

Section II Production

Chapter 9 Closings

9.1

Introduction

- A. After the Firm Commitment is issued, the closing of a Section 232 project is a collaborative effort primarily among the ORCF Closing Coordinator (hereinafter referred to as the “Closer”), the HUD Closing Attorney (hereinafter referred to as the “HUD Attorney”), the Lender’s Attorney, and the Lender. This Chapter focuses mostly on the closing roles and requirements of the Closer and the Lender. In addition to the requirements set forth in this Chapter, more detailed requirements for the Lender’s Attorney and HUD Attorney are distributed by the HUD Office of General Counsel. The contents within this Chapter are not intended to be and must not be interpreted as legal guidance.
- B. **Lender’s Responsibilities.** Lenders are strongly encouraged to engage and be represented by competent legal counsel throughout the loan application and closing document preparation and submission process. Lenders should not rely on personnel other than their legal counsel, and legal support staff under the careful oversight of legal counsel, in preparing and submitting closing documents. It is HUD’s experience that Lenders that rely on personnel other than those with proper legal training and experience often submit incomplete closing documents with numerous errors. This practice unnecessarily consumes HUD staff time and greatly increases the chances for disruptive and delayed closings, which ultimately becomes more expensive to the parties. At the HUD Closing Attorney’s discretion and in accordance with professional responsibility standards, the HUD Closing Attorney may decline to communicate with anyone other than the Lender’s attorney with respect to the transaction.

9.2

The ORCF Closer

ORCF utilizes a Closer for all of its closings. A Closer will be assigned to a project after the Firm Commitment has been issued. The Closer serves as the main point of contact for ORCF and will work closely with all of the parties to ensure that ORCF program and administrative requirements are satisfied prior to closing. The Closer’s responsibilities include, but are not limited to, the following:

A. Draft Closing Documents.

1. Upon assignment, the Closer will send an introductory email to the Lender and the Lender's Attorney with directions on the delivery of the draft closing documents to the Closer. If the closing documents are incomplete or substantially incorrect, the project may be marked inactive, removed from the Closer's assignments, and placed back in the closing queue. Once a complete/acceptable closing package is received and verified, the project will be marked as active and reassigned to a Closer as availability allows.
2. The appropriate closing checklist must be placed in front, on top of the closing package. (Closing document checklists are referenced in Appendix 9.1.) Documents must be tabbed according to the corresponding number on the checklist. All documents must be submitted in one hard copy package. The closing package must also contain evidence that all Special Conditions have been satisfied.
3. HUD anticipates that the documents in every submission are the final drafts of documents that all parties to the transaction have agreed upon prior to submission. If documents need additional review by the parties or by third parties, then the submission must be held until all issues can be resolved and final draft versions of documents can be submitted for HUD review.
4. The closing package must include both a clean copy of each document and a redline of the document against the HUD form where applicable. If a document is being resubmitted in response to HUD comments, that second submission must include both a clean copy of the document and a redline against the earlier submission. All proposed changes must be approved by both the Closer and HUD Attorney.
5. The Closer will review the draft closing documents to ensure that all programmatic requirements are met, all Special Conditions have been satisfied, and any repairs have been acceptably completed with adequate evidence. The Closer will notify the Lender, the Lender's Attorney, and the HUD Attorney of any deficiencies. The HUD Attorney will perform a similar, but legal, review and will notify the Closer and Lender's Attorney of any deficiencies. All deficiencies must be cured prior to establishing a closing date. Failure to cure deficiencies will lead to a canceled or delayed closing.
6. Piece-meal deficiency responses will not be accepted. Instead, responses to deficiencies must be submitted together in one e-mail or package with a written explanation. The written explanation must clearly identify which documents are attached and what changes have been made.

B. Amendments to the Firm Commitment. Requests to amend the Firm Commitment must be submitted to the Closer on Lender letterhead; the request must list the proposed amendments and attach the proper documentation. The Closer will review and, if appropriate, prepare, execute, and distribute the amendment.

- C. **Completion of Repairs.** If required by the Firm Commitment, the Closer will ensure that repairs are completed. The Closer will review evidence of completion, including supporting photographs and invoices, and the Borrower's Certification—Completion of Critical Repairs (Form HUD-91118-ORCF). For non-critical or Borrower elected repairs, the Closer will review the Escrow Agreement for Non-critical, Deferred Repairs (Form HUD-92476-ORCF) and list of repairs to be completed. For non-critical or Borrower elected repairs completed prior to closing, the Closer will review evidence of completion (photographs and invoices) and the Borrower's Certification-Full or Partial Completion of Non-Critical Repairs (Form HUD-92117-ORCF). If any remaining repair items are not completed, the Closer will review and approve a request for amendment to the Firm Commitment with a revised list of repairs.
- D. **Survey and Title.** If necessary, the Closer will coordinate resolution of any issues related to the title and ALTA survey. ORCF expects covenants that run contrary to the Fair Housing Act or other civil rights laws to be removed. To avoid delays in closing, the parties should discern early whether such covenants exist and, if so, immediately commence necessary actions to remove them. Initiating this effort obviously involves having a title search conducted early in the application process. In the event that, despite such timely and ardent effort, the parties are not able to timely obtain removal of the covenant, then, in order to avoid a closing delay, ORCF would expect those efforts to be clearly documented and would expect documents to be executed affirmatively acknowledging the unenforceability of such provisions and repudiating them.
- E. **Management Conference Call.** If applicable, the Closer will ensure that a conference call between the ORCF servicing Account Executive for the project and the Borrower occurs prior to closing.
- F. **Closing Statements and Cost Certifications.** The Closer will review and examine all closing statements and, if applicable, cost certifications (e.g., the Borrower's Certificate of Actual Cost (Form HUD-2205A-ORCF). The Closer will review all supporting documents such as the payoff letters and invoices.
- G. **Execution of ORCF Closing Documents.** Once all program and legal requirements are met, the Closer will work with the Lender's Attorney, the Lender, and the HUD Attorney to ensure that HUD signatory closing documents are signed by the appropriate ORCF Authorized Agent in advance of the closing. Documents must not be sent for ORCF's signature without prior, express approval from the Closer.
- H. **Closing Date.** The Closer will work with the HUD Attorney and the other parties to help determine a closing date. A closing date may be canceled or delayed if program or legal requirements are not fully satisfied.
- I. **Amounts Due to HUD.** The Closer will confirm the correct amount of the Mortgage Insurance Premium (MIP) due at closing and, if applicable, the Inspection Fee, and/or an additional Application Fee. All such payments shall be made through Pay.gov prior to

closing and evidenced by appropriate receipts. See Section 9.5 below for more information on required fees and refunds.

