

Department of Housing and Urban Development

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**Federal Housing Administration  
Multifamily Program Closing Guide**

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Revised February 2015

Part 1: Procedures for Closing

Part 2: Loan Documents

Part 3: Diligence and Other Closing Requirements

Part 4: Checklists

Part 5: Sample Language and Certifications

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## **Part 1: Procedures for Closing**

### **1.1 Objective of this Closing Guide**

A. Objective. This Guide is intended to:

1. Cover both Multifamily Accelerated Processing (MAP) and traditionally processed (TAP) closings for all FHA-insured multifamily rental projects for which a Firm Commitment has been issued on or after November 1, 2014. Guidance relating to Section 242 Hospital and Section 232 Assisted Living, Intermediate Care, and Nursing Home programs is not set forth in this Closing Guide. Other HUD programs are not covered by this Guide.
2. Provide procedures and protocols to Lender, Borrower, HUD Closing Attorney, HUD Multifamily Hub Director (Hub Director), and other HUD staff in preparing and reviewing documents for the initial closing, initial/final closing, and final closing of projects with loans insured by FHA. Notwithstanding interim guidance provided prior to publication of this Closing Guide, this Closing Guide provides the definitive closing policies and procedures authorized by the Office of General Counsel for the applicable projects.
3. Promote uniformity in the closing requirements and procedures in the various HUD field offices nationwide. No supplemental riders, language, or requirements, other than those set forth in this Closing Guide, shall be used. If the specifics of a deal or jurisdiction necessitate supplemental language, riders, or other requirements not set forth in the revised loan documents or this Closing Guide, the HUD Closing Attorney shall contact the Assistant General Counsel for the Multifamily Mortgage Division for authorization to use such additional requirements.

B. Authority.

1. Administrative policy determinations shall be consistent with Program Obligations, as defined below, including without limitation the current Multifamily Accelerated Processing Guide (MAP Guide).
2. With regard to any project insured by FHA (the Project), the term Program Obligations means (1) all applicable statutes and any regulations issued by the Secretary pursuant thereto that apply to the Project, including all amendments to such statutes and regulations, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, and Mortgagee Letters that apply to the Project, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Project only to the extent that they interpret, clarify and implement terms in the applicable closing document rather than add or delete provisions from such document. Handbooks, guides, notices, and Mortgagee Letters are available on HUD's official website: <http://www.hud.gov/offices/adm/hudclips/index.cfm>, or a successor location to that website.

3. The Hub Director (which term, wherever used in this Closing Guide, shall be deemed to include the Hub Director's designee, the Program Center Director for closings processed in a Program Center, any Field Office Housing Staff to whom closing tasks are delegated, e.g., a Project Management Chief, or any successor to any such position, as appropriate) is the organizational position with delegated authority pursuant to delegations of authority published in the Federal Register and current administrative notices for making administrative policy determinations with respect to insuring an FHA loan for multifamily rental projects, in accordance with Program Obligations.

## **1.2 Responsibilities for Closing**

### **A. Hub Director Responsibilities.** The Hub Director is responsible for:

1. Ensuring that all conditions of the HUD Firm Commitment have been met and advising the HUD Closing Attorney in an administrative memo prior to closing that:
  - a. All conditions, including special conditions, have been satisfied.
  - b. All required documents have been reviewed.
  - c. All documents are on HUD approved forms and/or changes have been approved (form HUD-2, Request for Waiver of Housing Directive, approving waivers and material changes to forms will be attached to the administrative memo).
  - d. All administrative requirements have been met.
  - e. Contents of the documents are programmatically accurate and consistent with the Firm Commitment.
  - f. The amount and form (e.g., check, wire, etc.) of any funds to be collected at closing.
2. Reviewing Closing Documents. Both the program office staff and HUD Closing Attorney shall review each document submitted. The Hub Director has responsibility for reviewing and approving the substantive business terms of each document submitted, including without limitation, the review and consideration of requested closing document changes that relate to business and policy concerns, business implications of litigation, UCC filings, site plans, survey matters and title encumbrances. As such, the Hub Director must ensure that the documents submitted comply with Program Obligations, including the underwriting requirements set forth in the MAP Guide. Note, however, that program office staff is not required to review HUD-91725M, *Opinion of Borrower's Counsel*.
3. Establishing the financial requirements for closing and confirming that the Lender will comply with the financial requirements.
4. Establishing processing priorities and start of construction target dates and monitoring construction schedules.
5. Arranging the pre-construction conference in accordance with MAP Guide requirements.
6. Directing all activities essential to the insurance of mortgage loans, including approval of:
  - a. Findings of acceptability with respect to program policy and eligibility criteria concerning the project.

- b. Staff's preliminary underwriting determinations supporting insurance endorsements.
    - c. Form HUD-2530, *Previous Participation Certification*, of Borrower and its principals and other participants.
  - 7. Coordinating the place for the closing, following consultation with the HUD Closing Attorney and Lender; and notifying the Lender and Borrower of the closing date, time and location. If the local HUD Field Office's protocols so dictate, the Hub Director shall set the closing date; otherwise the closing date will be set by the HUD Closing Attorney.
  - 8. Ensuring that at least one representative from the Office of Multifamily Housing with knowledge of the project being closed and signature authority to make decisions is available for the entire closing, along with the HUD Closing Attorney. This representative will be designated and provided with an appropriate delegation of authority in the administrative memorandum. The Hub Director shall ensure that if the primary HUD representative with signature authority will be unavailable for part or all of the scheduled closing, an alternate representative will be delegated signature authority, as necessary or appropriate.
  - 9. Coordinating crosscutting office support activities required for multifamily rental projects.
  - 10. Requesting approval from HUD Headquarters (HQ) of any credit subsidy and form HUD-9807, *Insurance Termination Request for Multifamily Mortgage Insurance*, where required.
  - 11. Collecting the MIP, inspection fee and additional examination fee, if any, and submitting the same to HUD Headquarters.
  - 12. Obtaining the payoff of any HUD-held loans (Section 202/811, Mark-to-Market, purchase money and Section 221(g) loans), and obtaining the related HUD HQ approval, if applicable.
  - 13. Endorsing the Note (as defined in Section 2.4 herein) for insurance.
  - 14. Preparing and submitting the Washington Docket in accordance with Appendix 11E of the MAP Guide (Completion Instructions for the Washington Docket), and the local HUD office closing dockets.
  - 15. Issuing Firm Commitment amendments, re-issuance, and extensions in a timely manner and in accordance with the requirements in 24 CFR §§ 200.46 and 200.47.
  - 16. Obtaining approval from the Office of Affordable Housing Preservation if the project has previously undergone a Mark-to-Market refinance in which HUD has taken back a soft secondary note. See Housing Notice 2012-10 for details of these requirements.
- B. HUD Closing Attorney Responsibilities.** The HUD Closing Attorney is responsible for:
- 1. **Reviewing Closing Documents.** Except as otherwise indicated, both the program office staff and HUD Closing Attorney will review each document submitted for all closing types, including Section 223(a)(7) refinancings. The HUD Closing Attorney has the primary responsibility of reviewing the legal sufficiency of each document submitted and advising the Hub Director accordingly. Legal sufficiency means that all closing

documents include all required provisions and comply with applicable statutory and regulatory requirements. The HUD Closing Attorney may only accept changes to the closing forms or waivers of this Closing Guide that have been made in accordance with the procedures set forth in Section 2.1 herein.

2. Setting the date and time of closing after (i) consultation with the Hub Director, Lender, and Borrower, and (ii) reviewing and approving the closing documents submitted by Lender; except, if the local HUD Field Office's protocols so dictate, then the Hub Director shall set the closing date.
3. Conducting the closing and collecting the appropriate closing documents pursuant to the Firm Commitment.
4. Reviewing the assembled Washington Docket in accordance with Appendix 11E of the MAP Guide (Completion Instructions for the Washington Docket).

#### C. Lender's Responsibilities.

1. 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 refuse to communicate with anyone other than the Lender's attorney with respect to the transaction.
2. Preparing closing documents. Except as otherwise provided, Lender (and counsel) and Borrower (and counsel) are responsible for completing the closing documents, reviewing them, and submitting them—including any closing documents prepared by third parties and recorded documents after recording—to the Hub Director and HUD Closing Attorney, according to the procedures below.
3. Submitting closing packages to the Hub Director.
  - a. Unless otherwise specified, three full sets of documents shall be submitted: one for the HUD Closing Attorney and two for the Multifamily staff. The Hub Director or HUD Closing Attorney may request a different number of closing packages be submitted.
  - b. Documents shall be submitted as hard copies unless the Hub Director and HUD Closing Attorney permit email or electronic versions of documents. HUD encourages the HUD Closing Attorney and Hub Director to permit documents (except for one original set of documents) to be submitted in electronic form.
  - c. Draft closing documents shall be submitted early enough for HUD to complete review, distribute written comments, and, if necessary, review one additional



- submission of draft closing documents prior to the requested date of the closing. HUD's goal shall be to complete this review in 15 business days, but Lender shall discuss the schedule with HUD Closing Attorney to determine whether additional time for review is necessary. This 15 day time frame is not binding on HUD relative to determining the date of closing; rather, it is a suggested time frame for HUD to complete its document review.
- d. Lender should take into consideration holidays, GNMA delivery schedule, bond closings, tax credit funding and events that may affect the closing date. Lenders should also notify HUD before an interest rate lock; if the interest rate is locked without HUD's written consent, Lenders and Borrowers assume the risk of having to pay extension or other fees if the loan cannot be closed in time.
  - e. Lender shall notify the HUD Closing Attorney of any changes made to the closing documents after the initial drafts are submitted, particularly when those changes are material. Participants are advised that such changes may affect the closing date.
4. If changes to the HUD form closing documents are requested, Lender shall prepare the written justification and supporting documentation for requested form changes and Closing Guide waivers. This applies regardless of the party seeking the change or waiver, with the exception of the Opinion of Borrower's Counsel. *See* Section 2.1.C.2. of this Closing Guide for further instructions.

**D. Standards of Acceptable Closing Review Package.**

1. For HUD to accept the draft closing package for review:
  - a. Provided that time-sensitive documents such as searches and status certificates may be submitted separately if necessary to preserve timeliness, all documents must be submitted at one time, including but not limited to, a survey, surveyor's report, Borrower's counsel's opinion and *pro forma* title policy (including legible copies of all title exception documents).
  - b. The closing package shall include the applicable HUD closing checklist, and the documents in the closing package shall be identified by number tabs and presented in the same order as listed on the checklist.
  - c. All forms and exhibits must be completed (or as complete as possible, provided that non-substantive information such as dates and recording information may be finalized at initial closing) and in substantially final form.
  - d. Lender and its counsel must ensure that documents are thorough and accurate, and shall not submit incomplete or inadequately completed documents to HUD. HUD reserves the right to return incomplete or inadequate submittals and to wait for complete and acceptable documents prior to commencing its review. The Hub Director will advise the Lender and its counsel of any rejected closing packages.
  - e. The draft closing documents submitted for initial review should be in redline comparison format, or show inserts by bold text and deletions by strike-through, so that the HUD Closing Attorney can easily identify changes made to the standard forms found on HUDClips and in this Closing Guide.
2. The closing shall not be scheduled until a complete set of documents have been reviewed

and approved by the Hub Director and the HUD Closing Attorney. It is imperative that closing documents not be reviewed for the first time during the closing. Any material changes needed to the documents, including those required by comments of HUD Closing Attorney, must be re-submitted and reviewed before closing.

