

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 generally 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 generally 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

39 accounts, the type of DACA used, and the manner in which lease costs/HUD mortgage loan
40 debt service are made. Occasionally state law or a particular healthcare program may affect
41 how a particular transaction can be structured. Regardless of the cash flow structure, the
42 deposit accounts must comply with any applicable HUD Program Obligations, including any
43 requirements that such accounts be federally insured (or if balances exceed such insurance
44 limits, be held at an institution subject to any ORCF Section 232 Program regulatory
45 exceptions). This may be of particular concern where commingled accounts, with large daily
46 balances, are proposed (see below, in Section 16.4.G). Deposit accounts must not be held
47 outside the United States, and must be denominated in U.S. currency.

48
49 [NOTE: Submission and approval of the cash flow chart and the use of at least one DACA
50 (and DAISA, if there are governmental receivables) is required regardless of whether AR
51 financing is proposed.]

- 52
53 D. **Lockboxes.** A lockbox is a mechanism that allows a financial institution to collect and
54 process account receivables by having an operating entity's payments sent directly to a
55 location accessible by the financial institution. Lockboxes are often used when payments to
56 multiple operating entities are made to the same account.

16.2

Submission and Review

59
60 ORCF will evaluate cash flow structures, DACAs and DAISAs pursuant to the guidance
61 provided in this chapter for the following programs:

- 62
63 A. Section 232 for new construction or substantial rehabilitation,
64 B. Section 232 pursuant to Section 232/223(f)¹ for purchase or refinance,
65 C. Section 232 pursuant to Section 232/223(a)(7) or Section 232 pursuant to 223(f) pursuant to
66 223(a)(7) for refinancing,
67 D. Section 241(a) for supplemental loans in connection with a 232 loan under one of the
68 categories described above, and
69 E. Section 223(d) operating loss loans in connection with a 232 loan under one of the categories
70 described.

71
72 Review of cash flow structures, DACAs and DAISAs may take place at various times, such as
73 during the firm application process, post-closing or at a later point in time during the life of the
74 FHA-insured loan.

F. During the Firm Application Process:

- 75
76
77
78 1. **Section 232/223(a)(7) and Section 232/223(f)** – HUD expects review to take place as

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

79 part of the review of the application and document submission for closing.
80

- 81 2. **Section 232 New Construction** – HUD will generally not require DACAs or
82 DAISAs to be put in place until the project reaches 70% completion. The application
83 and initial closing submission should still include the cash flow chart and, when
84 available, any AR Loan documents. DACAs and DAISAs must be in place, in any
85 event, by the earlier of: i) the date of final closing, or ii) the closing of any AR Loan.
86
- 87 3. **Section 232 Substantial Rehabilitation and Blended Rate** – HUD generally
88 requires the submission of cash flow charts, DACAs and DAISAs as part of the
89 application and document submission for initial closing.
90
- 91 4. **Section 241(a) Supplemental Loans and 223(d) - Operating Loss Loans** in
92 connection with 232 loans in any of the above categories– HUD generally requires
93 the submission of cash flow charts, DACAs and DAISAs as part of the application
94 and document submission for initial closing.
95

96 G. **Post-closing.** See Asset Management Chapter 10 for guidance, except for the following:
97

- 98 1. **Transfers of Physical Assets or change in Operator ~~involving AR Financing~~.**
99 Reviews are required in connection with a transfer of physical assets (TPA) or change
100 in Operator ~~that involves AR financing~~. The TPA occurring in conjunction with an
101 FHA-insured loan closing should be directed to the HUD Underwriter assigned to the
102 project.
103
- 104 2. **After a Cut-Off Time has occurred involving AR Financing.** Once a Cut-Off
105 Time occurs, FHA Lender can require the establishment of separate deposit accounts
106 into which payments with respect to Accounts arising after the Cut-Off Time are to be
107 deposited consistent with the terms of the Intercreditor. The Lender shall diligently
108 exercise its rights under the applicable contractual documents so as to best protect the
109 FHA-insured collateral.
110

111 H. **Portfolios.** In all the above instances, it should be determined if a portfolio acceptance letter
112 applies and whether an overall cash flow chart was approved during portfolio review, so that
113 it can be determined:
114

- 115 1. If the proposed structure is consistent therewith, and
116 2. If a DACA and/or DAISA form has been previously approved in conjunction with the
117 portfolio approval.
118

