreditor Agreement and do not need to be addressed in the DACA, but the DACA must be consistent with the Intercreditor Agreement. A termination by AR Lender must not terminate FHA Lender’s

interest under the DACA (or if a First Lien/Second Lien DACA are used, the Second Lien DACA); nor result in disposition of funds out of the account.

- d. Disposition of Funds on Termination: Generally, if the DACA is being terminated by the Operator or the bank, the DACA should direct the bank to direct the funds in the account on termination to an account designated by the Secured Party or Parties. This would typically be a replacement account set up by the Operator.

10. **Other Key Elements.** See Section 16.8 for additional key elements that apply to both DACAs and DAISAs.

16.7

Deposit Account Instructions and Service Agreements (DAISAs)

A Deposit Account Instructions and Service Agreement (DAISA) refers to the instructions provided to the bank by the account holder that details how the bank is to dispose of governmental healthcare funds in the deposit account. A DAISA must be used with respect to the deposit account(s) into which Government Receivables will be initially deposited. It is the parties' responsibility to assure that the DAISA comports with applicable healthcare program restrictions.

- A. **Key elements of a DAISA.** Currently HUD does not have a required form of DAISA, though it may post one or more sample forms as unofficial guidance. The sample forms are only examples, and the responsible parties may use a different form provided it addresses the key elements and is not inconsistent with HUD Program Obligations.

Key elements for DAISA's include those set forth below. Elements that include "must" are expected to be included in all forms. The remaining elements should be included, but HUD has discretion to permit deviations (and additional provisions) that do not materially affect HUD interests.

1. **Parties to DAISA.** If no AR Lender is involved, parties are typically the depository bank and Operator, and FHA Lender. If an AR Lender is involved, parties typically include the depository bank, Operator, FHA Lender and AR Lender. HUD must not be a party. If a party other than the Operator is named on or has an interest in the account, such arrangement must be acceptable to HUD and the parties must demonstrate this is permitted or required by the applicable government healthcare program. If required by FHA Lender and/or HUD, such third party must execute such DAISA's, joinders, security agreements, or other documents to bind such party's interest.
2. **Notification of Security Interests.** The DAISA should include a provision notifying the Depository that the FHA Lender has a security interest in the deposit account and all checks, funds, monies or other items now or hereafter deposited therein and any lockboxes associated therewith (especially if FHA Lender is not a party).

3. **No DACAs.** The DAISA should include representations to the effect that there are no control agreements affecting the account and that none will be placed on the account (other than those approved for the transaction).
4. **Accounts Covered.** The DAISA must identify the account(s) that are subject to the DAISA, which must match the cash flow chart, and any lockboxes associated with the account.
5. **Sweep Instructions.** The account holder (*not* the secured party) must instruct the depository bank to initiate a funds transfer (“daily sweep”) of available funds each business day (or, if expressly approved by FHA Lender and HUD when the DACA is approved, the account holder instruction may be for less frequent sweeping of the funds, but typically not more than 48 hours) into another account that is identified in the DAISA (typically, this will be the DACA account, unless HUD has approved a direct sweep into an AR Lender account). The account holder (not the Secured Party) should also instruct the bank not to permit account holder to make withdrawals from the account.
 - a. The DAISA must not grant either Lender the right to direct disbursement or to give instructions. It is not a control agreement and must not include the UCC Control Language or provisions allowing Lenders to give control notices.
 - b. Generally, Operator’s sweep instructions should be revocable and the DAISA should be terminable by the Operator (account holder) in order to comply with governmental healthcare program restrictions.
 - i. Restrictions on the account holder’s revocation or termination rights that are tantamount to FHA Lender control over the account should be avoided. For example, the DAISA should not condition the account holder’s right to revoke its instructions on FHA Lender consent *under the DAISA*. However, such a revocation or termination remains a default under the Operator Security Agreement if FHA Lender’s consent is not obtained under such security agreement.
 - ii. Provisions which delay implementation of a changed instruction and/or which require prior notice to FHA Lender are encouraged, though lengthy periods may be inconsistent with healthcare program restrictions and should generally be avoided. Exculpatory clauses restricting bank’s liability for failing to give such a notice are acceptable.
6. **The Bank must agree to limit rights of setoff, recoupment or any security interest or banker’s lien.** Limited exceptions (such as for their reasonable and customary fees, returned items, posting errors, etc.) may be acceptable but should be limited to items and fees related to this account only. No exceptions should be made for contractual security interests. AR Lender must waive its right to set off its loan against the DAISA account to the extent required by applicable law or governmental healthcare insurance program rules.