### **1.3 Closing Arrangements**

- A. Location of Closing. If the closing is held at HUD, the Hub Director is responsible for arranging accommodations for the closing. In determining the location for the closing, the Hub Director will take into consideration project remoteness, e.g., where an office has multiple-state jurisdiction, and whether a particular Field Office will have an individual present who is authorized to make decisions for HUD and to endorse the Note. The closing may be held at a location other than a HUD office if the Lender, Borrower and Hub Director all agree that it is appropriate to do so. If the closing is held at a non-HUD location, the Lender and/or Borrower will be responsible for arranging and paying for the cost of any closing facilities.
- B. Recordation and Dating of Documents.
1. To the extent possible, all closing documents must be dated with the same date, which may be prior to the date the Note is endorsed by HUD for insurance, except for the following items, which must be dated the day of endorsement (whether initial, initial/final, or final endorsement, as applicable):
    - a. Title insurance policy.
    - b. Form HUD-91725M, *Opinion of Borrower's Counsel*.
    - c. Form HUD-92434M, *Lender's Certificate*.
    - d. Form HUD-92455M, *Request for Endorsement of Credit Instrument and Certificate of Borrower, Lender and General Contractor*.
  2. The documents need not (but if the HUD Closing Attorney and Hub Director allow for pre-recording of documents may) be recorded prior to the date of endorsement, provided that Borrower and Lender assume all risks associated with the recording or execution of any documents prior to the date of the endorsement of the Note by HUD.
  3. Prior to recording:
    - a. Final loan documents must be reviewed and approved by the HUD Closing Attorney and Hub Director.
    - b. The Regulatory Agreement must be executed by a HUD official and acknowledged before a notary public (or other official authorized by the local jurisdiction to witness acknowledgments). In jurisdictions where the Regulatory Agreement may be signed in counterparts, HUD shall hold its signature pages in trust (or shall ask the title company to hold its signature pages in trust pursuant to an escrow instruction letter) and its signature pages shall not be released until Borrower has executed the Regulatory Agreement and released its signature pages. Upon the consent of the HUD Closing Attorney, the Regulatory Agreement may be executed by a HUD official and released for recording in advance of closing.
    - c. All the recordable documents must be reviewed by the title company or its designee

for recording purposes, to ensure compliance with local enforceability and recording requirements.

4. In addition to the unrecorded executed documents collected at closing, unless otherwise agreed by the HUD Closing Attorney, three copies (except in the case of the Regulatory Agreement, for which HUD shall receive the original and two copies), of all filed or recorded documents with recording information, shall be submitted to HUD as soon as possible after recording or filing, but no later than 5 days after receipt from the applicable recording or filing office. To the extent original recorded documents may not be available in a jurisdiction due to electronic recording practices or otherwise, or to the extent that Ginnie Mae requires retention of the recorded originals for its custodial file, HUD shall accept, for the Washington Docket and other HUD purposes, copies of the recorded documents certified by either the title company or recorder's office as true and complete copies of the recorded documents. Except that one original or certified hard copy of each document is required for the Washington Docket, the HUD Closing Attorney and/or HUD Field Office may accept electronic versions of documents instead of hard copies.

C. Closing by Mail.

1. General Policy. It is HUD's preference and general practice that closings shall be attended by all parties. However, closings may also be conducted by mail, at the request of the Borrower and Lender, and at the discretion of the HUD Closing Attorney, if the HUD Closing Attorney determines such closing is appropriate under the circumstances of the particular loan. Factors the HUD Closing Attorney will consider include, without limitation, the quality of the closing package; responsiveness of Lender's Counsel and other parties in the transaction; whether last minute changes continue to be made to documents in the package; the HUD Closing Attorney's previous experience with the parties to the transaction; the complexity of the transaction; the proximity of the parties to the HUD office; time constraints (i.e., is there a delivery deadline); and other factors.
2. Procedures for Closing by Mail. If a closing by mail is approved by the HUD Closing Attorney, the following procedures must be followed:
  - a. Package Format. All final, complete, and executed documents for the closing shall arrive in one package 2 business days (morning delivery) before the closing day, unless otherwise agreed by the HUD Closing Attorney. The HUD Closing Attorney may require a different time frame in complex closings or if there are a significant number of corrections or revisions necessary from the initial closing document review. HUD permits separate delivery of the title policy and recorded copies of pre-recorded documents on closing day (morning delivery required) as long as such documents are unchanged from the draft policy and documents previously approved by HUD. The documents must be accompanied by a checklist and must be in the order indicated on the checklist. Packages shall include the sufficient number of originals and copies (unless otherwise specified by the HUD Closing Attorney, three sets of documents). HUD will not make copies or correct errors on documents submitted. In addition, a pre-addressed, pre-paid envelope and an appropriate cover letter must be provided for return delivery of the endorsed Note, unless Lender makes alternate arrangements, as approved by HUD, to pick up the endorsed Note

on the day of closing.

- b. Availability by Telephone. All parties to the transaction must be available by phone and email on closing day in case a question or issue arises.
  - c. Failure to Close by Mail on Desired Day. Escrow and mail closing shall be completed by the date approved by HUD. If there are problems with the closing (including, without limitation: the documents do not arrive on time, there are errors on the documents, documents are missing, the closing is taking an unreasonably long time, etc.), the HUD Closing Attorney will contact Lender's Counsel and indicate that the closing will be delayed. HUD may ask Lender's Counsel to correct problems and resubmit certain documents, may send the entire package back to Lender's Counsel, and/or may schedule a live closing on another day.
3. Endorsement of Note. HUD shall not endorse the Note for insurance until all of the documents are presented to, and approved by, the Hub Director. Documents for a mail closing shall comply with all requirements, including date requirements (e.g., for surveys, surveyor's reports, good standing certificates, UCC and litigation docket searches, etc.).
  4. Alternative to Closing by Mail – Skeleton Closing. If requested by Lender and Borrower and as an alternative to a closing by mail, in some situations HUD will approve a "skeleton closing," attended by only some of the parties traditionally required at a HUD closing. With prior notice to the Hub Director and HUD Closing Attorney, Lender or its Counsel may decide whose attendance is necessary to complete closing, provided that if the absence of a necessary party prevents the completion of the closing, the HUD Closing Attorney shall reschedule the closing at a time and in a manner as the HUD Closing Attorney's schedule allows. The representative(s) will deliver all documents (the same way that they are delivered in a "traditional closing") and will be available, if necessary, to make the documents acceptable to HUD. Whether or not to approve a skeleton closing is at the discretion of the HUD Closing Attorney, if the HUD Closing Attorney determines such closing is appropriate under the circumstances of the particular loan. In making such determination, the HUD Closing Attorney will weigh factors similar to those considered for requests to close by mail.

#### **1.4 Handling of Initial Closing Documents**

- A. Retention and Processing of Closing Documents. Unless otherwise specified by the HUD Closing Attorney, the HUD Field Office shall receive three sets of closing documents: one retained for the HUD Field Office, one for the Office of Counsel, and one for the Washington Docket. HUD encourages electronic retention of documents, to the extent possible. To that end, although one original set of hard copy documents shall be collected for the Washington Docket, in accordance with the procedures set forth in the MAP Guide, HUD encourages the Hub Director, HUD Closing Attorney, Lender, and Borrower to consider retaining electronic versions of closing dockets instead of hard copy versions. Hard copies remain the default requirement unless otherwise requested by the HUD Closing Attorney. Lender's counsel shall provide HUD field offices with an electronic copy of all executed closing documents (preferably in searchable PDF format).
- B. Multifamily Insurance System. In connection with the Multifamily Insurance System (MFIS), the Hub Director must:

1. Complete the following items:
  - a. Form HUD-27038, *Official Receipt*.
  - b. Form HUD-3416, *Schedule of Project Collections*.
  - c. Form HUD-290, *Closing Memorandum*.
2. Within 5 days of a project's initial closing, mail each of these to the address below:

U.S. Dept. of HUD  
Multifamily Insurance Operations Branch  
P.O. Box 44124  
Washington, D.C. 20026-4124

## **1.5 Initial Endorsement Activities**

- A. Initial Endorsement of Note. The Hub Director is authorized to initially endorse the Note after ensuring that all requirements for closing have been met, including the receipt of the first year's Mortgage Insurance Premium and Inspection Fee. Except to the extent endorsement of the Note at closing is not feasible, the Note may not be endorsed prior to the closing date. If the Note is endorsed prior to the closing, it shall be held in trust by the HUD Closing Attorney (with the endorsement date left blank) until the completion of the closing, and the HUD Closing Attorney will insert the endorsement date upon closing.
- B. Revision of Closing Forms and Documents Restricted. After closing and initial endorsement of the Note, the closing forms and documents may not be revised or amended without the prior written approval of the Hub Director, unless otherwise permitted by the Program Obligations.
- C. Pre-Construction Conference. The pre-construction conference may be held prior to or concurrently with the initial closing, and must be held before the start of construction. Instructions for conducting the pre-construction conference are in MAP Guide §12.2 (Pre-Construction Conference).
- D. Initial Draw of Loan Proceeds. Initial draw of loan proceeds may be made on the day of closing, provided that no draw may occur until the Note is endorsed, the Security Instrument is recorded, the UCC-1 Financing Statements are filed, and the Hub Director has received satisfactory evidence that the insured mortgage loan constitutes a first priority lien on the Mortgaged Property (defined in form HUD-94000M, *Security Instrument*). With the HUD Closing Attorney's approval and if the title insurance has become effective to insure the first priority lien position of the HUD-insured loan, including during any gap period prior to recording, recording of the Security Instrument and/or filing of the UCC-1 Financing Statements may occur after endorsement and funding. See MAP Guide §12.7 (Insurance of Advances and Related Matters) for information regarding form HUD-92403, *Application for Insurance of Advance of Mortgage Proceeds*.

## **1.6 Coordination with Office of Labor Relations (OLR)**

- A. Multifamily Housing and OLR Procedures for Initial Closings.
  1. Housing shall provide OLR staff with a copy of each application for Firm Commitment (the first four pages of form HUD-92013 or comparable application form will suffice).

2. OLR staff shall provide the Hub Director and HUD Closing Attorney with a copy of the current wage determination and form HUD-92554M, *Supplementary Conditions of the Contract for Construction* and, subsequently, shall provide any updates to the wage determination prior to initial closing.
  3. Housing shall forward the wage determination and form HUD-92554M to the parties to the loan transaction in accordance with Housing's internal protocols and will keep OLR updated on the status of all pending projects.
  4. The Hub Director shall provide notification by email to all OLR staff of upcoming closings 3 to 5 days in advance of all closings. OLR shall provide the current wage determination.
  5. If OLR staff is located in the same HUD office as the Housing staff, OLR shall review the closing documents and specifications to ensure that the correct and current wage decision and HUD-92554M are included in the project's specifications. If OLR and Housing are in different offices, OLR will perform the review by telephone conference with Housing staff.
  6. OLR will provide initial closing clearance in writing (e.g., email) to the Hub Director and HUD Closing Attorney.
  7. Housing shall provide information to OLR needed for contacting the general contractor so that OLR can provide technical support regarding Davis-Bacon requirements.
- B. Housing and OLR Procedures for Final Closings: Prior to final endorsement, OLR staff must ensure that any labor standards issues are resolved or that provisions are made to ensure the payment of any due wage restitution.
1. The Hub Director must notify OLR of a pending final endorsement no later than upon completion of the Hub Director's review of the cost certification and completion of the form HUD-92580, *Maximum Insurable Mortgage*, with the final mortgage loan amount.
  2. OLR shall conduct such reviews as needed to determine whether any labor standards issues that may have arisen have been resolved.
  3. OLR shall provide written or email clearance to the Hub Director and HUD Closing Attorney and, if necessary, shall provide the following additional items:
    - a. If the clearance is conditioned, notification of what, if any, documents must be provided or actions taken in order to obtain clearance for final endorsement; and
    - b. If issues remain that cannot be resolved in advance of final closing, OLR shall also do the following prior to final closing:
      - i. Require a deposit to the U.S. Treasury of an amount equal to the amount of wage restitution and any other labor standards liabilities that have been found due; and
      - ii. Provide Housing with a completed deposit agreement (form HUD-4732), a schedule for the deposit, and wire transfer instructions for the depositor's financial institution.
  4. When a contractor has outstanding wage restitution obligations, the Department of Labor

may require, pursuant to statute, regulations, and form HUD-92554M, that HUD withhold “from the contractor under this Contract . . . or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics . . . .” This means that the OLR clearance memorandum for one project may address the wage restitution for another project.