119 If a project involves accounts receivable financing and is part of a portfolio that requires a
120 portfolio review, review of the proposed cash flow structure will generally take place at the
121 time of the portfolio review and a cash flow chart should be submitted at that time. Review
122 of the implementing-associated documents, including DACAs, DAISAs, Intercreditor

123 Agreement (for AR Financed Projects) (~~Form HUD-92322-ORCF~~) (“~~Intercreditor~~”), etc.
124 may take place when the projects are assigned to an ORCF Underwriter.
125

126 I. In all of the above instances, if an existing AR Lender is being replaced, the parties must
127 make arrangements acceptable to HUD for termination of any existing DAISAs or DACAs in
128 favor of such AR Lender.
129

130 J. **Exceptions.** ORCF understands that in the case of Section 232/223(a)(7) applications, there
131 may be justification for ORCF to waive strict adherence to its current policies with regard to
132 executing DACAs.
133

134 1. Waivers may be considered for a DACA on a Section 232/223(a)(7) application if the
135 subject facility seeking refinance pursuant to 223(a)(7) is operated by a non-IOI
136 Operator and was finally endorsed prior to the issuance of HUD Housing Notice
137 2008-09.
138

139 2. FHA Lenders, ~~if feasible~~ at the time of the Section 232/223(a)(7) transaction, must
140 obtain a DACA on the Operator’s receivable bank account. Otherwise, the Lender
141 must request a waiver. ORCF may grant the waiver subject to the following
142 conditions (these provisions will be added to the Healthcare Regulatory Agreement –
143 Borrower (Form HUD-92466-ORCF) (~~Borrower’s Regulatory Agreement~~) and
144 Healthcare Regulatory Agreement – Operator (Form HUD-92466A-ORCF)
145 (~~Operator’s Regulatory Agreement~~):

- 146 a. A special condition will be added to the firm commitment requiring a
147 mortgage debt service reserve (amount to be determined by ORCF) to be in
148 place until a DACA can be placed on the Operator’s receivable bank account,
149 b. At lease renegotiation (excluding renewals that only involve an extension of
150 the term) or termination, a DACA will be required ofby the Operator,
151 c. If accounts receivable financing is utilized in the future, a DACA will be
152 required on the Operator’s receivable bank account.
153

16.3

Cash Flow Charts

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

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

162
163 The Appendices to this Chapter include sample cash flow charts ~~to inform~~ showing the
164 completion of Section 232 project cash flow charts. HUD expects a cash flow chart submitted
165 pursuant to Section 232 to address and depict the following:

- 166
167 A. All of the accounts through which project funds flow, or which are related to the project,
168 (including investment accounts, if any) must be shown. The account into which Government
169 Receivables are initially deposited and the account into which Non-Government Receivables
170 are initially deposited must be identified.
171
172 B. The depository bank name, account number and all parties named on each account must be
173 depicted. If anyone other than the Operator is named on the account, the parties must explain
174 who such person is and its relationship to the Operator. If the DAISA account is not in the
175 name of the Operator, the parties must further demonstrate that such arrangement is
176 permitted by the applicable governmental healthcare programs.
177
178 C. Which accounts will be subject to DAISAs or DACAs, the parties to each, and the nature of
179 each DACA (immediate control versus future notification) must be depicted (see below, in
180 Section 16.6 for an explanation of the distinction between these two types).
181
182 D. If AR financing is involved, the flow of AR loan disbursements and repayments must be
183 shown. The cash flow chart must also show whether or not funds will go through any AR
184 Lender account (e.g. for daily pay-downs) and the account into which AR loan draws (and
185 any remittances of excess funds not necessary for pay-down) will be deposited.
186
187 E. How lease costs/FHA loan debt service will be paid must be addressed and any tenant or
188 master rent accounts that are proposed should be depicted. A “tenant rent account” is an
189 account established solely for the purpose of funding lease costs, through AR loan draws or
190 otherwise.
191
192 F. If there is AR financing involving multiple projects, the cash flow chart must depict the
193 above as to all projects within the AR line.
194
195 G. If a master lease is involved, the chart must depict the Master Tenant’s position in the cash
196 flow process (including any Master Tenant accounts and any deposit account agreements
197 proposed to govern such accounts). Alternatively, the cash flow chart must demonstrate and
198 the Intercreditor must address in a manner acceptable to HUD how the rent will be paid, and
199 the Borrower(s) and Master Tenant must agree to the arrangement as evidenced by their
200 signature on the ICA.
201
202

16.4

Cash Flow Structures

203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247

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 (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;

