

Regulatory Agreement

Format – more detailed, topical organization, easier to locate applicable provisions

1. Index
2. Headings
3. New Terms – e.g., Waste (§1(ll))
4. Although greater specificity built into the document, Program Obligations will fill in the detail. [Examples: Depository requirements (e.g., Reserve for Replacement and Residual Receipts provisions (§§10(a) and 11); insurance requirements (§12(g))]
5. Definition section cross referenced with the Security Instrument and the Note
 - i. Applies uniformly to all closing documents unless specifically referenced in the other documents
 1. More consistent interpretation and enforcement across all documents
 2. More defined terms and more details with respect to definitions to improve clarity, understanding of expectations and uniformity across the Department and program participants
 3. Always capitalized in text

Introductory Language

1. Language to be filled in includes type of processing; Elderly or Non-Elderly and identification of Borrower type
 - a. Be careful on Non-Profit; if non-profit owner but processed as a for profit project

Part I: Definitions

1. Includes definitions for
 - a. Displaced Persons (§1(f)) and Elderly (§1(g))
 - b. Goods and Services (§§1(i) and 24) and Reasonable Operating Expenses (§1(bb))
 - c. Residual Receipts (§1(ee)), Reserve for Replacement (§1(dd)) and Surplus Cash (§1(gg))
 - d. Waste (§1(ll))

Part II: Construction; Refinancing

1. Recognize language from the current Mortgagor's Certificate in what is now Part II of the Regulatory Agreement
2. Very limited changes

3. There had been no language in the Regulatory Agreement with respect to the construction or substantial rehab phase of the project, even though the Regulatory Agreement was in effect at that time.
4. Mortgagor's Certificate lacked enforcement language in the event there was a failure to comply with its terms.
5. Decision to merge the two documents and to make clear that it applies to both construction and refinancing loans and that enforcement during construction phase was possible under the Regulatory Agreement
6. Continues to contain some Borrower certifications – e.g., **Section 3 (Unpaid or Outstanding Obligations)** (Borrower certifies that it does not have unpaid obligations except those approved in writing by HUD and that the Borrower states that it is not aware of any liens other than those that appear as exceptions to a title policy accepted by HUD or shown on the UCC search) and **Section 5 (Construction Commencement/Repairs)** (Borrower certified not commenced construction or substantial rehab without HUD prior approval or other limited circumstances).
7. **Lender's Certificate** (§4)
 - a. Borrower agrees to be bound by the terms of the Lender's Certificate or Request for Endorsement
 - b. Discussion about payment of fees and expenses and use of deposited funds

Part III: Financial Management

1. Requires Borrower to make payments under the Note and Security Instrument (§9)
2. **Reserve for Replacement** (§10)
 - a. Depository standards to be set by Program Obligations (§10(a))
 - b. Reassessment of deposit amounts every 10 years or more frequently at HUD's discretion; if amounts change, no recorded amendment of Regulatory Agreement required (§10(b))
 - c. Restricted asset; investment per Program Obligations and interest earned deposited in R4R account and limited uses (§10(c))
 - d. Control of disbursements by HUD (§10(d))
 - e. Establishment of R4R amounts post TPA (§10(e))
 - f. Status of R4R funds following satisfaction HUD obligations (§10(f))
3. **Residual Receipts** (§11)
 - a. Depository standards to be set by Program Obligations
 - b. Must deposit within 90 days after end of fiscal period
 - c. Control of disbursements by HUD
4. **Property and Operations** (§12)
 - a. Deposit of rents and receipts, including equity and capital contributions (§12(a))
 - i. Does not include syndication proceeds
 - b. Use of funds (§12(a)) limited to
 - i. Reasonable operating expenses
 - ii. Distribution of Surplus Cash
 - iii. Permitted by Sections 14 and 15
 - iv. As permitted by the Regulatory Agreement
 - c. Hold in trust if received for unauthorized reasons (§12(a))