- C. Housing Actions for All Closings. Prior to any endorsement of any Note, the Hub Director must ensure that (a) the Hub Director has received OLR’s clearance, (b) if applicable, any conditions of the OLR clearance have been fully satisfied, and (c) if applicable, the parties have submitted evidence that any Department of Labor (DOL) withholding letters, consent orders, or other DOL requirements have been fully satisfied.

## **1.7 Early Start Procedures**

- A. General Requirements. Construction may not start before initial endorsement and recordation of the security instrument, except with the prior written approval of the Hub Director. Except as otherwise acknowledged in writing by the Hub Director, any work performed, including clearing, grading or other preliminary work, constitutes the start of construction. The foregoing notwithstanding, unless, the Hub Director indicates otherwise, demolition, environmental remediation, and off-site work do not constitute the start of construction.
- B. Early Start Date: This is the date of HUD’s approval of the early start, and it will be used instead of the initial closing date as, or for calculation of, the date of the following: the completion date to be entered in the construction contract; the date of the first amortized payment; and the completion date in the Building Loan Agreement. If HUD has approved an early start, the construction contract and payment and performance bonds must be dated no later than the Early Start Date.
- C. Conditions. The following are mandatory conditions for approval of an early start of construction:
1. Firm Commitment. There must be a valid Firm Commitment, including a HUD approved set of contract drawings and specifications on file with HUD. *See Handbook 4460.1 REV-1 for required Firm Commitment contract drawings and specifications.*
  2. Valid Basis for Early Start. The Hub Director must document the file fully defining the rationale and providing a compelling reason for granting an early start, after determining, in his or her discretion, that:
    - a. Circumstances do not allow for an immediate closing, but there is reasonable evidence and assurance that closing will occur in the near future.
    - b. There is a compelling need to start construction before the anticipated closing date.
    - c. An early start of construction will not be detrimental to HUD's interests.
    - d. HUD has no insurance obligation or liability for costs incurred during an early start if the project does not reach endorsement.
  3. Form HUD-92415, Request for Permission to Commence Construction Prior to Initial Endorsement for Mortgage Insurance, must be executed without change by the

contractor, Borrower and Lender. Prior to the Hub Director's execution of the HUD-92415, the HUD Closing Attorney shall review and approve the form and the documents required by and submitted with the form.

4. Preconstruction Conference. The preconstruction conference must be held before the start of construction.
- D. Violations of Early Start Criteria must be referred to the Hub Director for a determination as to whether the project may proceed to initial endorsement.

## **1.8 Completion of Project**

A. Completion Defined. Completion, for the purpose of final closing, means that:

1. The project has been completed in accordance with the drawings and specifications as indicated by the final form HUD-95379, *HUD Representative's Trip Report*, except for approved items of delayed completion covered by form HUD-92456M, *Escrow Agreement for Incomplete Construction*.
2. The entire project has been accepted for occupancy by the local authorities having jurisdiction, by Lender, and by HUD.

B. Assurance of Completion. See Section 3.5 of this Closing Guide for HUD's requirements for project completion assurance.

C. Commencement of Preparation for Closing. Upon the earlier of HUD's determination that an advance of mortgage loan funds is, or will be, the last advance prior to disbursement of the contract retainage or that the project has achieved substantial completion, preparation for final closing and final endorsement of the credit instrument should begin.

## **1.9 Preparing for Final Closing When On-Site Facilities are Incomplete**

A. Conditions for Approval of the Final Advance of Mortgage Loan Proceeds. It is desirable that all on-site construction be 100% complete before approval of a final advance of mortgage loan proceeds. There may, however, be circumstances in which it is desirable that approval of a final advance be given before 100% completion of on-site construction.

B. Exceptions to General Rule. When the completion and installation of on-site facilities is adequately assured in the discretion of the Hub Director, and the Hub Director believes the Borrower will diligently pursue the completion of the on-site facilities, the Hub Director may approve the final advance of mortgage loan proceeds, if:

1. All on-site sewer, water, electrical, and gas facilities are completely installed and connected.
2. Other on-site facilities such as streets, walks, curbs, and gutters are useable and safe, if incomplete and all buildings have all weather vehicular and pedestrian access.
3. Adequate facilities for ingress and egress are provided.
4. All applicable escrow agreements remain in force until the completion of the facilities.

C. Form HUD-92403, Application for Insurance of Advance of Mortgage Proceeds. This form is used both during the course of construction and at the conclusion of construction for the final advance. When construction is not yet complete, any form HUD-92403 submitted for



processing will not be treated as approval of a final advance, nor will the submission of form HUD-92023M, *Request for Final Endorsement of Credit Instrument*, be in order. Instead, form HUD-92403 may be treated as an ordinary application for advance of mortgage loan proceeds and may be approved in an amount which, when added to previous advances of mortgage loan proceeds, will equal 90% of the total advances to which the Borrower will be entitled at 100% completion (or such greater percentage as may be permitted pursuant to any Retainage Reduction Rider attached to the Building Loan Agreement).

- D. Approval of a Final Advance. If minor items of on-site construction are incomplete, approval of a final advance will be given only in cases in which:
1. All on-site items in the entire project are completed, based on the final form HUD-95379, *HUD Representatives Trip Report*, except those which qualify as items of delayed completion because:
    - a. They are minor; and
    - b. The Hub Director determines that immediate completion is inadvisable or impossible, due to weather or other conditions beyond control of the contractor.
  2. Funds are placed in escrow to assure completion of such minor items as provided in the certificate of mortgage loan insurance on form HUD-92403, and in the footnote on form HUD-92023M, *Request for Final Endorsement of Credit Instrument*; and
  3. 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 pedestrians and vehicular traffic, including fire apparatus, and all other construction requirements have been acceptably accomplished or acceptably assured; and
  4. The aggregate estimated cost of completing the above items not including the items described in sub-section (F), below, relating to escrows for unit painting does not exceed 2% of the principal amount of the mortgage loan.
- E. Escrow for Completion. With respect to all incomplete items, the amount held in escrow for completion must be at least one and one-half (1 ½) times the estimated cost of completion. The amount of any escrow shall be sufficient to assure an incentive to complete the work, taking into consideration a possible rise in cost. Such escrow will be held by Lender in accordance with the terms of form HUD-92456M, *Escrow Agreement for Incomplete Construction*, and the Hub Director will ascertain that the items to be completed are properly identified by the attachment to form HUD-92456M.
- F. Escrow for Unit Painting. In order to enhance marketability, it may be desirable for incoming tenants to select color schemes. If acceptable to the Hub Director, an escrow may be established to cover the cost of final interior painting of apartments without regard to the usual 2% of the principal mortgage loan amount limitations on escrows described in sub-section (D) above. This is conditioned upon the builder being bound to complete all work covered by the approved plans and specifications within a fixed period of time (not in excess of one year from the date of final endorsement for mortgage loan insurance) and without any additional charge either to the Borrower or to the incoming tenants.

## **1.10 Preparing for Final Closing when Off-site Facilities are Incomplete**

- A. General Rule: Unless all off-site utilities and 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 of mortgage loan proceeds. In such cases, the Hub Director will invoke the provisions of the building loan agreement and construction contract wherein it is provided that the required holdback will be retained until 100% completion of facilities, including off-site facilities, and will endeavor to obtain completion at the earliest possible time.
- B. Exception to General Rule. When the completion and installation of off-site facilities is adequately assured in the discretion of the Hub Director (see Section 3.5 of this Closing Guide), the Hub Director may approve the final advance of mortgage loan proceeds, if the Hub Director diligently pursues the completion of off-site facilities and if the following conditions are met:
1. All off-site sewer, water, electrical, and gas facilities are completely installed and connected.
  2. Other off-site facilities such as streets, walks, curbs, and gutters are useable and safe, if incomplete and that all buildings have all weather vehicular and pedestrian access.
  3. Adequate facilities for ingress and egress are provided.
  4. All applicable escrow agreements remain in force until the completion of the facilities.
- C. Submission of Forms. Following 100% completion of all off-site facilities, the Hub Director will require submission of a new form HUD-92403, *Application for Insurance of Advance of Mortgage Proceeds*, for approval of the final advance, and subsequent submission of form HUD-92023M, *Request for Final Endorsement of Credit Instrument*.

## **1.11 Security Instrument Modifications Prior to Final Endorsement**

- A. Hub Director's Authority. Under current re-delegations of authority, a Hub Director is authorized to approve modifications of the mortgage instruments for projects in development (*i.e.*, at or prior to final closing) where necessary to reduce the interest rate, reduce the mortgage loan amount, correct the legal description, and for other purposes.
- B. HUD Closing Attorney's Role. The HUD Closing Attorney shall review proposed modification documents and provide a written statement, which may be via e-mail, confirming the legal sufficiency and acceptability thereof.

## **1.12 Amortization and Mandatory Prepayments**

- A. Advance Amortization Requirements. "Advance amortization" is the requirement that, to the extent that the project generates net operating income during the Accountability Period (defined in the next paragraph), HUD may require Borrower, prior to final endorsement, to make, or to agree to make, a prepayment to principal in the amount of such net operating income, all as discussed more fully in sub-section (C) below. In order for the Hub Director to determine whether or not advance amortization is required, Borrower must account for all operating income for the period ending three months prior to the originally scheduled date of the first principal payment under the mortgage loan (*e.g.*, through June 30 if first principal payment is scheduled for October 1).

- B. Income and Expense Statement Requirement. In connection with cost certification, Borrower will already have reported the results of occupancy during the cost certification period. Therefore, when more than three months intervene between the cost certification period and the first principal payment as originally scheduled, the Hub Director will require an income and expense statement covering the period beginning at the end of the cost certification period and ending three months prior to the date of the first principal payment under the mortgage loan as originally scheduled (the Accountability Period).
1. Agreement of Borrower. When final closing is scheduled to occur before the expiration of the Accountability Period, Borrower must agree in writing, as an inducement to HUD to approve the final disbursement of mortgage loan proceeds prior to the expiration of the Accountability Period, to:
    - a. Furnish an income and expense statement for the required period within 30 days after its expiration, and
    - b. Immediately apply, as a mandatory prepayment to the mortgage loan, such portion of the net operating income as HUD may require.
  2. When final closing is scheduled to occur after the close of the Accountability Period, the income and expense statement shall be submitted prior to final closing.
  3. Treatment of Items in Statement. In the preparation of the income and expense statement, Borrower must include as income all rents received, exclusive of security deposits. All expenses for operation, including taxes, insurance, HUD-FHA mortgage loan insurance premium (MIP), interest and reasonable management fees (but not officers' salaries or depreciation), may be deducted in determining net income for this purpose. If the cost certification reveals an excess of expense over income, such excess (to the extent recognized by HUD) may be carried forward to the statement required by this paragraph as "unrecovered expense prior period."
- C. Amount of Required Prepayment. The amount and handling of the prepayment required is subject to the following:
1. In no case shall the required prepayment exceed the amount which would have been due in cumulative principal payments if the first scheduled payment had been on the first of the month in which the Accountability Period started.
  2. Prepayment will be required only to the extent that the amount of the net income permits payment of one or more full monthly principal payments as scheduled.
  3. If the circumstances are such that the operating statement is submitted before final endorsement, Lender and Borrower may elect to have the mortgage loan endorsed for less than the face amount by a sum equal to that which would have been required as mandatory prepayment, provided such action is acceptable to Ginnie Mae.
- D. Excess (Unused) Mortgage Loan Proceeds.
1. In circumstances where the cash paid out for completion of the project is less than the mortgage loan proceeds, the Hub Director shall require that any part of the mortgage loan proceeds that have not been expended to pay necessary costs of completing the project shall be deposited in a special account of Borrower, from which disbursements may be made only with the prior written consent of the Hub Director. This requirement is stated

in form HUD-93305M, *Agreement and Certification*, at paragraph (3). There will be no obligation for the investment of such funds in obligations of, or fully guaranteed as to principal by, the United States of America, or for their deposit in institutions whose accounts are insured by the United States.