- 248 5. On a Borrower Representative Account (described below),
249 6. If the AR Lender is also the depository, additional DACA's may be required to
250 evidence such bank's agreement that it will waive or limit any rights of set-off,
251 recoupment, banker's lien or contractual security interest in such other accounts (with
252 the exceptions set forth below, in Section 16.6); and
253 7. In such other instances that may be appropriate given the structure of the transaction.
254

255 **D. Types of Cash Flow Structures:**

- 256
257 1. If the project is a single "stand-alone" project, involving just one FHA mortgage loan
258 and one Operator, the cash flow chart will typically be as set forth on Appendix 16.1.
259
260 2. There are different types of AR financing, and the flow chart must make clear which
261 type is contemplated. In one type, the AR loan ~~b~~Borrower (typically, the Operator)
262 simply draws on the AR loan when needed and pays it down as necessary to stay
263 within its loan limits. The funds do not flow through an account held in the name of
264 the AR Lender. AR Lender might also be the depository bank, but the accounts are
265 held in the Operator's name. AR Lender, in its capacity as secured party, can access
266 such funds only on a default (through enforcement of its DACA or set-off rights).
267 These type arrangements are often seen where an Operator does not need a steady
268 stream of loan availability in order to maintain its liquidity but rather is using the line
269 as needed to protect against more minor cash flow shortfalls. A sample flow chart
270 showing this can be found at Appendix 16.1.
271
272 3. In another type of AR Loan, the project's revenues flow through an AR Lender
273 account, where they are applied by AR Lender to the outstanding balance of the AR
274 loan on an ongoing basis. In this type of arrangement, it is usually contemplated that
275 the Operator will be routinely making draws and that AR loan draws will be funding
276 most, if not all, operating expenses. A sample flow chart showing this can be found
277 at Appendix 16.2.
278

279 **E. Cash Flow Structures & Governmental Receivables.** Regardless of type, Governmental
280 Receivables must flow through a DAISA account before going through the AR Lender's
281 account.
282

- 283 1. For the cash flow structure type outlined above, in Section 16.4.D.3, funds may also
284 go through a project specific, or commingled "upstream" DACA account prior to
285 reaching the AR Lender account. See Appendix 16.3 for a specific example of this
286 scenario.
287
288 2. An upstream DACA account must not be the project operating account. Rather, the
289 project operating account may be an account that is downstream of the AR Lender.
290 Thus, if such an upstream DACA is used, it may call for a periodic (often daily)
291 sweep of funds into the AR Lender account until such time as AR Lender is no longer
292 entitled to give a Control Notice (i.e. until such time as the right to give the Control

293 Notice shifts to FHA Lender). The sweep of funds to AR Lender must not be
294 permitted once FHA Lender is entitled to give the Control Notice. The parties must
295 plan in advance how funds will flow into the downstream operating account once the
296 AR Lender is no longer in the picture.

297
298 3. In any instance where there is no upstream DACA, there must be a downstream
299 DACA at the first account which funds go through after leaving the AR Lender's
300 account.

301
302 4. If the AR Lender requires a DACA on a downstream account, the FHA Lender
303 should generally also be a party. See Appendix 16.2 for a specific example of this
304 scenario.

305
306 F. In the rare case where a project receives no Governmental Receivables (i.e. 100% private
307 pay), the cash flow structure will only have a DACA.

308
309 G. **Commingled Accounts:** If it is proposed that funds from more than one project will flow
310 into an account (a “commingled account,” as shown in Appendix 16.4) the parties must
311 demonstrate that:

312
313 1. Systems must be in place which will permit the identification of funds belonging to
314 each project at all times. Under the Operator’s Regulatory Agreement if HUD
315 determines that deposits cannot be reliably and readily traced by facility, HUD may
316 direct Operator to deposit such funds in a segregated account.

317
318 2. Operator compliance with the financial reporting required under 24 CFR 5.801 will
319 also necessitate that the Operator(s) maintain accounts in a manner that will allow
320 HUD and the FHA Lender to discern the funds attributable to each facility.

321
322 3. Generally, HUD does not permit Governmental Receivables from different projects to
323 be initially deposited into a commingled account. Any proposal to commingle
324 Governmental Receivables from different projects, in addition to meeting the above
325 standards, must demonstrate that such commingling is permitted or required by the
326 applicable healthcare program payor rules.