9.3

The Lender

The following are key responsibilities of the Lender in the closing process. In addition, it is the Lender's duty to keep the Closer informed of any special circumstances related to the closing.

- A. **Execution of Firm Commitment.** The Lender should execute and have the Borrower execute the Firm Commitment within 10 business days of receiving the Firm Commitment. Acceptance of Firm Commitments executed beyond 10 business days is subject to ORCF approval.
- B. **Amendments to the Firm Commitment.** Material changes to a transaction may require amendments to the Firm Commitment. Any material adverse conditions or changes to any facts or circumstances that would make any information submitted, or which should have been submitted, with the application for mortgage insurance (including without limitation any such information relating financial statements, rent rolls, reports, investigations or other credit risks) incomplete or inaccurate must be disclosed to ORCF. ORCF considers such information to determine whether an amendment to the Firm Commitment is required and/or whether the deal may proceed. No part of the Firm Commitment may be amended without the prior approval of ORCF. To amend the Firm Commitment, the Lender must submit a written request on letterhead to the Closer setting forth the specific changes requested. This request must include documentation to support the requested change(s). When possible, all requested changes to a Firm Commitment must be combined into one request in order to minimize the number of amendments.
 - 1. **Extensions.** Firm Commitments may be extended for periods of time depending on project type; however, processing and underwriting conclusions must be current at the time of any extension. For 223(f) projects, the Closer may extend the Firm Commitment for one 60-day period. For 223(a)(7) projects, the Closer may extend the Firm Commitment for one 90-day period. For new construction projects, the Closer may extend the Firm Commitment in 30-day increments. Extension requests beyond these periods require review and approval by the assigned project ORCF Workload Manager. The Lender's request to amend the Firm Commitment must provide a justification acceptable to HUD that the extension of the Firm Commitment is warranted and necessary in order to accomplish closing by the end of the extension period. Requests for extension must include the following statement (if true): *"The requested delay is not likely to change significantly the underwriting data on which the commitment was based or to undermine the feasibility of the project due to a change in the market, inflation, or other factors affecting cost."* If, at the expiration of the extension period, the closing fails to occur, HUD reserves the right to consider the application withdrawn. In that case, the application must be updated and submitted as a new application in order to receive further consideration.

2. **Interest Rate Changes.** ORCF suggests that the interest rate not be locked without confirmation that the closing is moving forward. Locking the interest rate prior to such confirmation will be at the Lender and Borrower's own risk. HUD will not close a transaction without all program and legal requirements being fully satisfied solely to accommodate a security delivery or obligation deadline. Once the interest rate has been locked, a request to amend the Firm Commitment must be submitted. Such a request must include a revised, signed Maximum Insurable Loan Calculation (Form HUD-92264A-ORCF).

C. **Satisfaction of Special Conditions.** Evidence of satisfaction of all Special Conditions listed in the Firm Commitment must be provided prior to closing and must be submitted with the draft closing document package. The Closer will provide a Special Conditions Matrix to keep track of the status and documentation related to each Special Condition. The following apply to 232 New Construction, Substantial Rehabilitation and 241:

1. Deferred Submission items (see the Lender's Architectural Reviewer and Cost Analyst's Statement of Work, Section IV.A.12) and/or any additional changes must be identified by addendum(s), must be reviewed by the underwriter of record and approved by HUD 15 days prior to Initial Closing.
2. The addendum(s) must include a list of drawing numbers and page numbers with a description of the change(s). Addendum(s) must be clearly noted and all drawings and specifications affected must have sheets and pages revised and replaced. Addendum(s) shall have no effect on cost or value. The Architect of record and the Lender's construction analyst must review the addendum(s) for acceptability.

D. **Evidence of Completion of Repairs.**

1. **Critical Repairs:** All critical repairs must be completed prior to closing. Evidence of completion includes a signed and dated Borrower's Certification – Completion of Critical Repairs along with clear, supporting photographs and invoices. Other items may be requested by the Closer as needed in order to verify that all repairs have been completed.
2. **Non-Critical or Borrower Elected Repairs:** Completion of non-critical repairs prior to closing is encouraged. If the non-critical/Borrower elected repairs are not completed by closing, they must be completed within 12 months of closing. An Escrow Agreement for Non-critical, Deferred Repairs must be established, which includes the list of repairs.
If all, or a portion of, the non-critical/Borrower elected repairs have been completed prior to closing, the Lender must submit a signed Borrower's Certification-Full or Partial Completion of Non-Critical Repairs. As with critical repairs, clear, supporting photographs and invoices demonstrating proof of completion must be attached. For the remaining repair items, a request to amend the Firm Commitment must be submitted with an attached, revised list of repairs. See above for more information on amendments.

3. See Production, Chapter 10.16 for more information on repairs.

E. Evidence of Insurance. Prior to closing, evidence must be provided showing that the project has all required fidelity, property, and professional liability insurance coverages. The insurance coverages must be current and in conformance with all ORCF requirements. If a policy will expire within one month of closing, proof of renewal will be required. See Production, Chapter 14, Insurance Requirements, for details on insurance coverage.