2. The establishment of the fund can be avoided by an immediate reduction of the mortgage loan at closing, before establishment of the amortization schedule.
3. The Hub Director will approve or disapprove the use of the funds for purposes other than reduction of the mortgage loan.
4. If the mortgage loan proceeds exceed the cash paid out for completion solely because there is a difference between the purchase price of land for a period of years and its “fair market value” in fee simple and “as is”, as determined by HUD, the Hub Director may waive this requirement. The request for waiver shall be accompanied by full information as to the date of purchase and the purchase price of the land.

### **1.13 Confirmation of Final Loan Amount**

#### **A. Preparation of form HUD-92580, *Maximum Insurable Mortgage*.**

1. Prior to final endorsement, the Hub Director shall execute form HUD-92580, *Maximum Insurable Mortgage*, for the purpose of indicating to Lender and Borrower whether or not a reduction in the original amount of the Loan is necessary, based either upon the cost certification or upon a request by Lender for a principal increase. The Hub Director will receive, review, and accept certificates of actual cost and form HUD-95379, *Final HUD Representative’s Trip Report*, prior to completing form HUD-92580.
2. If there is any change in the loan amount, form HUD-92580 also will recite the revised amount of the Level Annuity Monthly Payment (LAMP).
3. Upon execution of form HUD-92580, the original shall be forwarded to Lender and an executed copy shall be forwarded to Borrower. One copy shall be placed in the Washington Docket with copies of the cost certification exhibits and one copy, unless stored electronically, will be placed in the field office docket.
4. Copies of both form HUD-92580 and form HUD-95379 also shall be forwarded to the HUD Closing Attorney for use in preparing for final endorsement.

#### **B. Decrease in Loan Amount:**

1. If HUD’s review of the cost certification results in a decrease in the Loan amount, which decrease would be set forth in form HUD-92580, Lender must, subject to local practice, prepare and submit the following items to HUD, prior to final endorsement, to modify the Security Instrument amount and the LAMP amount accordingly:
  - a. A proposed Modification Agreement, in a form acceptable to HUD (see requirements in Part 2 of the Closing Guide) and,
  - b. As applicable, a proposed Allonge, in a form acceptable to HUD (see requirements in Part 2 of the Closing Guide).
2. The final endorsement for insurance shall be in the lesser loan amount.
3. If a small loan decrease is involved, and Borrower does not request a change of

amortization, a notation may be made on the Note indicating that the mortgage loan amount is reduced without a change in amortization. In this case, the finally-endorsed amount will reflect the reduced principal balance.

4. Any reduction in the original principal amount of the loan that may be required by HUD as a result of cost certification shall not be construed as a prepayment of the mortgage loan.

C. Increase in Loan Amount.

1. If the Hub Director approves an increase in the mortgage loan amount, as reflected in form HUD-92580, Lender must include the following items in the package of draft closing documents submitted to HUD for final endorsement to evidence the obligation to repay the amount of the increase and to consolidate the initial and supplemental documents:
  - a. Supplemental Note.
  - b. Supplemental Security Instrument.
  - c. Modification and Consolidation Agreement.
  - d. Supplemental Borrower's Attorney's Opinion (as to the foregoing three documents).
  - e. Increase in title policy insurance amount.
2. The requirements for these documents are discussed in Section 2.10.D of this Closing Guide.

D. Statement of Status of Escrows. Form HUD-92580 shall also:

1. Show the status of all escrow accounts that were established by Borrower at initial closing; and
2. Indicate whether, based on the final form HUD-95379, *HUD Representative's Trip Report*, an escrow for unpaid construction costs appears necessary. See discussion concerning incomplete facilities, at Section 1.9 and Section 1.10 of this Closing Guide, above.

E. Borrower's Investment.

1. The amount of Borrower's initial equity investment is to be determined by the Program Staff in accordance with the MAP Guide. Once this determination has been made, the Hub Director will immediately notify Borrower in writing as to the amount of the initial equity investment. A copy of such determination shall be attached to each copy of form HUD-92580. For new construction and substantial rehabilitation projects, equity is determined by subtracting the finally-endorsed mortgage loan amount from the amount on line 6, form HUD-92580.
2. To the base amount of the final mortgage loan, as determined above, there may be added certain cash outlays for furnishings, equipment, or other betterments essential to the operation of the project. The nature and extent of such outlays shall be substantiated by a supporting schedule in a manner satisfactory to the Hub Director. The schedule shall set forth the vendor's name, a description of the item or items purchased, the total price, and

the cash paid on account of the price. The schedule shall be signed by an authorized representative of Borrower.

## **1.14 Preparation for Final Closing**

- A. Prerequisites for Final Closing. The Hub Director will advise the Lender and HUD Closing Attorney of his or her findings and readiness for final closing, at which HUD will endorse the Note for insurance in the amount set forth in form HUD-92580, *Maximum Insurable Mortgage*, but only after the following have occurred:
1. Construction has been completed (except as otherwise provided in this Closing Guide).
  2. Certification of costs has been presented to and approved by appropriate Multifamily Housing staff.
  3. The appropriate diligence required by the HUD Closing Attorney's Final Closing Checklist (see Part 4.2 of this Closing Guide) has been submitted to and reviewed by the HUD Closing Attorney, including without limitation, evidence of updated title insurance and an as-built survey.
  4. HUD has issued Form HUD-92580 to Lender.
  5. If applicable, HUD has received Borrower's agreement regarding income and expense during the Accountability Period, described at Section 1.12 of this Closing Guide, above.
- B. Final Closing Date. A Final Closing date acceptable to all parties shall be set, contingent upon the parties' prior submission to HUD of all required items and HUD's approval of same. The Lender must be represented at final closing by legal counsel. Should final closing be held in person, the parties will consult with the HUD Closing Attorney as to which parties shall be required to attend, provided that, unless there are outstanding issues to resolve, such closing may be treated as a skeleton closing. If approved by the HUD Closing Attorney, closings by mail must follow the procedures set forth in Section 1.3.C. of this Closing Guide.
- C. Internal Closing Forms. The following items are prepared within HUD and shall be provided to the HUD Closing Attorney for use in preparing for closing:
1. Form HUD-95379, *HUD Representative's Trip Report*. The most recent inspection shall state whether or not there are items of delayed completion and, if so, the amount of funds that must be escrowed for their completion.
  2. Form HUD-92580, *Maximum Insurable Mortgage*. Included in this document, as described below, is whether specific escrows must be established or funds disbursed from existing escrows.
  3. Evidence of clearance from the Office of Labor Relations (as discussed more fully above at Section 1.6).

## **1.15 Final Endorsement**

- A. Request for Final Endorsement of Credit Instrument. To request approval of a final advance, the Lender shall prepare form HUD-92023M (Request for Final Endorsement of Credit Instrument).
1. Upon receipt, Housing staff will check form HUD-92023M against each previously approved form HUD-92403, *Application for Insurance of Advance of Mortgage*

*Proceeds*, to determine that the amount of each advance is correctly stated and that the total shown on the form HUD-92023M equals the total of all advances. If any error is found, the form will be returned to Lender with an explanation of the correction required. The inclusion of an amount advanced by Lender to Borrower from escrow funds required for completion of the project is a common source of error, and it is important that such amounts be excluded from form HUD-92023M. When reviewing this form, the Hub Director shall examine the title evidence submitted prior to final closing to confirm the certification by Borrower as to items of outstanding indebtedness.

2. Particular attention is directed to the required certifications by Borrower and the general contractor with respect to their obligations and to the penalty provided by law for misstatements. Form HUD-92023M requires in every case a full disclosure by both Borrower and the general contractor of all outstanding unpaid obligations. Upon conclusion of the final closing and receipt by the Lender of the finally-endorsed Note, the final draw shall be funded by the Lender or its title escrow agent in accordance with the approved closing statement. However, in all cases the Hub Director shall proceed as follows:
  - a. Borrowers shall be advised that all unpaid obligations contracted in connection with the acquisition of land, purchase of property, construction of the project, or the mortgage loan transaction shall without exception be reported on form HUD-92023M as required by the Certificate of the Borrower. Likewise, general contractors shall be advised that all unpaid obligations contracted in connection with the construction contract shall be reported on form HUD-92023M as required by the Certificate of General Contractor.
  - b. The unpaid obligations of Borrower listed in form HUD-92023M under subparagraphs 2.b. and 2.c of the Certificate of the Borrower shall not exceed the amount of the final advance of mortgage loan proceeds. In the event that a form HUD-92023M is received showing such an excess, unless Borrower deposits with the Lender or other escrow agent approved by HUD amounts sufficient to fund such excess prior to final endorsement, it shall be returned to Borrower with the advice that the differences must be liquidated by cash payment or other acceptable assurance of payment, in the discretion of the Hub Director.
  - c. In any case where the amount of the unpaid obligations certified by the general contractor exceeds the amount certified as due the general contractor by Borrower, the Hub Director shall urge the prompt payment of such excess obligation. If there is an identity of interest between Borrower and the general contractor, the Hub Director shall immediately notify Borrower that final endorsement will be withheld until evidence is furnished that sufficient cash is available to pay all outstanding obligations in full.

B. Endorsement. When these forms are satisfactorily completed and submitted, the final closing may proceed. The date of final endorsement will be the date the Hub Director affixes his or her signature to the credit instrument. The credit instrument will be finally endorsed in an amount equal to the full amount of all insured advances to Borrower, as shown by the applicable form HUD-92023M, regardless of whether the final endorsement occurs before or after the commencement of amortization of the insured mortgage loan. The original of form

HUD-92023M and a copy of form HUD-92456M, *Escrow Agreement for Incomplete Construction*, will be filed in the Washington Docket, and a conformed copy of each will be filed in the Field Office docket.

- C. Receipt for Payments. Paragraph 3 of the Certificates of Borrower and of General Contractor on Form HUD-92023M requires payment of the reported unpaid obligations within prescribed time limits. Borrower's and the general contractor's certifications as to this requirement are made under penalty of prosecution for false claims or statements, including criminal or civil penalties.
1. If the receipts for reported unpaid obligations are not received by the deadline, it is the responsibility of the Hub Director to immediately make appropriate inquiry in writing.
  2. If the receipts for the payment of the reported unpaid obligations are not received within two weeks from the date of such inquiry, the Hub Director shall take appropriate action.
- D. Release of Working Capital Deposit. The balance of the working capital deposit attributable to the Construction Contingency Amount (as that term is defined in form HUD-92412M, *Escrow Agreement for Working Capital*), if any, may be released to the Borrower at final endorsement upon Borrower's request. Terms for the release of that portion of the working capital deposit attributable to the Working Capital Amount are set forth in form HUD-92412M, *Escrow Agreement for Working Capital*, paragraph 4.
- E. Final Closings By Mail. Final closings may be conducted by escrow or by mail, at the request of Lender, unless the HUD Closing Attorney reasonably determines such closing to be inappropriate due to the circumstances of the particular case or requirements of state or local law or practice. If by mail, Lender must submit copies of all closing requirements in advance of the closing day in a form that meets HUD's requirements, to ensure that the originals, when executed and submitted for closing, fully comply with HUD's requirements. Lender must arrange for the original Note to be delivered to HUD for endorsement and for the original title policy or title endorsement to be delivered to HUD, in addition to all other closing requirements. This may require arranging for the title company to send the policy or endorsement the day before, by overnight delivery, bearing the date of the expected endorsement. In addition, escrow or mail closings must comply with the requirements of closing by mail for initial closings, as described above.
- F. Revision of Instruments. After final closing, the closing forms and documents may not be revised or amended without the prior written approval of the Hub Director.

## **1.16 Final Advance**

- A. Requirements for Final Advance: Upon ascertaining that the advance will be the final advance of mortgage loan proceeds, the Hub Director will determine the following and will provide instruction in accordance with his/her findings, pursuant to the relevant sections of this Closing Guide:
1. Whether any items of on-site construction are incomplete.
  2. Whether any off-site facilities are incomplete.
  3. Whether any revisions are required in connection with hazard insurance.
  4. Whether the insured loan maintains a first priority lien over the entirety of the Mortgaged



Property.