327
328 4. The use of commingled accounts is subject to HUD’s written approval and must be
329 identified on the cash flow chart, which must show all the facilities whose funds are
330 proposed to flow through such account. An approved commingled account would be
331 subject to the provisions of a DACA in accordance with Section 16.6. The Operators
332 involved must be affiliated. Generally, accounts that commingle FHA-insured
333 facilities with non-FHA insured facilities will not be permitted. Generally, the use of
334 commingled accounts in connection with a master lease structure may be acceptable.
335 The Operator Security Agreement and A/R Financing Certification (Form HUD-
336 90020-ORCF) require that the account into which Governmental Receivables are

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

339
340 H. **Borrower Representatives on AR Line**: Occasionally AR Loan Documents ([or documents](#)
341 [for a centralized deposit account held by one of the Operators or an affiliate](#)) may call for a
342 single person or entity (usually called the “Borrower Representative”) to be the sole party
343 authorized to make draws on behalf of multiple Operators; and may also call for such draws
344 to all be initially deposited into a commingled account in the name of the Borrower
345 Representative and/or for such draws to be deposited into separate project accounts as
346 directed by Borrower Representative. Generally, this is encountered where an AR Loan
347 includes many Operators (or will include, if it anticipates adding additional FHA facilities in
348 the portfolio). Sometimes the Borrower Representative is proposed to be one of the
349 Operators, and sometimes it is proposed to be a separate entity that is affiliated with the
350 Operators. The cash flow chart must always depict any such proposed arrangement and any
351 Borrower Representative accounts. Such arrangements raise a number of considerations and
352 must be acceptable to HUD.

353
354 All documents evidencing the relationship between the Borrower Representative (in its
355 capacity as such) and the Operators must be submitted [for HUD’s consideration](#). ~~Generally,~~
356 ~~¶The Borrower Representative must not be a creditor of the Operators; i.e. the documents~~
357 ~~should establish that the Borrower Representative is making such draws as agent for the other~~
358 ~~Operators and is not borrowing funds in its own capacity then “re-lending” such funds to~~
359 ~~other Operators. The Borrower Representative must be obligated to make and disburse~~
360 ~~draws to the respective facilities in a manner consistent with HUD Program Obligations,~~
361 ~~applicable HUD Regulatory Agreements (Borrower’s Regulatory Agreement, Operator’s~~
362 ~~Regulatory Agreement or Healthcare Regulatory Agreement – Master Tenant (Form HUD-~~
363 ~~92337-ORCF), and the Intercreditor with respect to each Facility. ~~If the Borrower~~~~
364 ~~Representative is not one of the Operators, the parties must run, and their counsel must~~
365 ~~review, the same types of searches (UCC/litigation/tax lien, etc.) as is required for~~
366 ~~Operators. Additionally, the Borrower Representative will be required to sign a certification~~
367 ~~to disclose the named entity on the accounts managed or controlled by the Borrower~~
368 ~~Representative.~~

370 16.5

Lease Cost/Debt Service Payment Methods

371
372 The cash flow chart must show how “Current Impositions” (i.e. the rent, taxes and insurance, and
373 deposits to escrows or reserves required under the Lease or other Borrower-Operator Agreement)
374 will be paid. If the FHA Borrower is also the Operator, there are no lease payments so the chart
375 will show only payment of debt service and deposits to escrows and reserves required by the
376 FHA-insured loan documents. The method detailed in the cash flow chart must be consistent
377 with and match the description in the Intercreditor. The Operator’s, Borrower’s (and where
378 applicable, Master Tenant’s) execution of the Intercreditor evidences their agreement to the lease

379 cost payment method, and also evidences the AR loan Borrower's authorization to the AR
380 Lender to direct the proceeds of lease cost draws as provided therein.

381
382 A. **Acceptable Payment Methods.** Generally, the following methods are acceptable and
383 consistent with the Intercreditor:

- 384
385 1. **Direct from AR Lender to FHA Lender.** The Operator directs AR Lender to
386 disburse AR loan advances to pay Current Impositions or the current loan costs
387 directly into an account in the name of the FHA Lender.
- 388 2. **Disbursement into Operator Designated Account.** If the proceeds of such an
389 advance are not being paid directly to the FHA Lender, the FHA Lender must be able
390 to receive by automatic debit or otherwise have the right to withdraw from an
391 Operator account amounts at least equal to the Current Impositions or the current
392 mortgage loan costs. If the FHA Lender is only receiving current mortgage loan
393 costs, the Operator should be required to pay excess Current Impositions to the
394 Borrower.
- 395 a. **Disbursement into Tenant Rent Account.** The Operator may establish a
396 "Tenant Rent Account" whose sole purpose is for payment of Current
397 Impositions and which is funded directly by AR loan draws (or by the
398 Operator). The Operator must be obligated to timely cause to be deposited
399 sufficient funds each month to pay such costs. AR Lender should disclaim
400 any interest in such an account, and it will be subject to a DACA solely in
401 favor of FHA Lender. An example of this scenario can be found in Appendix
402 16.2.
403 [NOTE: In this scenario, it is acceptable to use an immediate control DACA
404 (as defined below) which permits the bank, after FHA Lender's debit for debt
405 service, to remit any excess to the FHA Borrower's account. FHA Lender
406 should be able to revoke such permission.]
- 407 b. **Disbursement into Operating Account.** Alternatively, draws for Current
408 Impositions sometimes will be disbursed directly into the project's general
409 operating account. This alternative is generally acceptable for stand-alone or
410 smaller transactions (so long as the FHA Lender has the ability to debit this
411 account for Current Impositions) and may be less acceptable for more
412 complex transactions. An example of this scenario can be found in Appendix
413 16.1).
- 414
415 3. **Disbursement into Master Tenant Account.** If a master lease structure is used,
416 such advance may be made directly from AR Lender into the Master Tenant's
417 account. An example of this scenario can be found in Appendix 16.3.

418
419 In this scenario, it may be appropriate to use an immediate control DACA in favor of
420 FHA Lender which permits Master Tenant, after FHA Lender's debit for debt service,
421 to remit any excess to the respective FHA Borrowers. FHA Lender should be able to
422 revoke such permission.

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

- 429 a. If AR Financing is involved, the Intercreditor must evidence approval by
430 Master Tenant and Borrowers of such method of payment.
- 431 b. If AR financing is not involved and HUD approves a structure under which
432 funds do not flow through Master Tenant, Master Tenant's and Borrower's
433 agreement to such method of payment should be documented.

434
435 FHA Lender agrees to apply amounts received on account of Current Impositions
436 toward payment of the FHA Borrower's monthly debt service obligation under the
437 FHA Loan and to fund applicable escrow and reserve requirements, with the balance
438 remaining of the payment so collected, if any, to be remitted by FHA Lender to the
439 FHA Borrower (or such excess may be remitted to the FHA Borrower by the DACA
440 Bank or Master Tenant after the FHA Lender debit if permitted by the DACA or by
441 such other remittance method as may be approved by HUD).

442
443

16.6

Deposit Account Control Agreements (DACAs)

444
445 A Deposit Account Control Agreement (DACA) is an agreement between a debtor/account
446 owner, a secured party, and the bank maintaining the account that the bank will comply with
447 instructions from the secured party directing the disposition of funds in the deposit account
448 without further consent by the debtor/account owner.

449
450 A. **General Parameters.** Under the Uniform Commercial Code (UCC), a Lender must have a
451 DACA with the depository bank to perfect its security interest in such deposit account as
452 original collateral. There is an exception if the Lender is also the institution where the
453 account is held (i.e. the Lender has possession of the account). However, even if ARFHA
454 Lender is the depository bank, HUD generally still requires a DACA that clearly describes
455 the priority of the liens.

456
457 AR Lender must also agree to limit its ability to assert other security interests, set-off,
458 recoupment, or banker's liens in project accounts held by it as the depository (see Section
459 16.4).

460
461 In the event it becomes appropriate to do so, the FHA Lender shall "spring" any DACAs in a
462 timely manner. In the event that the FHA Lender ultimately assigns the loan to HUD, it shall
463 also assign the DACA to HUD.

464

465 B. **Types of Deposit Account Control Agreements.** There are two primary types of DACA’s:
466 future notification, or “springing,” DACA’s, and immediate control DACA’s.