- d. Single Asset rule (§12(b))
 - e. Requirement to satisfy liens (§12(c))
 - f. No penalties to be paid from Project (§12(d))
 - g. Notify HUD of receivers, bankruptcy filings and insolvency (§12(e)); condemnation (§12(g)); litigation (§12(h))
 - h. Insurance requirement (§12(f))
5. **Security Deposits** (§13)
- a. Details requirements; status of forfeited tenant deposits
6. **Distributions** (§14)
- a. Take only from Surplus Cash or in accordance with Program Obligations
 - b. None from borrowed funds, prior to Project completion or after notice of Violation or Event of Default under Security Instrument or where a forbearance agreement (§14(a))
 - c. None when certain services have not been provided or certain repairs completed. New process for escrowing funds pending HUD inspections. Permit where minor problems on case-by-case basis (§14(b))
 - d. Repayment requirements (§14(c))
 - e. Time for taking Distribution; limited dividend/non-profit rules (§14(d))
 - i. If not taken when required, remain as Mortgaged Property and can only be used as permitted by Regulatory Agreement (it does not remain as available Surplus Cash if not taken)
 - f. Equity or capital contributions reimbursement (§14(e))
7. **Reimbursement of Advances** (§15)
- a. Advances to be deposited in operating account
 - b. Advances made for reasonable operating expenses may be reimbursed from Surplus Cash at end of annual/semiannual period OR at any other time as approved in writing by HUD
 - c. Interest permitted if approved in advance by HUD
 - d. Repayment not a Distribution
8. **Financial Accounting** (§16)
- a. Focus on Program Obligations
 - b. Undocumented Expense or Distribution is ineligible expense unless otherwise determined in writing by HUD
 - c. Definition Undocumented Expense
 - d. Access to books and records for inspection
9. **Books Maintained by Management Agents** (§17)
- a. Must follow Program Obligations
 - b. Be available for inspection
 - c. Contractual requirements
 - d. If management contract terminated, books and records remain with Borrower
10. **Annual Financial Statement** (§18)
- a. Failure to meet obligation, HUD can hire CPA at expense of Borrower
 - b. Requires certifications
 - c. No other relationship with Borrower unless permitted by HUD
 - d. Certain expenses cannot be Project expenses

Part IV: Project Management

- 1. Preservation, Management and Maintenance (§19)**
 - a. Borrower shall
 - i. Not Commit Waste (§19(a))
 - ii. Not Abandon Mortgaged Property (§19(b))
 - iii. Restore/Repair whether or not litigation, insurance proceeds or condemnation awards are available (§19(c))
 - iv. Keep in decent, safe, sanitary condition and good repair (§19(d))
 - b. Absolute obligations and not contingent on availability HUD funds or HUD performance of administrative or contractual obligations
 - c. Books and records examination
 - d. Insurance proceed usage in accordance with Security Instrument
 - e. Eminent domain proceeds in accordance with Security Instrument
- 2. Flood Hazards (§20)**
- 3. Management Agreement (§21)**
 - a. Compliant with Program Obligations
 - b. Management certification
 - c. Management agreement cannot be assigned with prior HUD approval
- 4. Acceptability of Management (§22)**
 - a. Must be acceptable to HUD
 - b. HUD may require replacement
- 5. Termination of Contracts (§23)**
 - a. Management agent termination language
- 6. Contracts of Goods and Services (§24)**
 - a. Program Obligations
 - b. Costs, amounts and terms not exceed reasonable levels and customarily paid in the vicinity of the Land
 - c. HUD monitoring
- 7. Responsiveness to Inquiries (§25)**
 - a. Furnish information to HUD
- 8. Tenant Organizations (§26)**
 - a. See HUD regulations

Part V: Admissions and Occupancy

- 1. Lease Term, including hotel services language (§28)**
- 2. Commercial Leases (§29)**
 - a. No prior HUD approval for commercial lease renewals where no change in terms or use
 - b. Copies of commercial leases to HUD
- 3. Subleases (§30)**
 - a. Hotel language
- 4. Tenant Selection and Occupancy (§31)**
 - a. No major changes
- 5. Charges for Services and Facilities (§33)**

- a. Only applies if HUD regulates rents
- 6. **Prohibition of Certain Fees** (§34)
 - a. Cannot charge fees prohibited by Program Obligations
- 7. **Security Deposits and Other Fees** (§35)
 - a. No changes

Part VI: Prior Written Approval of HUD (§36)

1. No major changes; remember, not absolutely prohibited, these things can occur if Borrower receives prior written approval from HUD
2. TPA rules (§36(a))
 - a. Includes language from Handbook
3. Use of funds of the Mortgaged Property (§36(c), (d) and (j))
4. Enter into contracts for supervisory or managerial services or Leases for operation of the Project as a whole (§36(e))
5. Remodel, demolition, disposition (§36(g))
6. Change use of Mortgaged Property (§36(h))
7. Changes to bylaws, although some changes can occur without prior HUD approval (§36(i))
8. Fees/payments from employees or contractors except for certain warranty claims (§36(k))
9. Establish condominium/cooperative regimes (§36(m))
10. Materially change unit configurations or unit numbers (§36(n))