F. Closing Statements and Cost Certifications.

1. Closing statements, sometimes referred to as settlement statements, are required for all closings. The final version of the closing statement must be signed by both the Lender and the Borrower and presented prior to closing. At a minimum, the statements must include the following: amounts to be paid to satisfy Borrower's obligations for existing indebtedness; repairs, if any; financing fees; HUD fees; legal expenses; title and recording costs; third party costs; interest rate premium payments, if any; bond premium payments; other allowable costs; and any Lender-required escrows for taxes, insurance or other items. The statement must also include any cash contribution by the Borrower. For Section 223(a)(7) projects, the closing statement must be supported by current payoff letter(s) and invoices. The closing statement must show the transfer amount of the Reserve Fund for Replacement and any additional initial deposit amount, if required. Also for Section 223(a)(7) projects, the Closer will compare the amount of the transfer of the current replacement reserves on the Closing Statement to the amount in the Lender Narrative. If the amount has decreased by \$20,000 or 20%, the Lender will be asked to recalculate the necessary reserve for replacement deposits. The Lender must provide a letter certifying that the Lender has recalculated the necessary reserve for replacement deposits, considered any changes to the current reserve for replacement since the time of the original firm application, and, that based upon that review, the Lender has notified the Closer of any necessary increases to the initial deposit to the reserve for replacement account or monthly deposit. The ORCF Underwriter must approve any changes to the reserve for replacement requirements. For changes to Reserve amounts, a revised Reserve for Replacement Funding Schedule may be required. Note: security extension fees are not an allowable mortgageable cost.

2. If a Borrower's Certificate of Actual Cost (also known as a "Cost Certification") is required, it must include the supporting documents such as current payoff letter(s) and invoices. The Cost Certification must be signed by the Borrower and will be reviewed and approved by ORCF. See Production, Chapter 11.15 for more information.

G. Fees. The Lender must ensure that all fees due at closing are properly prepared and delivered at closing. Any missing or incorrect fee may result in a delayed closing. See Section 9.5 on Fees Due.

- H. **Lender and Lender's Attorney.** The Lender must at all times work closely with its attorney to ensure all closing requirements are met in a timely manner.
- I. **Lender's Certificate/Request for Endorsement.** The Lender will be required to execute either a Lender's Certificate or a Request for Endorsement, which include several certifications. It is the Lender's responsibility to perform any necessary due diligence to allow the Lender to make such certifications accurately.

9.4

General Closing Logistics

- A. **Type of Closing.** ORCF closings may take place with all parties present, a "table closing," or remotely, a "by mail closing." There may also be a "skeleton closing," wherein only one or some of the parties attend. Although "by mail" or "skeleton" closings are encouraged, the HUD Attorney will make the final determination on the type of closing to conduct and will provide the Lender and Lender's Attorney appropriate instructions. By mail closings are conducted at the discretion of the HUD Attorney and may be limited in circumstances where incomplete or substantially incorrect documents are received or certain circumstances demonstrate the need to have a table closing. Under no circumstances should the endorsed note be provided to the FHA Lender prior to closing.
- B. **Date of Closing.** The closing date will be set by the HUD Attorney after consultation with the Closer. The closing date will only be set once all programmatic and legal requirements have been fully satisfied. The closing may be cancelled if documents are not satisfactory or if any programmatic or legal requirement is not met.
- C. **Documents to be signed by ORCF.** The documents to be signed by ORCF, such as the Healthcare Facility Note (Form HUD-94001-ORCF), the Healthcare Regulatory Agreement – Borrower (Form HUD-92466-ORCF), and any other documents required in the transaction, will be signed by ORCF in advance of the closing. Once the Closer has approved the documents for signature, the Closer will coordinate ORCF's execution of the documents. The Lender and Lender's Attorney must ensure that the documents have been properly prepared and are received by ORCF in sufficient time for execution and shipment. The documents must be in final form before sending them for ORCF signature, and the documents must be the exact versions approved by all parties, including HUD. ORCF will execute a maximum of four copies of the documents; however, to cut down on administrative time two copies are strongly encouraged.
- D. **Recording Documents.** Documents may be recorded in advance of the closing with prior approval from the HUD Attorney.
- E. **Closing Day.** The HUD Attorney will lead a "table" or "skeleton" closing. If closing "by mail," the Lender's Attorney, Lender, Owner, Borrower, Borrower's Attorney, Operator, Operator's Attorney, and other related parties must be readily available by telephone should any question or problem arise. All documents must be satisfactory to HUD, be in complete and final form, and be the exact same versions as previously submitted and approved. All

HUD requirements must be satisfied. At the conclusion of the closing, the HUD Attorney will deliver the endorsed Healthcare Facility Note to the Lender's Attorney either in person or by mail.

- F. **Closing Document Copies.** After closing, the Lender's Attorney must provide a compact disk, or a Zip file, containing scanned copies of the documents accepted by the HUD Attorney at the closing. The Closer will provide the details on where to send the disk or file.

9.5

Fees Due and Refunds

- A. **Mortgage Insurance Premium (MIP).** A first year MIP fee is due at closing. The amount of the fee is listed in the Federal Register, published annually on or about July 1, and varies per type of program under which the loan is insured and will be set forth in the Firm Commitment.
- B. **Inspection Fee.** The Inspection Fee varies by program. See Production, Chapter 2, General Program Requirements, under each program section for specific amounts and formulas.
- C. **Additional Application Fee.** If the mortgage amount has increased since the initial submission of the Application or the issuance of the Firm Commitment, an additional application fee will be required, which will be set forth in the Firm Commitment Amendment.
- D. **HUD Application Fee Refunds.** If the mortgage amount has decreased since the initial submission of the Application or the issuance of the Firm Commitment, the Lender may request a refund of the application fee after closing. Requests for refunds must be sent to OHPrefunds@hud.gov and must include the project name and FHA number in the subject line with the Request of Overpayment of Firm Application Fee (Form HUD-91112-ORCF) attached. Refunds are sent via electronic transfer.

9.6

Closing Section 232/223(a)(7) and Section 232/223(f) Loans

There are several types of Section 232 pursuant to Section 223(a)(7) loans, which are refinances of existing FHA loans such as new construction, substantial rehabilitation, 223(f) and 241(a).