7. **Termination of DAISA:**

- a. By Operator: Operator (debtor) shall be able to terminate the DAISA in order to comply with Medicaid and Medicare anti-assignment requirements. However, failure to procure the FHA Lender's prior written consent to such termination may result in a default under the Operator Security Agreement.
- b. By depository bank: The depository bank must be obligated to give notice to FHA Lender prior to its voluntary termination of the DAISA. A notice period of at least 30 days is expected (unless for breach, when a shorter period may be acceptable). Longer notice periods are favored.
- c. By secured parties: The DAISA account is subject to the control of the healthcare provider, not the Lenders. Generally, the Lender is a party solely for the purpose of notifying the depository bank of its interest. Accordingly, the secured party has very few rights under a DAISA (for example, it may have the right to be provided bank statements and on-line access to monitor account activity, and/or to be notified of certain key events, like revocation of a sweep instruction on the account). The DAISA may provide for notification by the secured party to the bank when it no longer has any interest. However, such a notification should not have the effect of terminating the DAISA, as FHA Lender is continuing to rely on the sweep instruction. There may be exceptions (for example, if there is a separate DAISA to which FHA Lender is a party that remains in place and/or a new DAISA entered into concurrently).
- d. When AR Lender is the depository bank: the DAISA should refer to the AR Lender in its capacity as depository bank where appropriate.

8. **Other Key Elements.** See Section 16.8 for additional key elements that apply to both DACAs and DAISAs.

16.8

Key Elements for Both DACAs and DAISAs

- A. As referenced above, there are some elements that HUD expects to see in both DACAs and DAISAs. Those elements are as follows:
1. **Access to Account.** For the DACA, and for any DAISA to which FHA Lender is a party, depository bank must agree to provide FHA Lender upon FHA Lender's request (which need only be made once and not on a recurring basis) access to daily activity in the account and copies of periodic account statements delivered to Operator.
 2. **Account Maintenance Requirements.** If the depository bank is also the AR Lender, and it requires that Operator maintain its deposit accounts with it, then the DACA/DAISA must provide language to the effect that if the depository bank terminates the DACA/DAISA for reasons other than breach thereof, the Operator must be able to move its relationship notwithstanding any restriction to the contrary in its other agreements (or this can be addressed by AR Lender in its loan documents).

3. **Minimum Balance Requirements.** Occasionally, the parties may wish to include a minimum balance requirement in the DACA or DAISA:
 - a. To provide a source of payment for bank permitted debits, such as its fees,
 - b. To provide a source of funds for overpayment reconciliation for a government healthcare program, or
 - c. For other reasons.

Such an arrangement must be brought to ORCF's attention during underwriting, be reasonable in amount, and be acceptable to FHA Lender and HUD.

4. **Conflicts:**
 - a. The DACA and DAISA must provide that in the event of a conflict between the DACA and the bank's deposit agreement(s), the terms of the DACA and DAISA control.
 - b. Certain future events may be permitted by a DAISA or DACA but will still be defaults under the HUD Loan Documents. For example, to comply with government healthcare program rules, the DAISA normally permits the Operator to revoke its sweep instructions and/or to terminate the DAISA. These acts remain defaults under the FHA Loan Documents. The execution of such DAISA or DACA by FHA Lender, and HUD's approval of same, shall not be deemed any waiver thereof or consent thereto. The DAISA or DACA should contain language to make this clear. But regardless of whether such language is included, such a waiver shall not be implied.
5. **Bank Fees.** These should be limited to usual, customary and reasonable fees in the normal course of business of the bank.
6. **Indemnification obligations.** These should typically be limited to the Operator (debtor) and, if required by the depository bank, a guarantor(s).

Indemnities binding FHA Lender are not encouraged. However, if FHA Lender agrees to such obligations, they should typically be limited to third party claims arising from compliance by Bank with FHA Lender's written instructions after a Control Notice is given and reimbursement of returned items to the extent FHA Lender received the proceeds thereof. The Operator should be primarily responsible for indemnities. HUD must be expressly excluded from all such indemnification obligations.

Any indemnification provided by the FHA Lender (and preferably, by Operator) to the Depository Bank should exclude indemnification for indirect damages, lost profits, or special, punitive or consequential damages, and at a minimum, bank's gross negligence or intentional misconduct. If AR Lender is also the depository, it should be clear the indemnity is geared towards its capacity as depository and not as secured party.

7. **Boilerplate.** Should include standard provisions dealing with governing law, execution of counterparts, execution by facsimile (or other electronic) signature, etc. Provisions which would not permit venue in a federal district court are not permitted.
8. **Assignment:** The DACA must permit assignment of the DACA by the FHA Lender. The assignment provisions must not be materially inconsistent with, or unduly burden, HUD assignment of claims procedures. For example, an assignment clause which requires the assignee to execute an assumption shall not apply to an assignment to HUD.