- B. Form HUD-92403, Application for Insurance of Advance of Mortgage Proceeds. When the final advance is in order, Lender and Borrower will execute the completed form HUD-92403.
1. If no items of on-site construction are incomplete, type the word "None" in the Certificate of Mortgage Insurance on form HUD-92403, in the space provided for the amount of the escrow deposit.
  2. If there are incomplete items of on-site construction, an escrow deposit may be in order, in accordance with form HUD-92456M, *Escrow Agreement for Incomplete Construction*. In addition, an itemized list of incomplete items shall be attached to form HUD-92456M and the amount of the escrow deposit required for completion of incomplete items shall be typed into the Certificate of Mortgage Insurance portion of form HUD-92403 in the space provided.
- C. Handling of Form HUD-92403. The Hub Director will deliver the executed original(s) of form HUD-92403 to Lender at final closing, with necessary attachments listing any incomplete items. An executed copy will be filed in the Washington Docket, and one copy will be retained by the Hub Director.
- D. When Mortgage Insurance is Effective. If form HUD-92403 is for final advance of mortgage loan proceeds, at the time the Hub Director returns form HUD-92403 to Lender, Lender's attention must be called to the proviso in the "Certificate" section of the form concerning the fact that this last advance shall not be considered insured until the occurrence of the events set forth in such proviso, which events are:
1. Submission of form HUD-92023M, *Request for Final Endorsement of Credit Instrument*, and
  2. Establishment, if necessary, of an escrow for incomplete items of construction.

### **1.17 Final Closing Procedures when Owner and Contractor are in Dispute**

- A. Disputes. Occasionally, Borrower and the general contractor may have disputes regarding change orders, the quality or cost of the construction work, or the timing of payments therefore. This may delay final closing. If Borrower and the general contractor enter into arbitration, litigation, or both, the delay may be excessive. It may be impossible to reach agreement in order to complete final closing. Such delays may cause Lender and Borrower to ask HUD to finally endorse the Note even without the full participation of the general contractor, because of the cost of continuing to incur extension or other fees and Lender's need to convert the underlying financing of the mortgage loan to permanent status.
- B. Closing Without General Contractor. If both the Hub Director and HUD Closing Attorney, each in his or her own discretion, agree, the parties may proceed to final closing without the participation of the general contractor if the following conditions are met:
1. Cost certification must have been satisfactorily completed by all parties required subject to this requirement.
  2. The remaining mortgage loan proceeds must be placed in escrow pending the outcome of the dispute.
  3. The title company must issue affirmative title insurance coverage over any liens that are

in place related to the dispute.

4. There must be a mechanism in place for eventual resolution of the dispute or termination of the escrow that is satisfactory to HUD, such as litigation that does not involve HUD.

C. Issues to Consider. The following issues are among those that should be considered when a dispute is delaying final endorsement:

1. *Has cost certification been completed?* If not, it is unlikely that a final endorsement can occur, because:
  - a. HUD will be unable to ensure that the mortgage loan does not exceed the statutory limit and therefore unable to comply with the statutory cost certification provisions of the National Housing Act, and
  - b. Cost certification may provide the only basis for determining what outstanding obligations remain, without which HUD cannot ensure that sufficient funds exist and have been put under Lender's control to pay those obligations.
2. *Has the general contractor submitted final closing documents, or drafts thereof?* These documents offer some indication of what outstanding obligations remain. It is important to know what outstanding obligations remain so that HUD can ensure that Borrower will have sufficient funds at the time of closing to cover them.
3. *Can a mechanic's lien prime the HUD mortgage in your jurisdiction under the present facts? Have any liens been filed?*
  - a. If no liens have been filed, has the statutory period for filing liens expired, or is it possible that liens could be filed in the future?
  - b. If liens have been filed, will the remaining mortgage loan proceeds be sufficient to pay such liens?
    - i. If not sufficient, Borrower must furnish additional funds or other assurances acceptable to the Hub Director to cover any liens and other outstanding obligations at closing.
    - ii. If sufficient, consider if it is possible to escrow the mortgage loan proceeds with the title company.
    - iii. Consider what title coverage is available to bring the effective date of the policy forward to final endorsement. Is clean title, with no liens shown as exceptions available? Alternatively, if any mechanic's liens must be shown as exceptions, is affirmative coverage against those liens available? The latter option may make it clear that the title company was aware of the existence of the liens when it provided the date-down endorsement or replacement title policy for final closing.
4. *Is it possible for Borrower to bond over the liens, if any, or the litigation, if any, in order to free the project from the effects thereof and clear title to the project?* (See, e.g., Colorado Revised Statutes § 38-22-131; other states may have similar procedures.)
5. *Are there state laws that affect the process?* For example, some states have statutes under which a claimant can force the disburser of funds either to pay the claimed amount or

hold all undisbursed mortgage loan proceeds in escrow pending the outcome of the dispute. (See, *e.g.*, Colorado Revised Statutes § 38-22-126.) If so, does state law provide or permit a process that is consistent with HUD's requirements and objectives?

6. *To what extent can Borrower and Lender meet HUD's requirements for final endorsement without the participation of the general contractor?* If HUD proceeds to final endorsement, certain requirements of MAP Guide §12.7.G will not be met. (MAP Guide §12.7.G is labeled "Final Advance" and sets forth requirements for the final advance.) The Hub Directors have the authority to waive any non-statutory and non-regulatory requirements in an appropriate case. The specific provisions that should be considered are as follows:
  - a. Regulations at 24 CFR §200.96 and MAP Guide §12.7.G.1 require cost certification and determination of the maximum insurable mortgage loan. No final endorsement may occur without completion of these requirements, except when cost certification is not required (see, for example, §§ 2.11.G and 3.4.E.7 of this Closing Guide).
  - b. MAP Guide §12.7.G.2 requires the general contractor to execute form HUD-92448, *Contractor's Requisition and Contractor's Prevailing Wage Certificate*.
    - i. HUD's files may contain original forms HUD-92448 from previous approved draws that contain the prevailing wage certification.
    - ii. If the Office of Housing or the HUD Closing Attorney also has received the customary letter or memorandum from the Office of Labor Relations stating that the project is in substantial compliance with labor standards and may be closed, such receipt could offer some assurance on this subject.
  - c. MAP Guide §12.7.G.3 requires that the sum to be approved for advance is the balance of the mortgage loan proceeds, based on form HUD-92580, and should be followed here as in final closing.
  - d. MAP Guide §12.7.G.4 requires an escrow for items of delayed completion (discussed more fully above, at Section 2-5). This escrow is required whenever there are items of delayed completion, but depending upon the nature of the dispute that is preventing the normal closing procedure, its terms may need further consideration.
  - e. MAP Guide §12.7.G.5 requires the general contractor to execute form HUD-92023M (discussed more fully in Section 1.15(C), above). This includes the contractor's certification as to its outstanding obligations. If the contractor has submitted a cost certification or a draft copy of this form, these may provide a list of the outstanding obligations to subcontractors, although it may include items that were subsequently paid (an unlikely event in cases involving disputes).
  - f. Regulations at 24 CFR § 200.101 require Borrower to certify, among other matters, as to "all unpaid obligations in connection with the mortgage loan transaction, the purchase of the Mortgaged Property, the construction or rehabilitation of the project or the purchase of the equipment financed with mortgage loan proceeds."
7. *How will contractor's retainage (holdback) be handled?* MAP Guide §12.15.D (Amount of contractor's retainage and release), concerning early release of the contractor's

10 percent holdback, provides some additional guidance relevant here. Paragraph D.3.h(2) specifies that HUD must retain an adequate amount for any owed or contested amounts indicated by mechanic's liens.

8. *Will the parties' actions in closing without the contractor trigger a lawsuit? Is it possible for Borrower to notify the contractor of what is planned?* This communication may either gain the contractor's cooperation and permit the parties to proceed with a normal closing, or assure the contractor that funds are being held pending the outcome of the dispute and avoid an unnecessary lawsuit.

#### D. Closing Documents Required.

1. All customary final closing documents are required, except as otherwise noted.
2. Additional title endorsements insuring over liens may be required, as discussed above.
3. Waivers may be required for certain handbook requirements that cannot be satisfied due to the general contractor's absence.
4. An escrow agreement may be required to assure the availability of funds to pay outstanding obligations:
  - a. To provide a mechanism for the title company to pay all undisputed obligations, such as amounts owed subcontractors, upon receipt of proper lien waivers;
  - b. To provide a mechanism for the remaining funds in escrow to be disbursed upon the happening of specified events, such as resolution of the dispute, or upon a designated future date; and
  - c. To provide, as necessary, for a supplemental cost certification following disbursement of the remaining funds to ensure that the mortgage loan amount needs no further adjustment.

### **1.18 Section 223(f) Transactions**

- A. Introduction. Acquisition of an existing project or refinance of existing indebtedness may be achieved through HUD's Section 223(f) program and may involve limited repairs and improvements to the project. All existing structures must be at least three years old unless otherwise permitted under the Program Obligations. Except as otherwise provided and except to the extent such requirements apply exclusively to the insurance of construction advances, the procedures set forth above apply to Section 223(f) transactions. (See MAP Guide §3.9, "Section 223(f) Acquisition/Refinancing of Existing Apartments," for an overview of the Section 223(f) program.)
- B. Endorsement of Note. In a Section 223(f) closing, there is no "initial closing" endorsement of the Note because HUD is not insuring advances from a construction loan. Instead, there is one closing at which FHA endorses only the "total sum" portion of the panel on the Note. The 2014 version of form HUD-94001M includes different endorsement panels for the various insuring authorities under the National Housing Act, including Section 223(f).

### **1.19 Section 223(a)(7) Closings**

- A. General. Section 223(a)(7) of the National Housing Act is intended to provide a process for refinancing for projects that have an active HUD-insured loan. The process can be used to

reduce the interest rate, provide funds for repairs, or extend the term of the loan. The rationale for the latter two objectives must be documented by HUD. Pursuant to MAP Guide §1.3.B (Programs Covered by MAP) and Mortgagee Letter 2010-21, Section 223(a)(7) projects may be processed under MAP. Further program instructions for processing 223(a)(7) project loans are expected to be included in the next revision to the MAP Guide.

- B. Types of Projects. This process is available for:
1. Multifamily housing projects.
  2. Coinsurance projects with financing that has converted to full insurance.
  3. Housing with Section 8 assistance is eligible, but must be processed in accordance with special instructions from Headquarters concerning rents and Net Operating Income.
- C. Prepayment Issue. Parties shall be advised that, although projects with financing insured under Section 223(f) are eligible for refinancing under Section 223(a)(7), if the project's statutory 5-year prepayment lockout period has not expired at the time of such refinance, it may be necessary for the Borrower to enter into a Rental Use Agreement using form HUD-93150 in order for HUD to permit the prepayment of the Section 223(f) mortgage loan in connection with closing of the new Section 223(a)(7) mortgage loan.
- D. HUD Guidance. The following processing guides provide additional guidance regarding (a)(7) transactions, particularly in those cases where the loan is not processed under MAP:
1. Housing Handbook 4567.1, Refinancing of Insured Multifamily Projects Pursuant to Section 223(a)(7). Note that this Handbook cross-references other Multifamily Handbooks for technical guidance in various areas. Section 5-1 of Handbook 4567.1 describes the format of the Commitment.
  2. Notice H 93-89, Expedited Section 223(a)(7) Processing Instructions. These instructions supersede inconsistent provisions of the Handbook for projects eligible for expedited processing. Attachment 4 provides a sample letter format for the Commitment.
  3. Notice H 94-56, Expedited Section 223(a)(7) Processing Instructions for Coinsured Projects.
  4. Mortgagee Letter 93-39, Refinancing of Existing Insured Mortgages Pursuant to Section 223(a)(7) of the National Housing Act.
  5. Mortgagee Letter 94-17, Refinancing of Insured Mortgages Pursuant to Section 223(a)(7) of the National Housing Act – Questions and Answers.
  6. Mortgagee Letter 06-03, Refinancing of FHA Insured Multifamily Project Mortgages Pursuant to Section 223(a)(7).
- E. Mortgage Modifications. If the proposal is solely for a reduction in interest rate, as agreed between Borrower and Lender, it may be handled by a modification of the Security Instrument and Note rather than by using Section 223(a)(7). Under current re-delegations of authority, modifications must be approved by Headquarters Office of Asset Management, although Hub Directors may have limited authority to approve and execute documents in connection with interest rate reductions in certain limited situations. Field program staff should consult with HQ Housing if there are any questions about their authority in this area.