- 467
- 468 1. **Future Notification DACAs.** In a future notification, or “springing,” DACA, the
469 Operator is permitted to use the account as it normally does and to make withdrawals.
470 The bank follows the Operator’s instructions as to the account; until such time as the
471 secured party notifies the depository bank that it is exercising exclusive control (such
472 as a notice is referred to herein as a “**eControl Notice**”). Once the Control Notice is
473 given, the bank must follow only the secured party’s instructions as to the disposition
474 of funds in the account. Typically, the secured party can only give such a Control
475 Notice and “spring” the DACA (and any associated lockbox) once an event of default
476 occurs under its loan documents.
- 477 a. The FHA Lender DACA is typically a “future notification” DACA.
 - 478 b. The Operator Security Agreement contemplates that, unless otherwise
479 approved by HUD, the FHA Lender DACA will be a future notification type
480 DACA that can be triggered only on default.
- 481
- 482 2. **Immediate Control DACAs.** In an immediate control DACA, the secured party
483 exercises control immediately and the bank is obligated from the date of the
484 agreement’s execution to comply with the instructions of the secured party, and/or the
485 Operator/account holder is precluded from making withdrawals. (Sometimes a
486 DACA will be labeled “future notification” but the Lender gives the Control Notice at
487 closing or within the document; these are, in effect, immediate control DACAs).
- 488 a. If a Tenant Rent Account is used for the lease cost payment method, it may be
489 appropriate to use an immediate control DACA in favor of FHA Lender on
490 the Tenant Rent Account. Likewise, if a Master Lease is involved and lease
491 payments are being made into a Master Tenant Account, it may be appropriate
492 to use an immediate control DACA in favor of FHA Lender on such Master
493 Tenant account.
 - 494 b. Where there is a DACA in place upstream of an AR Lender account, such
495 DACA may call for daily sweeps into the AR Lender’s account and no
496 withdrawals by the Operator.
 - 497 i. Typically, if the FHA Lender is party to this DACA, FHA Lender’s
498 ability to exercise control will still be linked to its future notification if
499 the parties intend that this account serve as a general operating account
500 once AR Lender control terminates.
 - 501 ii. In this scenario, it may be appropriate to require a DACA on the
502 downstream project operating account.

503

504 C. **Key elements of DACA.** ~~Currently,~~ HUD does not have a required form of DACA, though
505 [one or more sample forms it may are posted](#) ~~one or more sample forms~~ as unofficial guidance.
506 These sample forms are only examples, and the responsible parties may use a different form,
507 at their discretion, provided the form used addresses the key elements and is consistent with
508 HUD Program Obligations.

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

514
515 **1. Parties to DACA:**

- 516 a. Where no AR Loan is involved, the FHA Lender must be the only secured
517 party named in the DACA. Parties will generally be the Bank, FHA Lender,
518 and the Operator (or named account holder). The depository bank must be an
519 organization engaged in the business of banking.
- 520 b. Where an AR Loan is involved, both the AR Lender and FHA Lender can be
521 named as secured parties in a single DACA, or a First Lien DACA (in favor of
522 AR Lender) and a Second Lien DACA (in favor of FHA Lender) may be
523 used.
- 524 c. HUD must not be a party to a DACA (unless the loan is held by HUD).
- 525 d. If a party other than the Operator is named on, or has an interest in, a deposit
526 account in the flow of funds, such arrangement must be acceptable and
527 comply with any restrictions in the FHA-insured loan documents. If required
528 by FHA Lender and/or HUD, such third party must execute such joinders,
529 security agreements, DACA's or other documents to bind such party's
530 interest.

- 531
532 **2. Notification of Security Interests.** The DACA must include a provision notifying
533 the Depository that the FHA Lender has a security interest in the deposit account and
534 all checks, funds, monies or other items now or hereafter deposited therein and any
535 lockboxes associated therewith.

- 536
537 **3. No Other DACAs.** The DACA should include representations to the effect that
538 there are no other control agreements affecting the account and that none will be
539 placed on the account (other than the DACA(s) approved as part of the transaction).

540
541 In any instance where a First Lien DACA and Second Lien DACA are used, the First
542 Lien DACA must refer to and permit the Second Lien DACA (and vice versa).

- 543
544 **4. Accounts Covered.** The DACA must identify the account (or accounts) that are
545 subject to the DACA. The account number(s) must match the cash flow chart (and
546 the DAISA must be checked to ensure that it is sweeping funds into an account
547 identified in the DACA). If the DACA covers more than one account, it should
548 provide that FHA Lender can give a Control Notice as to any or all accounts.