Part VII: Enforcement

1. This Part focuses on enforcement for the Borrower's failure to comply with the requirements of the Regulatory Agreement
2. **NOT** a provision providing any exceptions at all to the non-recourse terms of the Security Instrument or the Note
3. It contains many of the same terms and requirements of the current Regulatory Agreement
4. It continues to rely on the concept of "violation" of the Regulatory Agreement (§37); Declarations of Default (§38(a)) and the remedies that HUD may take following a Declaration of Default (§38(b) and 39)
5. A **Violation** occurs if
 - a. Borrower fails to comply with any provision of the Regulatory Agreement
 - b. Fraud, material representation or material omission by Borrower (officer, director, trustee, GP, member, manager or managing agent) connection with
 - i. Financial statement, rent roll or report/submission **to HUD** during term of the Regulatory Agreement
 - ii. Request for HUD consent to any action requiring **HUD's** prior written approval
(Distinguish from discussion of default under the Security Instrument)

- c. Commencement of a forfeiture action (civil or criminal) which in HUD's reasonable judgment could result in the forfeiture of the property or materially impair HUD's interest in the Mortgaged Property
6. **Procedures for Declaring a Default** (§38(a))
- a. Once a violation exists, HUD gives notice of violation to Borrower (procedures in Regulatory Agreement)
 - b. Time to correct violation, 30 days, but HUD may set longer or shorter time in notice
 - c. Declare default without further notice if not corrected within timeframe
 - d. Declare default without notice to protect health and safety of tenants; may declare default at any time (health and safety is not an element of default without notice under the Security Instrument)
7. **Remedies following Declaration of Default** (§38(b))
- a. May declare Indebtedness immediately due and payable and proceed to foreclosure if HUD holds the Note
 - b. May notify holder of Note of default and request declaration of default under the Note and Security Instrument and holder option to declare default under those documents and proceed to foreclosure or assign to HUD
 - c. Collect rents and other fees to meet Borrower's obligations under the Regulatory Agreement and the Note and Security Instrument and pay expenses to preserve and operate the project
 - d. Take possession of the project and take all steps to operate and maintain the project in decent, safe and sanitary condition and good repair
 - e. Seek a receiver to be appointed or other appropriate relief from a court (includes the affirmative statement that "the injury to HUD arising from a default under the terms of the Agreement would be irreparable and the amount of damage would be difficult to ascertain" – admission from Borrower in the document)
 - f. Collect attorney fees
8. **Measure of Damages** (§39)
- a. Sets forth a formula to calculate the amount for **failure to maintain as required by the Regulatory Agreement** (a challenge in the past)
 - b. The cost of repairs to return the Project to decent, safe and sanitary condition and good repair (plus other damages or remedies available by law)
 - c. The measure of damages for Waste under the Security Instrument (§ 47(c)), while not the same, requires that any collection of damages for Waste must be applied to remedy Waste (as well as to the Indebtedness, costs and other purposes as directed by HUD).

Part VIII: Miscellaneous

- 1. **Compliance with Laws** (§40)
 - a. Language similar to Security Instrument very broad
- 2. **Present Assignment of Rents to HUD**, subject to the assignment of Rents in the Security Instrument (§45)
- 3. **Third Party Beneficiary** (§49)

- a. Borrower agrees it is not a third party beneficiary to the Contract of Insurance between HUD and Lender

Part IX: Non Recourse

1. Non-Recourse Debt (§50)

- a. Applies to persons/entities identified in the Firm Commitment; names in Security Instrument §6
- b. Continues non-recourse nature of Loan
- c. Identified persons are liable for
 - i. Funds coming into their hands which not entitled to retain under the Regulatory Agreement
 - ii. Authorizing any disposition of Mortgaged Property in violation of §36(a) for the Regulatory Agreement without prior HUD approval
 - iii. Own acts and deeds or acts and deeds of others which it has authorized in violation of the Regulatory Agreement
- d. These obligations survive foreclosure or any release of the Security Agreement

Signatures/Certifications/Warnings

1. There is a certification that all statements and representations made in the Regulatory Agreement are true, accurate and complete
2. Borrower states that the Regulatory Agreement has been made for the purpose of influencing an official action of HUD and may be relied on by HUD as true statement of fact (needed for certain types of civil and criminal prosecutions)
3. Warning after signature line