- F. Refinances of Second Mortgages. Note that Section 223(a)(7) may be used to refinance a HUD-insured subordinate mortgage. See Handbook 4567.1, ¶ 2-2.D (e.g., mortgages insured under Section 241 of the National Housing Act). For projects with HUD-insured first, and one or more subordinate mortgages, HUD will permit the refinancing of two or more such loans with a single Section 223(a)(7) loan.
- G. Procedures Distinguished from Section 223(f) Procedures. Generally, underwriting and closing of the Section 223(a)(7) loan is similar to the procedures used for Section 223(f). (See the checklist for closing Section 223(a)(7) loans, Closing Guide Part 4.) Closing procedures for Section 223(a)(7) loans that differ from Section 223(f) loans are discussed below.
1. Previous Participation Clearance using form HUD-2530, Previous Participation Certification, is not required for existing principals and affiliates who have already obtained clearance. New principals and affiliates must obtain the HUD-2530 clearance.
  2. A new project number is assigned to the Section 223(a)(7) project.
  3. Standards for the maximum mortgage and the mortgage term are set forth in Notice 93-89, Sections II.B and C. Note that if expenses exceed those allowed for Section 223(a)(7) underwriting, the application must be converted to a Section 223(f) loan or, for substantial rehabilitation, a Section 221 loan.
  4. Use form HUD-92476.1M when establishing an escrow for deferred repairs, and require a 110% deposit (i.e., the required Additional Deposit Amount is to be 10% of the estimated cost of the Repair Work).
  5. A new Regulatory Agreement must be executed at closing, referencing the same Section of the Act as the original loan, with the addition of “pursuant to Section 223(a)(7).”
  6. The Section 223(a)(7) program is based upon the premise that the original insurance obligation is transferred to the new Section 223(a)(7) loan. Please see the new 2014 form HUD-94001M, *Note (Multifamily)*, in which the endorsement panel for Section 223(a)(7) loans contains provisions specific to Section 223(a)(7), including the transfer of the Contract of Insurance from the prior FHA project number to the new loan, and including the following:
    - a. 207/223(f) becomes “§ 207/§ 223(f) pursuant to § 223(a)(7)”;
    - b. and 221(d)(4) becomes “§ 221(d)(4) pursuant to § 223(a)(7)”.
  7. Borrower’s current organizational documents shall be submitted and, if necessary, updated to comply with HUD’s requirements.
  8. Notwithstanding the other provisions of this Closing Guide relating to survey requirements, Housing does not require a survey and surveyor’s report when the title company will issue the policy with no survey exceptions, a copy of an as-built survey is available in the original file (or provided by Borrower from the previous insured closing), and no changes have been made to the land or buildings since the original survey was filed. In some instances, if the other conditions above are fulfilled but minor changes are proposed to the land and/or buildings, if such changes are acceptable to HUD, Housing has discretion not to require a survey. The HUD Closing Attorney may accept an

Owner's Survey Affidavit certifying to no material change, in a format similar to that attached hereto in Closing Guide Part 5 to document the lack of changes. The HUD Closing Attorney shall include in the new file a copy of the survey from the originally insured case file for ease of access in the future.

9. On bond-financed projects, the insured project loan interest rate may be higher than the interest rate on the bond obligations, and the resulting spread may be used to finance a variety of costs associated with closing the new loan. (See MAP Guide §8.14, *Bond Financed Projects*, and Handbook 4470.1, ¶ 15-2.A.2, *Loan Rates*.) HUD has adopted a policy to allow use of the interest rate premium to finance prepayment penalties associated with existing insured loans. Refer to the foregoing to adapt and evaluate closing documents when an interest rate premium is approved by the Hub Director.

**1.20 Sections 241 and 223(d) Closings.** Notwithstanding anything else in this Closing Guide, a loan insured pursuant to Sections 241 or 223(d) may be a subordinate loan and need not be secured by first priority encumbrances. Wherever this Closing Guide requires a first-priority lien or otherwise requires or refers to the HUD-insured as being in first priority position, such references and requirements shall be interpreted for Sections 241 and 223(d) transactions to mean the appropriate HUD-approved subordinate position.

### **1.21 Insurance Upon Completion Closings**

- A. Explanation. Insurance Upon Completion closings involve construction of a project for which FHA insurance is not provided until after completion of construction. Consequently, many requirements are different than a typical FHA-insured new construction/substantial rehabilitation loan closing. Note that Insurance Upon Completion is not to be confused with an FHA-insured refinance of an existing building.
- B. Preparation for Insurance Upon Completion Closings: (See MAP Guide §8.12, Insurance Upon Completion, for details of requirements.) Closing occurs after completion of construction and cost certification. Additional requirements are found in MAP Guide §12.16 (Insurance Upon Completion).
- C. Cost Certification. The owner's cost certification is reviewed by the HUD Cost Analyst and Mortgage Credit Analyst, who will prepare form HUD-92580, *Maximum Insurable Mortgage*, for the Hub Director's signature, which form determines the amount of the insured mortgage loan. See MAP Guide §13 (Cost Certification).
- D. Form FHA 2453-MM, *Commitment for Insurance Upon Completion* must be issued prior to commencement of construction. Note that the Firm Commitment requires that a Master Set of the Drawings and Specifications of the Project, which has been signed by all necessary parties, together with certain other related items, be filed with HUD, and an additional three copies thereof, at the time of issuance of the Firm Commitment.
- E. Construction Requirements.
  1. Prior to commencement of construction, Borrower must establish that the project complies with applicable zoning laws and regulations. See 24 CFR § 200.72 and Part II of form HUD-91070M, *Consolidated Certifications - Borrower*. The zoning laws and regulations must permit the construction and operation of multifamily rental housing of the nature proposed for the project to be insured under the applicable section of the

National Housing Act. See opinion 6 of form HUD-91725M, *Opinion of Borrower's Counsel*, as well as Section (1) of form HUD-92478M, *Borrower's Oath*.

2. Borrower and contractor must enter into a construction contract and execute form HUD-93305M, *Agreement and Certification*. The parties may, but need not, use form HUD-92442M, but all attachments required by form HUD-92442M are required as attachments to the form of construction contract used.
  3. The contractor must comply with applicable labor standards, which may include Davis-Bacon wage rates and procedures, so the parties shall participate in a pre-construction conference with HUD staff to go over those matters.
  4. Form HUD-92441M, *Building Loan Agreement*, is not required for Insurance Upon Completion Closings.
  5. Borrower's assurance of completion is not required. A latent defects escrow will be required at closing. See form HUD-92414M, *Escrow Agreement for Latent Defects*.
- F. Subordination of Restrictive Covenants. HUD has specific requirements concerning restrictive covenants resulting from bond financing and low-income housing tax credit financing (Closing Guide Sections 3.8 and 3.9, respectively). Borrower and Lender shall be advised that, regardless of the timing of recordation of such covenants and related documents, HUD will require that they meet HUD requirements before endorsement of the note for insurance, even if they must be amended. Consequently, Borrower and Lender shall ensure that these documents, if applicable, meet HUD requirements before commencement of construction.
- G. Endorsement of Note.
1. Conditions for Endorsing Note: The Hub Director may consult with other HUD staff, including the HUD Closing Attorney, prior to endorsing the Note. The Hub Director, however, is fully authorized, pursuant to current delegations of authority, to endorse the Note after receiving the first year's mortgage insurance premium and inspection fee and concluding that all requirements for closing have been met. In no event shall the Hub Director endorse the Note for an amount greater than the principal balance of the mortgage loan that would have been outstanding if all payments to principal due before the date of endorsement (including required advance amortization payments if any) had been paid. Nor shall the Hub Director endorse for insurance on a date after the first principal payment is due until the Hub Director has determined that all principal payments due have actually been made and the mortgage loan otherwise is current.
  2. Completion of Note Endorsement Panel. The 2014 form HUD-94001M, Note (Multistate) contains a separate endorsement panel for Insurance Upon Completion closings.

## **1.22 Assignments Prior to Final Endorsement**

- A. HUD Approval Needed. Lender must notify HUD of any assignment of an insured loan made prior to final endorsement, and provide HUD with appropriate evidence of assignment as set forth below. Under Handbook 4435.1 (*Project Construction and Servicing Before Final Closing*), paragraph 1-33, HUD must approve in writing any assignment of an insured mortgage loan if the mortgage loan has not been fully disbursed. Note that these



requirements do not apply to assignments of a Firm Commitment made prior to or at initial closing.

- B. Document Review. In those circumstances where the insured loan is assigned prior to full disbursement of the insured loan, the HUD Closing Attorney must review, and advise as to the acceptability of, the instruments submitted in connection with such an assignment including the:
1. Note endorsement;
  2. Assignment of the Security Instrument;
  3. Assignment of the Building Loan Agreement;
  4. Assignment of the assurance of completion;
  5. Assignment of the assurance of installation of offsite facilities;
  6. Assignment of all escrow agreements and related transfer of funds held by the insured Lender for the benefit of the Project and/or Borrower;
  7. Assumption by the assignee of all obligations under the contract of mortgage insurance and of the terms and conditions pertaining to all documents, funds and escrow deposits required in connection therewith;
  8. Opinion of the assignee's counsel as to the validity of the assignment transaction and of the documents executed and delivered in connection therewith;
  9. Title policy endorsement from the title insurer reflecting the assignment of the mortgage loan and of any other recorded documents; and
  10. Any other documents required under local law.

### **1.23 Workout Restructuring and Interim Closing**

- A. Introduction. When problems occur during construction necessitating a workout or restructuring of a Project, an Interim Closing may be necessary.
1. Handbook 4435.1 and MAP Guide §12 (Construction Period) provide guidance for issues and procedures during a project's construction period. Normally, the HUD Closing Attorney has a limited role during this period. However, when problems arise during construction, the HUD Closing Attorney will be placed in the middle of what is usually a very complicated and contentious situation.
  2. Handbook 4435.1, Chapter 4, and MAP Guide Appendix §12D (Problems before Final Closing) present general guidance and procedures for resolving the various problems. One of the most difficult problems is the complete default and abandonment of the job by the general contractor. Regardless of why or how the abandonment occurs, there will probably be a lengthy time period of negotiations and litigation among and between the various project participants, especially the surety. This will result in additional costs and significant alterations to the development financial plan and construction plan put in place at initial closing.
  3. If the negotiations are successful, there will be workout and settlement agreements among the parties. Implementing those agreements will require amendments of

documents and agreements entered into at initial closing.

- B. Interim Closing Issues. Since every case is unique, the following is not intended to be an exhaustive or a mandatory checklist, but rather a list of suggestions that should be considered.
1. Closing Guide Part 4 (Checklists) contains a guide to issues that should be considered at an Interim Closing, and should be tailored to project specifics. It is not a checklist of mandatory documents.
  2. Some of the documents listed may not require amendment.
  3. Specific guidance as to some necessary amendments and revisions will be found in this Closing Guide, in the MAP Guide or in Handbook 4435.1; for example, this Closing Guide describes the proper documentation of a mortgage loan increase.
  4. If additional mortgage loan funds are to be advanced, HUD will require that documentation necessary to establish or confirm the subordination of any existing secondary financing be re-subordinated to the mortgage loan, as increased, and other HUD loan documents, as amended.
  5. If litigation has been filed or is threatened, the HUD Closing Attorney shall confer with the appropriate HUD litigation attorney. A litigation hold may be necessary.