- 549
550 **5. UCC Control Language and Execution.** To establish "control" within the meaning
551 of the Uniform Commercial Code, the DACA must provide that Depository Bank will
552 comply with FHA Lender's instructions as to disposition of funds without further
553 consent of the debtor (typically the Operator). This language is referred to as "UCC
554 Control Language". The DACA must be authenticated; i.e. it must be fully executed

555 by all of the parties. Notarization is not required, unless required by state law.
556 [Provisions in the DACA allowing Depository Bank to file an interpleader action](#)
557 [should not include disputes between depositor and FHA Lender/HUD.](#)
558

- 559 6. **When Each Secured Party Is Entitled to Give Control Notice.** If both AR Lender
560 and FHA Lender are parties to the same DACA, the DACA must clearly set forth
561 when the Depository is obligated to follow the FHA Lender’s (as opposed to AR
562 Lender’s) instructions, which must be consistent with the “change in control” or
563 termination of DACA provisions in the Intercreditor.
564

565 In any instance where a First Lien DACA and Second Lien DACA are used, the First
566 Lien DACA must terminate or provide for a change in control over to the Second
567 Lien DACA consistently with the “change in control” and termination provisions in
568 the Intercreditor.
569

570 7. **Giving and Implementing Control Notices:**

- 571 a. The DACA must clearly set forth the manner for sending a Control Notice and
572 should identify when it is deemed given or received. The manner of giving a
573 Control Notice must include expeditious means (i.e. it should not be limited to
574 delivery by mail, but also include personal delivery or other prompt means).
575 b. The depository bank should agree to implement the notice as soon as is
576 reasonably practicable. The key is to be able to identify when the block
577 begins, which must not be subject to significant delay. Implementation
578 periods of longer than three business days after notice will not be acceptable.
579 c. Once a Control Notice goes into effect, depository bank must agree to (a)
580 disregard further instructions delivered by the Operator/account holder and
581 block Operator’s/account holder’s access to the account (except for the
582 purpose of making and accepting deposits) and (b) rely solely on instructions
583 of the Secured Party giving the Control Notice.
584

- 585 8. **Set-Off, Recoupment, Bank Liens and Security Interests.** The depository bank, in
586 its capacity as Depository Bank, must agree to limit any rights of set-off, recoupment,
587 banker’s lien, or contractual security interest in the account and Account Collateral.
588 Generally, these should be limited to:

- 589 a. If depository bank is also the AR Lender the obligations secured by the AR
590 loan/security agreement, provided any such setoff must be subject to the
591 Intercreditor;
592 b. Its customary and usual fees in its capacity as depository bank related to the
593 DACA account; and
594 c. Returned items, customary collecting bank, or similar items related to the
595 DACA account.
596

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

600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624

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 and do not need to be addressed in the DACA, but the DACA must be consistent with the Intercreditor. 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)**

625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641

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.

642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685

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

686 default under the Operator Security Agreement if FHA Lender's
687 consent is not obtained under such security agreement.
688 ii. Provisions which delay implementation of a changed instruction
689 and/or which require prior notice to FHA Lender are encouraged,
690 though lengthy periods (~~over 3 business days~~) may be inconsistent
691 with healthcare program restrictions and should generally be avoided.
692 Exculpatory clauses restricting bank's liability for failing to give such
693 a notice are acceptable.

694
695 **6. The Bank must agree to limit rights of setoff, recoupment or any security**
696 **interest or banker's lien.** Limited exceptions (such as for their reasonable and
697 customary fees, returned items, posting errors, etc.) may be acceptable but should be
698 limited to items and fees related to this account only. No exceptions should be made
699 for contractual security interests. AR Lender must waive its right to setoff its loan
700 against the DAISA account to the extent required by applicable law or governmental
701 healthcare insurance program rules.

702
703 **7. Termination of DAISA:**

- 704 a. By Operator: Operator (debtor) shall be able to terminate the DAISA in order
705 to comply with Medicaid and Medicare anti-assignment requirements.
706 However, failure to procure the FHA Lender's prior written consent to such
707 termination may result in a default under the Operator Security Agreement.
- 708 b. By depository bank: The depository bank must be obligated to give notice to
709 FHA Lender prior to its voluntary termination of the DAISA. A notice period
710 of at least 30 days is expected (unless for breach, when a shorter period may
711 be acceptable). Longer notice periods are favored.
- 712 c. By secured parties: The DAISA account is subject to the control of the
713 healthcare provider, not the Lenders. Generally, the Lender is a party solely
714 for the purpose of notifying the depository bank of its interest. Accordingly,
715 the secured party has very few rights under a DAISA (for example, it may
716 have the right to be provided bank statements and on-line access to monitor
717 account activity, and/or to be notified of certain key events, like revocation of
718 a sweep instruction on the account). The DAISA may provide for notification
719 by the secured party to the bank when it no longer has any interest. However,
720 such a notification should not have the effect of terminating the DAISA, as
721 FHA Lender is continuing to rely on the sweep instruction. There may be
722 exceptions (for example, if there is a separate DAISA to which FHA Lender is
723 a party that remains in place and/or a new DAISA entered into concurrently).
- 724 d. Disposition of Funds on Termination: Generally, if the DAISA is being
725 terminated by the Operator or the Bank, the funds will be disposed of in
726 accordance with the then-current sweep instruction.
- 727 e. When AR Lender is the depository bank: the DAISA should refer to the AR
728 Lender in its capacity as depository bank where appropriate.
- 729