A loan insured under Section 232 pursuant to Section 223(f) is the refinance or purchase of a residential care facility project, which may or may not be currently FHA-insured.

The Closer checklists and to the HUD Attorney checklists which set forth the documents required to close these loans are identified in Appendix 9.1. When sending the draft closing documents for HUD review, place the appropriate checklist on top of the closing package; additionally, please tab and organize the corresponding documents to match the checklist.

The closings of these two types of loans are similar. A few key differences are:

1. No repair Inspection Fee is required for loans processed under Section 223(a)(7).
2. A cost certification, the Borrower's Certificate of Actual Cost, is required for all Section 223(f) loans. This document is only required for Section 223(a)(7) projects that have repairs but did not submit a PCNA. See Production, Chapter 11.15 for full details on cost certifications. All cost certifications will be reviewed and approved by ORCF.
3. A closing statement is required for all Section 223(a)(7) and Section 223(f) loans; however, for Section 223(f) loans, supporting documentation does not have to be attached to the closing statement if it is provided with the Borrower's Certificate of Actual Cost.
4. Total Lender's Fees are limited to 2.0% of the mortgage amount for a Section 223(a)(7) loan; they are limited to 3.5% for a Section 223(f) loan. Fees may be up to 5.5% for bond transactions.
5. The repair escrow overage for a Section 223(a)(7) loan is 10% of estimated costs; the overage is 20% for a Section 223(f) loan.
6. Prior to the closing of a Section 223(f) loan, a conference call between the Borrower and the servicing ORCF Account Executive must be scheduled. This is not required when the loan is insured under Section 223(a)(7).

9.7

Closing New Construction, Substantial Rehabilitation, Section 241(a) Loans

Loans insured under Section 232 for New Construction or Substantial Rehabilitation are for the complete construction of a project or for substantial repairs or improvements to an existing project.

A loan insured under Section 241(a) is a supplemental loan to an existing loan insured by FHA to allow for an addition or improvements to a project.

For the above loans, the closings are either Insured Advances or Insurance Upon Completion. If the loan is for Insured Advances, there are two closings: an initial closing prior to the start of work and a final closing after the completion of the work. If the loan is for Insurance Upon Completion, there is only one closing. Because of the complexities of these types of closings, the following sections provide more closing information.

In addition to the documents listed below, see Appendix 9.1 for the reference to the checklist of documents required to close these types of loans. Note: there is only one checklist for both the Closer and the HUD Attorney.

A. **Construction Contract** (Form HUD-92442-ORCF). These contracts may be either Lump Sum or Cost Plus. See Production, Chapter 11.13.A for more information on these contract requirements.

1. Attach the Contractor's and/or Owner's Cost Breakdown (Form HUD-2328) as Exhibit A to the contract. This form must be approved and signed by ORCF with the Firm Commitment.
2. Attach the Supplementary Conditions of the Contract for Construction (Form HUD-92554-ORCF). The Davis Bacon Wage Determination must be included in the specifications. The Closer will confirm with HUD's Office of Labor Standards and Enforcement that the Davis Bacon Wage Determination is current as of the date of initial endorsement. The Lender must certify that the most current and applicable wage decision has been incorporated in the Construction Contract and Specifications prior to closing. See Appendix 4.1, Labor Standards and Enforcement Protocol for information on coordinating with Labor Standards and Enforcement.
3. Attach the Incentive Payment Addendum (Form HUD-92443), if the Borrower and contractor have agreed to such a payment, and there is no Identity-of-Interest between the Borrower and contractor.

B. **Owner-Architect Agreement** (AIA Document B108). The Agreement must include the HUD Amendment to the B108 (Form HUD-92408-ORCF), which contains a section for disclosing parties in an identity-of-interest relationship with the Architect. If there are no such parties, then the form should indicate "none." See Production, Chapter 4.2, Exhibit C, for additional information. This form must be reviewed and accepted at the Firm Commitment stage.

C. **Assurance of Completion.** Documentation and HUD review will vary depending on the type of assurance of completion provided. Except for letters of credit, the HUD Attorney must review each type of Assurance of Completion, including the form of bonds where used.

1. Letters of Credit. These may be used instead of cash for all assurances of completion and escrows required at initial and final closing, or during construction, except for up-front cash escrows.
 - a. Acceptance of a letter of credit is at the Lender's discretion. However, the letter of credit must always be:
 - i. Unconditional and irrevocable;
 - ii. Issued by a banking institution; and

- iii. Valid and collectible.
 - b. The Lender may not be the issuer of any letter of credit without prior written consent of ORCF.
 - c. HUD will neither look at the letter of credit nor render an opinion as to its enforceability or acceptability; letters of credit are accepted at the Lender's sole discretion.
2. Assurance of Completion for On-Site Improvements. The Lender or Borrower may impose higher requirements, but must require one of the following as a minimum:
- a. Surety Bonds. The Payment Bond (Form HUD-92452A-ORCF) must be used for payment bonds and the Performance Bond-Dual Obligee (Form HUD-92452-ORCF) must be used performance bonds. Each bond must equal 100% of the ORCF estimate of the total for all improvements (Line 53, Contractor's and/or Owner's Cost Breakdown). The following requirements must also be satisfied:
 - i. The surety must be on the accredited U.S. Treasury list, Circular 570, published annually in the Federal Register on or about July 1;
 - ii. The bonds must not exceed limits listed in Circular 570;
 - iii. GNMA may also be named as an obligor if GNMA securities are being used;
 - iv. An original power of attorney from the surety company to its agent must be attached to each bond and dated the same day as the bond; and
 - v. Payment and Performance bonds are required for Assurance of Completion of on-site improvements where payment for components stored offsite has been approved.
 - b. Completion Assurance Agreement (Form HUD-92450-ORCF). This agreement must be secured by a cash deposit (or unconditional, irrevocable letter of credit) for the appropriate percentage of the ORCF estimate of construction or rehabilitation cost, as described below:
 - i. For projects of less than four stories, ORCF requires a deposit of 15% of the HUD estimate of construction or rehabilitation cost;
 - ii. For large and elevator projects, ORCF requires a deposit of 25% of the HUD estimate of construction or rehabilitation cost for projects where the structure includes an elevator, or the structure is four or more stories.
3. Assurance of Completion for Off-Site Improvements. See Lender's Certificate (Form HUD-92434-ORCF) for requirements. To assure the completion of work which may not be financed with mortgage proceeds, one of the following is required:
- a. A Public Body Agreement acceptable to HUD from the controlling jurisdiction giving assurance for installation of utilities, streets or other facilities without cost to the Borrower. The Borrower's attorney's opinion as to whether the agreement is binding on the public body and succeeding administrations is required;