## **Part 2: Loan Documents**

### **2.1 General Requirements for Form Loan Closing Documents**

- A. Use of HUD Forms Required. Closing forms and documents are listed in the Closing Checklists included as Part 4 of this Closing Guide, and must be used in all closings for programs covered by the MAP Guide unless a substitute has been approved in writing by the Assistant General Counsel for Multifamily Mortgage Insurance. Local Field Offices are not authorized to modify the items on the closing list except to meet the requirements of local law or custom or to meet the unique requirements of a particular case, but the format of the checklist may be altered according to the preferences of the HUD Closing Attorney. The HUD Closing Attorney will inform Lender's counsel of any modifications to the Closing Checklists.
- B. Under the HUD Firm Commitment, one of the standard conditions that must be satisfied before HUD is legally obligated to endorse the Note for mortgage insurance is that all certificates, documents and agreements required in the Firm Commitment must be on forms approved or prescribed by HUD, which also must be completed, executed and filed in the number of copies and in such manner as HUD requires. If participants become aware during the mortgage insurance application process that significant and/or novel changes will be required for their closing, it is strongly encouraged that they notify HUD early in the process to determine if such changes are acceptable, from both a programmatic and legal perspective. This suggestion for early consultation is particularly necessary when third parties (e.g., third-party funding sources for secondary financing) are involved and have requested document changes. Participants should not take for granted that HUD can or will accept changes or waivers to the closing documents and requirements, particularly after issuance of the Firm Commitment.
- C. Form Changes and Closing Guide Waivers.
1. With the exception of changes contemplated in the closing documents as indicated by blanks and bracketed alternate language, changes permitted by the HUD Closing Attorney due to local law or custom, and other changes contemplated elsewhere in this Closing Guide, HUD Field Offices may not permit changes to the closing documents or waivers of Closing Guide requirements. This policy was established by the Office of Housing in 2011 in connection with the issuance of the revised Multifamily program closing documents issued that year, and communicated to HUD field counsel and program participants by the Office of General Counsel at the request of the Office of Housing. The policy was created in order to achieve greater uniformity and consistency in the closing process among the various HUD offices, greater efficiency for HUD staff and program participants, and to honor HUD's legal obligation to provide fair and equal treatment to program participants. Consequently, such closing document and Closing Guide changes and waivers are strongly discouraged, and will not be permitted except in limited situations where there is a compelling deal-specific reason requiring the change and such change or Closing Guide waiver is reviewed and approved by HUD Headquarters pursuant to the procedures provided immediately below. Please note that any and all closing document changes must be legally permitted under federal, state and local law.

2. Lender and Lender's counsel are responsible for articulating in writing the justification(s) for any requested changes to the closing documents or waivers of the Closing Guide. Such justification(s), including associated documentation, must be provided to the Closing Attorney sufficiently in advance of the Closing Date to permit both OGC and program staff in the field and at Headquarters to review prior to the Closing Date. HUD's review will be completed pursuant to the procedures in this section, as well as Section 3.3.B of the Closing Guide (as it relates to the *Subordination Agreement*, HUD-92420M). Lender and Lender's counsel must work directly with the HUD Closing Attorney in this regard, and should not contact HUD Headquarters, except in coordination with the HUD Closing Attorney. The HUD Closing Attorney is the primary point of contact for any needed communications with Headquarters OGC. However, it is the Lender's and Lender's counsel's responsibility to provide the necessary information and justifications for any requested closing document changes or Closing Guide waivers seeking to deviate from HUD's standard closing forms and closing requirements.
3. When a change is requested by Lender or Lender's counsel, the HUD Closing Attorney should discuss the requested change with the Hub Director. If the Hub Director does not recommend making the requested change, the change will not be made.
4. If the Hub Director finds good cause for permitting the change, the HUD Closing Attorney should determine whether or not there is a statutory, regulatory or administrative obstacle (other than the requested change to the closing document or Closing Guide requirement) caused by the change. If there is a statutory obstacle, the change will not be made. If there is a regulatory or administrative barrier, the HUD Closing Attorney shall discuss such barriers with the Hub Director. If the Hub Director agrees to the change, then the Field Office shall pursue any necessary waivers using appropriate waiver protocols.
5. If there exists no statutory, regulatory or administrative barrier to making the change (or if the Field Office is willing to pursue waivers using waiver protocols), the HUD Closing Attorney shall determine if there are any other legal concerns (including impacts on other documents), and will set forth any such concerns in writing when referring the matter to Headquarters OGC.
6. The HUD Closing Attorney will refer the matter via email to the Assistant General Counsel for the Multifamily Mortgage Division, who will serve as a facilitator on behalf of the Office of Housing, Office of Multifamily Housing Programs, in determining the acceptability of the requested changes. Based in part on information submitted by the Lender and Lender's counsel, and after engaging in an independent analysis (the HUD Closing Attorney should not rely exclusively on information submitted by Lender or other parties), the HUD Closing Attorney must include the following information in the referral to HQ:
  - a. precisely what change is being requested to what document(s);
  - b. the extent to which such change impacts other documents;
  - c. why the change is appropriate, i.e., the compelling deal-specific and unique circumstances justifying the requested change;
  - d. that the Hub Director has been consulted and concurs with (and supports) the request;

- e. that if a Housing Notice or MAP Guide waiver is needed, such waiver has been granted according to appropriate protocols;
  - f. what additional legal considerations/concerns exist, if any; and
  - g. what time pressures exist (e.g., whether a closing date is set, whether this question must be answered prior to setting a closing, other time-sensitive concerns, etc.).
7. The information submitted shall identify and segregate the specific provision that the parties wish to change. If necessary, a redline excerpt of the relevant document provision identifying the specific changes may be included in the submitted narrative. The justification should include enough detail, context, and rationale to allow Headquarters to make an informed determination, as well as to establish that HUD is not acting in an arbitrary and capricious manner in its decision making. The HUD Closing Attorney (and outside parties) are not required to send redlines and/or clean documents to Headquarters for review and approval and such redlines will not be deemed sufficient unless provisions are isolated and explained as requested above.
  8. The Assistant General Counsel will solicit the review and decision of Headquarters staff in the Office of Housing, Office of Multifamily Housing Programs, which will make the final determination on behalf of Headquarters with respect to requested policy change(s). The Assistant General Counsel for the Multifamily Mortgage Division will review and determine the acceptability of requested changes that are strictly legal in nature.
  9. The Assistant General Counsel, or such staff as appropriate, will respond on behalf of the deciding HQ office (Housing or OGC, as appropriate) to the HUD Closing Attorney who submitted the referral. HQ staff will make every attempt to respond within ten (10) business days (and likely sooner for high quality submissions), provided the submitted justification meets the requirements of this Closing Guide. As discussed above in Section 2.1.B. of this Closing Guide, participants should engage HUD in the document change process as early as possible and well before the desired closing date.
  10. The HUD Closing Attorney may approve legal changes to any closing document (including the sample forms provided at the end of this Closing Guide), if the changes are required by local law or custom (or if other sections of this Closing Guide contemplates discretion to the HUD Closing Attorney or otherwise to the Field Office) without referring the changes to Headquarters.

D. Evidencing Closing Document Changes.

1. Draft Submissions. All completed drafts of the HUD forms submitted to the HUD office for review must include clean versions of the documents as well as redlines of those drafts to show any and all changes to the forms, including any changes required by the HUD Firm Commitment.
2. Closing Submissions. Documents submitted at the closing table shall include redlines of any changes approved through the above described HUD document waiver process. Similarly, inapplicable provisions, such as the construction provisions in documents presented in many refinance transactions, and any changes required by the HUD Firm Commitment must be presented in a redline format. This policy will prevent shifts in numbering within documents and alert HUD and the Lender of alterations to the

documents during the loan servicing period.

If a HUD closing document provides alternatives, the preparer may remove the alternatives that do not apply; striking through the remaining alternatives is not required. For example, sections of form HUD-94001M, *Note*, provide alternatives for interest rate definitions, payment provisions, prepayment provisions, and endorsement panels. Also, information inserted into blanks on the form and changes required by the applicable state addenda are not required to be presented in a redline format.

3. Attorney's Opinion. The requirements of form HUD-91725M, *Opinion of Borrower's Counsel*, vary from the protocol described above. Both a clean copy and a redline copy of the Opinion must be provided in the drafts submitted to HUD for review. Pursuant to confirmation (h) on the last page of the Opinion form, the Opinion provided to HUD at the closing table must include a complete redline as an exhibit to the clean Opinion.
4. Subordination Agreement. Changes to form HUD-92420M, *Subordination Agreement*, requested to accommodate (to the extent feasible) the characteristics of governmental programs that provide secondary financing to FHA-insured multifamily projects, have slightly different requirements than those described above. Please see Section 3.3 of this Closing Guide for specific instructions on how to address requested changes to the Subordination Agreement.
5. Exhibit of Document Changes. Section 29 of form HUD-92455M, *Request for Endorsement*, and section 29 of form HUD-92434M, *Lender's Certificate*, require the Lender to certify that the closing documents submitted to HUD (with the exception of the Opinion of Borrower's Counsel) conform to closing document forms provided by HUD and that those documents have not been "changed or modified in any manner except as specifically identified and approved by HUD as evidenced by the attached Exhibit." The exhibit must include an itemized list of changes to the HUD loans documents, excluding selections of alternatives.

## 2.2 Security Instrument

- A. General Requirements. Form HUD-94000M, *Multifamily (Mortgage, Deed of Trust, Deed to Secure Debt, or Other Designation as Appropriate in Jurisdiction), Assignment of Rents and Security Agreement (Security Instrument)* must be used to secure the insured loan and grant a first lien on the entirety of the Mortgaged Property, as that term is defined in the Security Instrument. The title of the document shall be revised as appropriate to reflect the appropriate designation in the project jurisdiction.
- B. Modifications for State-Specific Requirements and Practices.
  1. The Security Instrument shall be modified to comply with local requirements relating to recording practices and enforceability. Attach a HUD-approved addendum, if applicable, and/or recording cover sheet, if necessary. State-specific riders and modifications can be found on HUDClips at:  
[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/administration/hudclips/forms/hud9/riders-addendums](http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/forms/hud9/riders-addendums)

2. In certain jurisdictions (such as New York and Florida) for refinancings under Sections 223(a)(7) and 223(f), Borrowers have commonly asked to modify the *Security Instrument*, and *Note* (form HUD-94001M) in order to facilitate a reduction in mortgage recording taxes. Such modifications may be approved at the Field Office or regional Hub level without Headquarters approval in jurisdictions where this practice is permitted under state law, and if approved by the Hub Director in accordance with Program Obligations. In such cases, the Security Instrument and Note may be modified in order to accommodate the use of supplemental and consolidated or amended and restated loans. The permitted Security Instrument and Note modifications shall take the form of (a) changing the title of the Security Instrument and Note to conform to the requirements of the local jurisdiction; and (b) a rider to both the Security Instrument and Note. The riders shall outline the information regarding the different security instruments and notes, including that the security instruments and notes are consolidated and extended (to meet the term of the FHA insurance), and state that the parties consent to the assignment of note and the consolidation. Any additional documents required due to the loan structure (such as a Supplemental Security Instrument and Supplemental Note) must conform to the new multifamily document forms. All changes are subject to final approval by the HUD Closing Attorney, who should ensure statewide consistency concerning the documentation involved in this practice.
- C. Ground Lease. When all or part of the Mortgaged Property consists of a leasehold estate, the Ground Lease shall include the provisions set forth in form HUD-92070M, *Lease Addendum*. The Lease Addendum provisions must be attached to the Ground Lease or incorporated into the Ground Lease by reference prior to the execution of the Ground Lease, or if such incorporation by reference is not possible, must be separately executed by the Landlord and Tenant. A rider to the Security Instrument is not required. For Section 223(a)(7) transactions only, to the extent the original Ground Lease was previously approved for use in an FHA-insured closing, then a new Lease Addendum is not required. However, the new Lease Addendum is required upon the renewal of the Ground Lease.