- 730 8. **Other Key Elements.** See Section 16.8 for additional key elements that apply to
731 both DACAs and DAISAs.
732
733

16.8

Key Elements for Both DACAs and DAISAs

- 734
735 A. As referenced above, there are some elements that HUD expects to see in both DACAs and
736 DAISAs. Those elements are as follows:
737

- 738 1. **Access to Account.** For the DACA, and for any DAISA to which FHA Lender is a
739 party, depository bank must agree to provide FHA Lender upon FHA Lender's
740 request (which need only be made once and not on a recurring basis) access to daily
741 activity in the account and copies of periodic account statements delivered to
742 Operator.
743
- 744 2. **Account Maintenance Requirements.** If the depository bank is also the AR Lender,
745 and it requires that Operator maintain its deposit accounts with it, then the
746 DACA/DAISA must provide language to the effect that if the depository bank
747 terminates the DACA/DAISA for reasons other than breach thereof, the Operator
748 must be able to move its relationship notwithstanding any restriction to the contrary
749 in its other agreements (or this can be addressed by AR Lender in its loan
750 documents).
751
- 752 3. **Minimum Balance Requirements.** Occasionally, the parties may wish to include a
753 minimum balance requirement in the DACA or DAISA:
754 a. To provide a source of payment for bank permitted debits, such as its fees,
755 b. To provide a source of funds for overpayment reconciliation for a government
756 healthcare program, or
757 c. For other reasons.
758

759 Such an arrangement must be brought to ORCF's attention during underwriting, be
760 reasonable in amount, and be acceptable to FHA Lender and HUD.
761

- 762 4. **Conflicts:**
763 a. The DACA and DAISA must provide that in the event of a conflict between
764 the DACA and the bank's deposit agreement(s), the terms of the DACA and
765 DAISA control.
766 ~~b. The DACA and DAISA must not control over the Intercreditor Agreement.~~
767 ~~e.b.~~ Certain future events may be permitted by a DAISA or DACA but will still be
768 defaults under the HUD Loan Documents. For example, to comply with
769 government healthcare program rules, the DAISA normally permits the
770 Operator to revoke its sweep instructions and/or to terminate the DAISA.
771 These acts remain defaults under the FHA Loan Documents. The execution of
772 such DAISA or DACA by FHA Lender, and HUD's approval of same, shall

773 not be deemed any waiver thereof or consent thereto. The DAISA or DACA
774 should contain language to make this clear. But regardless of whether such
775 language is included, such a waiver shall not be implied.

776
777 5. **Bank Fees.** These should be limited to usual, customary and reasonable fees in the
778 normal course of business of the bank.

779
780 6. **Indemnification obligations.** These should typically be limited to the Operator
781 (debtor) and, if required by the depository bank, a guarantor(s).

782
783 Indemnities binding FHA Lender are not encouraged. However, if FHA Lender
784 agrees to such obligations, they should typically be limited to third party claims
785 arising from compliance by Bank with FHA Lender's written instructions after a
786 Control Notice is given and reimbursement of returned items to the extent FHA
787 Lender received the proceeds thereof. The Operator should be primarily responsible
788 for indemnities. HUD must be expressly excluded from all such indemnification
789 obligations.

790
791 Any indemnification provided by the FHA Lender (and preferably, by Operator) to
792 the Depository Bank should exclude indemnification for indirect damages, lost
793 profits, or special, punitive or consequential damages, and at a minimum, bank's
794 gross negligence or intentional misconduct. If AR Lender is also the depository, it
795 should be clear the indemnity is geared towards its capacity as depository and not as
796 secured party.

797
798 7. **Boilerplate.** Should include standard provisions dealing with governing law,
799 execution of counterparts, execution by facsimile (or other electronic) signature, etc.
800 Provisions which would not permit venue in a federal district court are not permitted.

801
802 8. **Assignment:** The DACA must permit assignment of the DACA by the FHA Lender.
803 The assignment provisions must not be materially inconsistent with, or unduly
804 burden, HUD assignment of claims procedures. For example, an assignment clause
805 which requires the assignee to execute an assumption shall not apply to an assignment
806 to HUD.