- b. A cash escrow using an Escrow Agreement for Offsite Facilities, deposited with the Lender, a trustee or an escrow agent acceptable to HUD, or an unconditional, irrevocable letter of credit. The amount must equal or exceed ORCF's estimate of the cost of offsite facilities; or
 - c. Where additional assurance is deemed necessary by ORCF, one of the following will be required:
 - i. Offsite Bond – Dual Obligee (Form HUD-92479-ORCF), or
 - ii. A letter of credit.
- D. **Building Loan Agreement** (Form HUD-92241-ORCF). This document sets out the responsibilities, conditions, and operating terms between the Lender and the Borrower, including the basis under which insured advances may be made during the construction period.
- E. **Lender's Certificate** (Form HUD-92434-ORCF). All required escrows, deposits, fees, and other amounts must be properly reflected in the Lender's Certificate as well as information concerning other bond obligations, extension fee agreements, and permanent loan commitments. Where permissible prepayment lockout and/or penalty provisions are included in the Healthcare Facility Note, this form may include conditions under which HUD may consider an override of such provisions. An addendum to the Lender's Certificate may be used to clarify certain expenses.
- F. **Agreement and Certification** (Form HUD-93305-ORCF). This obligates the Borrower to certify its actual costs of project construction or rehabilitation costs, and to disclose any identity of interest among project participants. It also obligates the Borrower to agree to a reduction of the mortgage amount in certain instances.
- G. **Application for Insurance of Advance Mortgage Proceeds** (Form HUD-92403). An initial draw of loan proceeds may be made on the day of initial closing upon recordation of the Security Instrument, evidence it constitutes a first lien on the property, and HUD's delivery of the initially endorsed Note. This form must be submitted to ORCF for review and approval prior to closing. Supporting documentation including invoices, receipts, or cancelled checks organized with tabs and a summary sheet for each line item, must also be submitted with the draw. A final, fully executed copy of this form must be submitted no later than three (3) days prior to initial closing. See Production, Chapter 10, Construction Period, Appendix 10.2, Instructions for Approval, for additional details.
- H. **Escrow Agreement for Operating Deficits** (Form HUD-92476B-ORCF). Any operating deficit escrow requirements prescribed in the Firm Commitment may be in the form of cash, and/or one or more unconditional and irrevocable letters of credit issued to the Lender by a banking institution.
- I. **Escrow Agreement for Working Capital** (Form HUD-92412-ORCF). When the Firm Commitment requires a working capital deposit, the Borrower must deposit with the Lender a cash escrow or one or more unconditional and irrevocable letter(s) of credit at initial closing. See Production, Chapter 10.15.C.

J. **Minor Movable Equipment Escrow Agreement** (Form HUD-9443-ORCF). When the Firm Commitment requires an escrow for minor moveable equipment, the Borrower must deposit with the Lender a cash escrow or one or more unconditional and irrevocable letters of credit at initial closing.

K. **Other Escrows.** Other escrows may be required by the Firm Commitment. Examples include an Off-Site Escrow or a Demolition and Asbestos Removal Escrow.

L. **Fee Payment from Cash Available to Borrower.**

1. Fees Paid at Initial Closing. Excess mortgage proceeds may be used to pay construction costs, permanent loan discounts, and other fees recognized by HUD under paragraph 19 of the Lender's Certificate.
2. For New Construction, excess mortgage proceeds may also be allocated to the following items:
 - a. ORCF's estimate of the "as-is" value of land or the actual latest arms' length purchase price, whichever is less. The latest arm's length purchase price may include the following connected costs:
 - i. Legal fees associated with acquisition of land, zoning, examination of title on the purchase, or defense of title after the purchase;
 - ii. Prepaid special assessments;
 - iii. Interest on bridge loans to purchase property after the date of submission of the initial application for mortgage insurance;
 - iv. Taxes;
 - v. Cost of improvements made to the project site by the Borrower;
 - vi. Cash escrow to cover offsite construction cost;
 - vii. Cost of any demolition reflected in the fair market value of the land (note that payment is approved as demolition progresses);
 - viii. Construction and/or permanent loan discounts required to be paid at initial closing; and
 - ix. Interest shortfall escrow, working capital deposit, initial operating deposit, debt service reserve, non-realty items, and any permanent loan discounts not required to be paid at initial closing.
 - b. The remaining balance may be used to fund approved change orders or be held until final closing.
3. For rehabilitation of existing construction, excess mortgage proceeds may also be allocated to ORCF's estimate of the "as-is" value of land or the Borrower's acquisition cost/existing indebtedness, whichever is less, and items listed in 2 above.
4. **Restricted Excess Mortgage Proceeds.** Restricted excess mortgage proceeds are those excess mortgage proceeds determined not to be available to the Borrower during construction.

- a. These funds cannot be used to satisfy escrow requirements and must be held until final closing; and
 - b. These funds must be identified in an unused column of the Financial Record of Mortgage Loan Transaction (Form HUD-92451) as restricted funds.
- 5. **Fees Paid After Initial Closing.** Excess mortgage proceeds may be used to fund permanent loan discounts, including those for unitary loans, and construction and permanent loan extension fees for payment after initial closing to the extent recognized by ORCF under paragraphs 19(b), (c) and (d) of the Lender's Certificate. In these instances, loan documents approved by ORCF must provide for the payment of such fees after initial closing, subject to the following:
 - a. The Lender is required to escrow sufficient funds on the Borrower's behalf to cover fees approved in the Lender's Certificate, paragraphs 9(b), for payment after initial closing;
 - b. The Borrower is required to furnish a written agreement to ORCF that any disbursements from the escrow accounts must require ORCF written approval;
 - c. A letter of credit will not be accepted at initial closing for any of the amounts to be satisfied from excess mortgage proceeds; and
 - d. Such escrowed excess mortgage proceeds may be released when earned.
- M. **Permits, Approvals and Plans.** All building and other permits, governmental approvals, and plans required to construct or to rehabilitate the Project improvements must be provided for ORCF review and approval prior to initial closing. Approvals and permits must be unconditional and consistent with the ORCF-approved plans and specifications.
- N. **License.** Evidence must be provided at the initial closing that the application process for the facility license has begun, and upon completion of the project, as proposed, a license will be issued. The evidence must be confirmation from the appropriate governing authority.
- O. **Easements and Use Agreements.** All easements and joint use agreements must be approved by ORCF and the HUD Attorney.
- P. **Additional Agreements.** Any additional agreements that affect the property or financing of the project must be disclosed to ORCF, including, but not limited to, construction agreements; indemnifications, guarantees, and hold harmless agreements; and any other document or information that would require reprocessing of the Firm Commitment, increase Borrower's cash requirements, or increase the General Contractor's bond requirement.
- Q. **Accounts Receivable Financing.** If there is to be accounts receivable financing on new construction projects, final draft versions of the documents will be due at 70% completion. In no event should Accounts Receivable documents be executed without prior HUD consent.

- R. **Deposit Account Control Agreement (DACA) and Deposit Account Instruction Service Agreements (DAISA).** ORCF requires that all project Owners and/or Operators maintain appropriate agreements, approved by HUD, perfecting a security interest in project accounts.

9.9

Preconstruction Conference

A Preconstruction Conference is required prior to the start of construction. The Preconstruction Conference must be scheduled within one week of initial closing. The Lender is responsible for arranging and facilitating the Preconstruction Conference. The signing of the Plans and Specifications generally occurs at the Preconstruction Conference. The signing may also be conducted at Closing. See Production, Chapter 10, Construction Period, for more information.

9.10

Tax Credits

- A. For more information, see Production, Chapter 12, LIHTC and Other Tax Credit Program Guidance.

Specific to loans involving tax credits, the initial closing documents must include:

1. A final detailed Sources and Uses statement of total development costs, reflecting any revisions to hard and soft costs as reflected on the Firm Commitment's Maximum Insurable Loan Calculation. If any funding sources have changed, a revised Applicant/Recipient Disclosure/Update Report is also required.
2. All documents must include conflict language giving the HUD documents supremacy over other documents. Documents may not include indemnification provisions, except as otherwise permitted by outstanding HUD guidance.

- B. Tax Credit Equity Contribution:

1. The required initial equity investment will be reflected in the Firm Commitment as a Special Condition; the initial installment must be advanced at initial closing.
2. Application for Insurance of Advance Mortgage Proceeds. Approval of costs to be funded will be based on those approved in the Firm Commitment, or, if applicable, approved amended Sources and Uses Statement.
3. After the first installment of LIHTC Equity is distributed at initial closing, the subsequent contributions must be made at a time and in a manner during construction to ensure that the underwriting requirements in the Firm Commitment are maintained and met for actual costs.

C. Tax Credit Equity Bridge Loans:

1. Tax credit equity syndicators or investors (with or without an Identity of Interest with the Section 232 Lender) may make equity bridge loans to LIHTC, Historic, or New Markets Tax Credit projects during the construction or substantial rehabilitation period before the property's placed-in-service date. The bridge loan may be evidenced by a promissory note from the Borrower and may be secured by a pledge of the tax credits or of the limited partnership interest but may not be secured by a lien on the real estate. After the placed-in-service date, the bridge loan must be released and retired by the pay-in of the investor's equity.
2. An equity bridge loan is a means of securing the Borrower's cash contribution that is required to complete construction before the tax credits are available to be claimed by the equity investor. The placed-in-service date is the date when the newly constructed or rehabilitated property has been completed and its units have been occupied by income qualified tenants. This is also when the tax credits are officially able to be claimed by the equity investor, and, in the case of LIHTCs, is evidenced by issuance of Low-Income Housing Credit Allocation and Certification (IRS Form 8609). However, at Final Closing, all funds needed to meet the Borrower's cash contribution must be in the transaction so the sources and uses will balance and the tax credit investors will pay in the equity to retire the equity bridge loan.

9.11

Final Closings: Required Forms and Documentation

Once construction has been completed and the certification of costs has been approved by ORCF, the loan must proceed to final closing. ORCF will issue a Maximum Insurable Mortgage Letter providing the final mortgage determination. Once the letter is issued, immediate preparation for final closing must begin. Final closing documents are to be submitted within 30 days of the date of the Maximum Insurable Mortgage Letter. See Production, Chapter 11, Cost Certification, for complete information on cost certifications.

See Appendix 9.1 for the references to the checklist of required documents for a final closing. Note: there is only one checklist for both the Closer and the HUD Attorney.

- A. **Deposit Account Control Agreement (DACA) and Deposit Account Instructions Service Agreement (DAISA).** For all Insurance of Advances projects where the DACA and/or the DAISA were not approved by HUD prior to initial closing, the final and executed DACA and/or the DAISA must be submitted to the Closer and the HUD Attorney when the project reaches 70% construction completion. The final and executed documents must be approved prior to HUD's approval of the Permission to Occupy.

B. Title Evidence at Final Endorsement.

Prior to final endorsement, the Lender must provide HUD with a new title policy, or, if approved by the HUD Attorney, a title endorsement covering the following matters:

1. Showing what, if any, matters have gone on record since the initial closing;
2. Changing the effective date of the title policy to the day of final closing;
3. If a Modification Agreement or Supplemental Mortgage and Consolidation Agreement are used, insuring that the mortgage, as modified, or as supplemented and consolidated, remains in a first lien position. Should the title insurance company be unable to provide such endorsement, or should the endorsement show any lien intervening between the recordation of the original insured mortgage and the Supplemental Mortgage, ORCF will not endorse the mortgage for insurance at the increased amount;
4. Deleting the pending disbursements clause; and
5. Increasing title coverage if the mortgage amount increased.
6. ORCF will examine any exception to title, not shown in the title evidence accepted at initial closing, to determine whether or not it affects the value and/or marketability of the project. Any exception which affects the value and/or marketability of the project as determined by ORCF must be removed from the title policy or its effect insured against by the appropriate endorsement to the title policy;

C. Labor Standards and Enforcement Clearance. The Office of Labor Standards and Enforcement must confirm that all Davis Bacon requirement have been satisfied. The Closer will request clearance for closing from the Office of Labor Standards and Enforcement. If there are outstanding Davis Bacon violations, the Labor Standards and Enforcement Specialist will inform the General Contractor, the Closer, and the ORCF Construction Manager that deposits to the U. S. Treasury must be established as a condition of closing to ensure payment of wages. Final closing cannot proceed until the violations have been cleared. The Office of Labor Standards and Enforcement will provide approval to proceed to final closing. See Appendix 4.1, Labor Standards and Enforcement Protocol, for more information.

D. Incomplete On-site Facilities.

1. Conditions for Approval. It is desirable that all on-site construction be 100% complete before approval of a final advance of mortgage proceeds. However, there may be circumstances where it is necessary that approval of a final advance be given before 100% completion of on-site construction.
 - a. Approval of a final advance where minor items of on-site construction are incomplete will be given only in cases in which funds are placed in escrow to assure completion of such minor items, as provided in the Certificate of

Mortgage Insurance in the Application for Insurance of Advance Mortgage Proceeds, and in the footnote on Request for Final Endorsement (Form HUD-92023-ORCF).

- b. Approval of a final advance of mortgage proceeds will be given only in those cases in which:
 - i. The aggregate estimated cost of completing the items does not exceed 2% of the principal amount of the mortgage.
 - ii. Funds must be placed in escrow for the completion of minor items when immediate completion is inadvisable or impossible, due to weather or other conditions beyond control.
2. Escrow for Completion. With respect to all incomplete items, the amount held in escrow for completion must be at least 1.5 times the estimated cost of completion. The amount of any escrow must be sufficient to assure an incentive to complete the work, taking into consideration a possible rise in cost. Such escrow will be held by the Lender in accordance with the terms of the Escrow Agreement for Incomplete Construction (Form HUD-92456-ORCF), and ORCF will ascertain that the items to be completed are properly identified by attachment to the Application for Insurance of Advance of Mortgage Proceeds. See Production, Chapter 10.8.I for additional information.

E. Incomplete Off-Site Facilities.

1. Approval of a final advance of mortgage proceeds will be given only in those cases in which: All off-site utilities such as sewer, water, electrical, and gas facilities are installed and connected, and the buildings are served by safe and adequate all-weather facilities, either permanent or temporary, for the ingress and egress of pedestrian and vehicular traffic, including fire apparatus, and all other construction requirements have been acceptably accomplished or acceptably assured.
2. Completion of Off-Site Utilities. Until all off-site facilities are completely installed and connected, as applicable, and the required ingress and egress is provided, HUD will not process a request for the final advance. In such cases:
 - a. Any Application for Insurance of Advance of Mortgage Proceeds submitted for processing will not be treated as approval of a final advance, nor will the submission of Request for Final Endorsement. Instead, the Application for Insurance of Advance of Mortgage Proceeds may be treated as an ordinary application for advance of mortgage proceeds and may be approved in an amount which, when added to previous advances of mortgage proceeds, will equal 90% of the total advances to which the Borrower will be entitled at 100% completion.
 - b. Following 100% completion of all off-site facilities, ORCF will require submission of a new Application for Insurance of Advance of Mortgage Proceeds for approval of the final advance and subsequent submission of an updated Request for Final Endorsement.

F. Security and Start of Amortization.

1. **Non-Realty Items.** All non-realty items must be covered by the mortgage lien or security agreement, or both, whether or not paid for with mortgage proceeds, so long as such items are reasonably necessary to operate the project for the Approved Use. Any items not secured at initial Closing must be secured at final closing.
2. **Start of Amortization.** Whether construction has been completed or not, amortization must start on the date specified in the Note, unless a deferment has been recommended by the Lender and approved in advance by ORCF. Any request for deferment of amortization will be reviewed by the Closer, ORCF Account Executive, and the HUD Attorney.

G. Mortgage Amount.

1. **Decrease in Mortgage Amount.**
 - a. **Modification Agreement.** If there is a mortgage decrease based upon HUD's final mortgage determination, a draft Modification Agreement must be submitted prior to final closing. The Modification Agreement must amend the Security Instrument and set forth the new mortgage amount. HUD will endorse the HealthCare Facility Note for the decreased mortgage amount.
 - i. The following provision must be included in the Modification Agreement: Nothing in this Agreement shall waive, compromise, impair or prejudice any right HUD may have to seek judicial recourse of any breach of that certain Regulatory Agreement executed by the parties hereto, recorded on even date with the Security Instrument, which breach may have occurred prior to or may occur subsequent to the date of this Agreement. In the event that HUD initiates an action for breach of said Regulatory Agreement and recovers funds, either on HUD's own behalf or on behalf of the Project or the Borrower, those funds may be applied, at the discretion of HUD, to payment of the delinquent amounts due under the HealthCare Facility Note or the Security Instrument or as a partial prepayment of the Healthcare Facility Note.
 - ii. Prior to final endorsement, the Modification Agreement must be properly executed and recorded in the real property records of the county in which the project is located.
 - b. The Healthcare Facility Note may be modified, with an allonge, to set forth the decreased mortgage amount and the new amortization schedule. Any such modifications are subject to HUD approval.
 - c. HUD must approve appropriate title evidence related to the modification(s), as set forth above.
2. **Increase in Mortgage Amount.** If ORCF approves an increase in the mortgage

amount, the following documents must be submitted to HUD for approval prior to final endorsement:

- a. Supplemental HealthCare Facility Note.
 - i. The Lender must prepare a Supplemental HealthCare Facility Note acceptable to HUD, entitled “Supplemental HealthCare Facility Note.”
 - ii. This document must contain a cross-default provision with the original HealthCare Facility Note.
 - iii. The principal amount of the Supplemental HealthCare Note must be for the amount of the increase to the mortgage, not for the new total mortgage amount.
 - iv. The amount of the payments to principal must be sufficient to amortize the increase amount over the mortgage term.
- b. Supplemental Security Instrument.
 - i. The Lender must prepare a Security Instrument acceptable to HUD, entitled “Supplemental Security Instrument.”
 - ii. This document must contain a cross-default provision with the original Security Instrument.
 - iii. The Supplemental Security Instrument must encumber the entire project and must secure repayment of the Supplemental HealthCare Facility Note.
- c. Modification and Consolidation Agreement.

The Lender must prepare a Modification and Consolidation Agreement, acceptable to HUD, to be recorded in the real property records in the property jurisdiction. Such documents must evidence the following:

 - i. The original Healthcare Facility Note and the Supplemental Healthcare Facility Note will be deemed one indebtedness; and
 - ii. The original Security Instrument and the Supplemental Security Instrument will be deemed one indebtedness.
 - iii. The original Security Instrument shall be modified to provide for cross-default with the Supplemental Security Instrument.
 - iv. The original Healthcare Facility Note shall be modified to provide for cross-default with the Supplemental Healthcare Facility Note.
- d. Borrower’s Attorney’s Opinion. The Borrower’s Attorney must give an opinion, in a format approved by HUD, with respect to the documents evidencing the increased mortgage amount.
- e. Title evidence approved by HUD.

H. Application for Insurance of Advance of Mortgage Proceeds. For the contractor’s remaining retainage and any outstanding costs to be paid at final closing, the Borrower and Lender must execute this form. The form must be accompanied by a completed Contractor’s Requisition (Form HUD-92448), signed by the contractor and the architect.

1. If no items of on-site construction are incomplete, enter “None” in the space provided for the amount of the escrow deposit on the form.

2. If items of on-site construction are incomplete and an escrow deposit is required, attach an itemized list of incomplete items and enter the amount of the escrow deposit required.
 3. The Closer will determine if:
 - a. any items of on-site construction are incomplete;
 - b. any off-site facilities are incomplete;
 - c. any revisions are required in connection with hazard insurance; and if
 - d. the necessary non-realty items have been submitted.
 4. The Closer will obtain ORCF approval signatures on the Application for Insurance of Advance of Mortgage Proceeds and the Contractor's Requisition. Electronic copies will be forwarded to the HUD Attorney and the Lender.
- I. **As Built Survey.** The final as-built survey must be dated within 120 days of closing. The term "dated" means the surveyor's certification must show that the survey was made "on the ground" within 120 days prior to closing. The survey accompanying this request must show the exact location of all buildings, water, sewer, gas and electric mains, and all easements for such existing utilities. The survey must be prepared, signed and sealed by a licensed surveyor and must include a certification in the format set out in the Survey Instructions and Owner's Certification.
- J. **Permits, Licenses and Approvals.** All building and other permits, licenses, and governmental approvals required to own and operate the project must be provided for HUD review and approval including, but not limited to, the Certificate of Occupancy and the Certificate of Need.
- K. **Lender Letter of Loan Status.** The Lender must submit a letter, dated the day of final closing, stating that the loan is current. This may be combined with the Current Payment Letter.
- L. **Request for Final Endorsement.** An updated and fully executed Request for Final Endorsement must be submitted and reflect any material change made from the time of cost certification.
- M. **Insurances.** Proof of acceptable insurances for professional liability, property, and fidelity must be provided.
- N. **Request for Release of Escrows.** To release any escrow for a change order, minor moveables, or working capital, submit a Request for Approval Advance of Escrow Funds (Form HUD-92464-ORCF).
- O. **License.** The facility license must be current with the correct number of beds/units approved in the underwriting.

- P. **Current Payment Letter.** The Lender must provide evidence that all impound payments, such as for debt service, Reserve for Replacements, and taxes and insurances, are current.
- Q. **Secondary Financing.** If any secondary financing sources are utilized, the source and amount will be verified against what was approved in the approved cost certification.
- R. **Lease.** The operating lease must be executed and meet all ORCF lease requirements. The Lender must also demonstrate that the amount of the lease payment conforms to ORCF's requirements.

9.12

Insurance Upon Completion – New Construction, Substantial Rehabilitation and Section 241(a)

Section 232 New Construction, Substantial Rehabilitation and 241(a) projects that are Insurance Upon Completion only have a final closing, which is addressed in Section 9.11 above.

9.13

Closing Section 223(d) Operating Loss Loans and Section 232(i) Fire Safety Equipment Loan Insurance Programs

A loan insured under Section 223(d) is an Operating Loss Loan provided to a project owner with a current FHA-insured loan. To be eligible, a project must have experienced operating losses incurred during the first two years after project completion, or any other 2-year period within the first 10 years after completion. A credit subsidy is required for this type of loan. After the acceptance of the Firm Commitment, ORCF will request HUD obligate a credit subsidy. If HUD so obligates, the Firm Commitment will be extended 60 days after the date of obligation.

Section 232(i) sets forth the requirements for the Fire Safety Equipment Loan Insurance Program. This type of loan insurance is provided for nursing homes, skilled nursing facilities and intermediate care facilities to purchase and install fire safety equipment, primarily fire sprinkler systems. Qualified loans must be secured by a lien that may be superior or inferior to other liens.

For both these types of loans, see Production, Chapter 2, Eligible Section 232 Mortgage Insurance Programs, and Chapter 3, Loan Sizing, for more details. Consult with the Closer for closing document requirements.