## **2.3 UCC-1 Financing Statements**

### **A. General Requirements**

1. As set forth in the Security Instrument, Borrower shall grant Lender a first lien security interest in all of the Mortgaged Property, including the personalty associated with the project. The Lender shall take any and all measures that are necessary, including the filing of appropriate UCC financing statements, to ensure that it has a valid and enforceable first lien security interest under the Uniform Commercial Code in all of the Mortgaged Property at the time of closing and for the duration of the insured project loan (see 24 CFR § 207.258(b)(4)). The Lender certifies that these requirements have been met in form HUD-92434M, *Lender's Certificate* (see paragraph 38) for new construction/substantial rehabilitation, and form HUD-92455M, *Request for Endorsement of Credit Instrument* (see section 34) for refinances.
2. Additional UCC-1 Financing Statements and a separate legal opinion may be required if the construction advances include offsite storage of building components.
3. Real property and any non-realty equipment, furnishings, and all other collateral covered by the Security Instrument, must be free and clear of all liens other than the insured

mortgage loan, liens for taxes and assessments that are not yet due and payable, and any other liens that HUD approves in writing prior to the closing.

4. The legal description for the real property must be identical to the legal description in the Regulatory Agreement, Building Loan Agreement, Security Instrument, title policy and survey, and in all other closing documents, provided that minor differences, such as differences in abbreviations or other minor stylistic differences, are allowed.
5. HUD shall be listed as an additional secured party, as follows: “Secretary of Housing and Urban Development,” and the address shall be the Office of Housing at the program office location processing the loan.

**B. Description of Collateral.**

1. Attach to the UCC-1 Financing Statement a description of tangible and intangible Mortgaged Property, which shall include all Mortgaged Property, as defined in the Security Instrument, except for the realty. The description of the personalty in the UCC-1 Financing Statement may need to differ from the language used in the definition of Mortgaged Property in the Security Instrument, depending on the jurisdiction's rules regarding the specificity required for enforceability. The Lender is responsible for ensuring that the description of such property in the UCC-1 Financing Statement is adequate to create an enforceable first priority lien, as it certifies to in the Lender's Certificate or Request for Endorsement of Credit Instrument, as applicable.
2. Appropriate after-acquired property and proceeds clauses shall be included in the description of collateral.

## **2.4 Promissory Note**

**A. General Requirements.**

1. Form HUD-94001M, *Note (Multistate)* (Note), must be used to evidence the insured loan. Any changes to the form must be approved by the Hub Director or HUD Closing Attorney, as set forth in Section 2.1 of the Closing Guide. The section of the Act under which the mortgage loan is insured must be identified in the endorsement panel of the Note.
2. Terms. The terms of the Note must be consistent with the Firm Commitment.

**B. Prepayment Provisions.** The Note includes alternative provisions for prepayment, including lockout provisions relating to Section 223(f) transactions. The applicable provisions shall be used, as set forth in the Note. To the extent a rider is necessary to set forth the prepayment terms, as called for in Alternative B to section 9 of the Note, the rider shall include only the prepayment schedule. (See MAP Guide §11.7.B.4, Prepayment Provisions, for guidance on determining the acceptability of the prepayment schedule.) Other provisions previously included in riders to previous versions of the Note or called for in the MAP Guide have already been incorporated into the body of the Note and shall not be included in a rider.

**C. Endorsement Panel.** The 2014 version of the Note contains separate endorsement panels for the various closing types covered in this Closing Guide.

**D. Late Charge Provisions.** In accordance with 24 CFR § 200.88, Lender may collect a late charge for the cost of handling delinquent payments, subject to the following:



1. Charges must not exceed two cents per dollar of unpaid principal and interest that is more than 10 days in arrears.
  2. Late charges must be separately charged to and collected from Borrower and cannot be deducted from any total monthly mortgage payment, or collected from any reserve escrow, residual receipts funds, or from any interest accruals thereto.
- E. Changes to Loan Interest Rates. Any change to the interest rate prior to initial endorsement requires an amendment to the Firm Commitment.
1. Amendment for Rate Reduction. If the construction interest rate is reduced before initial endorsement and it is not feasible to reprocess the project, the Firm Commitment must be amended to state the proper interest rate and contain the following condition (see MAP Guide §8.14.B.2.a, Loan Rates):
 

*“Any interest savings resulting purely from a differential between the HUD processed interest rate and the actual construction interest rate may not be construed as excess funds that may be used to offset costs in other categories at the time of cost certification. Any such saving must be applied as a mortgage reduction.”*
  2. Reprocessing For Rate Increase Before Closing. If the construction and/or permanent interest rate increases before initial endorsement, the Firm Commitment must be amended and the application reprocessed to reflect the higher rate.
- F. Reprocessing For Change in Permanent Financing After Closing. Re-processing of loans for changes to the permanent financing from the terms in the Firm Commitment after initial closing is generally prohibited by the MAP Guide §3.2.D. Changes are allowed in the limited situation of a bond deal, as the permanent interest rate may not be known at initial closing (see MAP Guide §8.14.B, Bond Financed Projects, Loan Rates). If the evidence submitted in preparation for final endorsement does not indicate that the permanent financing will be available at the interest rate, for the term length, and for at least the mortgage loan amount identified in HUD’s Firm Commitment, then the Firm Commitment must be reprocessed accordingly.

**2.5 Regulatory Agreement.** Form HUD-92466M, *Regulatory Agreement for Multifamily Projects* (Regulatory Agreement), must be used to establish regulatory restrictions on the project, Borrower's obligations in operations, and HUD's rights if the Agreement is violated. The Security Instrument incorporates the Regulatory Agreement by reference at Section 9 of the Security Instrument.

- A. Section 50. Section 50 and the Section 50 Addendum of the Regulatory Agreement relate to the non-recourse nature of the indebtedness and provide certain losses for which the named parties may be held personally liable; the names of those parties identified in the Firm Commitment shall be inserted.
- B. Occupancy Restrictions and Policies. The Regulatory Agreement no longer has check boxes for Elderly/Non Elderly housing. Any occupancy restrictions, including limitation to elderly residents or any other occupancy restrictions to which the project will be subject, even those imposed by other programs, should be listed in Section 30 of the Regulatory Agreement. To

the extent restrictions not imposed by the FHA-insured loan transaction apply to the project, the language used to include them in Section 30 of the Regulatory Agreement shall make clear that their inclusion is for information purposes only and does not impose restriction independent of the program to which they are connected. Lenders and Borrowers must work closely with HUD during the application and closing process to ensure that any occupancy restrictions imposed are lawful and comply with Program Obligations.

- C. Residual Receipts Rider. The checkboxes on the 2011 version for the different borrower types have been removed in the 2014 version of the form. Multifamily Housing no longer recognizes a distinction between non-profit and for-profit entities (even non-profits organized under Section 501(c)(3) of the Internal Revenue Code). Multifamily Housing no longer imposes “Residual Receipts” requirements on non-profits or prohibits non-profits from taking surplus cash distributions, as was the case in the past. Non-profit entities no longer receive more favorable underwriting than for-profit entities, as was the case in the past.

As a result of this change in Multifamily Housing policy, the Residual Receipts provisions have been removed from the 2014 version of the Multifamily Regulatory Agreement. However, Multifamily Housing is aware that, in some cases, other programs (such as Section 8 and Section 202 Supportive Housing for the Elderly) impose Residual Receipts requirements on non-profit owners. In such cases, a project will be subject to Residual Receipts requirements even though the FHA-insured loan transaction does not impose these requirements. However, once the other program’s Residual Receipts requirements terminate, nothing in the FHA-insured loan transaction requirements would prohibit the project from taking surplus cash distributions in accordance with the provisions of the Regulatory Agreement.

The 2014 version of the Regulatory Agreement requires projects subject to Residual Receipts requirements to attach a “Residual Receipts Rider” and indicate whether the project is subject to such a rider on page 1 of the Regulatory Agreement. If a Residual Receipts rider is attached and the “yes” blank is checked, the Surplus Cash provisions of the Regulatory Agreement are modified and the provisions of the attached Rider indicate that Residual Receipts account requirements are imposed by another program. Only add the Residual Receipts Rider if the project is actually subject to a residual receipts requirements (for example, if there is a HAP contract that imposes such a requirement).

The Rider shall clearly define the source and duration of the Residual Receipts requirements, and indicate that upon expiration of these requirements, the terms in the Regulatory Agreement regarding Surplus Cash will control. In other words, once the underlying program that required the Residual Receipts terminates with respect to the project, HUD will no longer impose such restrictions on distributions.

In the case of FHA-insured projects that receive rental assistance in the form of a project-based Section 8 housing assistance payments (HAP) contract, the mortgage insurance documents, including the Regulatory Agreement, are separate and apart from the Section 8 HAP contract. Thus, the maturity or prepayment of an FHA-insured loan and the resulting release of the Regulatory Agreement have no effect on the Section 8 HAP Contract, which continues in full force and effect until the date on which it expires, unless terminated for

cause.

**2.6 Building Loan Agreement.** Form HUD-92441M, *Building Loan Agreement*, sets out the basic agreement to loan funds to Borrower. Project-specific terms shall be completed as appropriate. The form calls for three exhibits: (A) the legal description, (B) form HUD-2328, the Contractor's and/or Mortgagor's Cost Breakdown, and (C) if applicable, a disbursement agreement relating to disbursement of the Project Completion Funds required by HUD at initial closing and/or a rider to the disbursement agreement listing certain charges or items to be paid from Loan proceeds or Project Completion Funds. If the Borrower also acts as the Contractor in the transaction, Borrower shall also submit the supplement to form HUD-92441M.SUPP, Supplement to Building Loan Agreement. If a Section 241 transaction is not subject to prevailing wage requirements, the provisions of the Building Loan Agreement regarding prevailing wages for such transaction may be deleted.

## **2.7 Lender's Certificate**

- A. General Requirements. The Lender must make certain certifications and acknowledgements to HUD, as set forth in form HUD-92434M, *Lender's Certificate* (Lender's Certificate).
- B. As set forth in the form Lender's Certificate, all required escrows, deposits, fees, charges, and financial obligations must be properly reflected in the Lender's Certificate. The Hub Director is responsible for determining that the financial amounts are appropriate and correct.
- C. As set forth in the Lender's Certificate, appropriate exhibits, addenda and other items shall be either attached or provided separately, including without limitation:
  - 1. Each of the exhibits to be attached, as required by Sections 8, 20(f), 20(h), 29 and 30 of the Lender's Certificate.
  - 2. Each of the items, as applicable, to be submitted separately to HUD, as required by Sections 2, 5, 11, 12, 13, 14(a) and 13(b).
- D. Working Capital Deposit. The Working Capital Deposit required by the Lender's Certificate is discussed below at Section 2.8.C of this Closing Guide.
- E. Assurance of Funds to Meet Operating Deficits. The funding of any operating deficit projected on form HUD-92264, *Multifamily Summary Appraisal Report*, is a condition of the Firm Commitment. The initial operating deficit deposit is established with the Lender at initial closing. It may be funded by cash, letter of credit or excess mortgage proceeds, if any. These funds can be released pursuant to the protocol established in the MAP Guide §12.15.E (Escrowed Funds, Letters of Credit, Deposits, Holdbacks and Related Matters). The details of this funding obligation are to be set forth in Lender's Certificate Section 13, and in form HUD-92476a-M, *Escrow Agreement for Operating Deficits*.
- F. Cost Certification
  - 1. The Hub Director will inform Lender in writing of the aggregate amount that will be allowed at cost certification for discounts, financing fees and issuance costs. The allowed amount shall be reflected as a percentage of the mortgage loan. The amount of the fee is listed in the financing section of form HUD-92264 (or in an attachment thereto), which is a part of the Firm Commitment.

2. Lender will be required to acknowledge the additional costs, if any, that HUD will allow at cost certification by signing a copy of a letter from HUD to Lender detailing such costs. Such acknowledgement must be filed with form HUD-92434M in order to properly review the cost certification.

G. Fee Payment:

1. Only financing fees and charges disclosed in the Lender's Certificate will be accepted by HUD as certifiable costs in connection with the determination of the maximum insurable mortgage.
2. Loan fees are earned as follows:
  - a. Construction loan fees are earned at initial closing, except to the extent that the loan documents defer a portion to a later date. Construction loan extension fees are not earned until the time such extensions are granted.
  - b. Permanent loan fees and permanent loan extension fees, to the extent a separate permanent loan is anticipated, are earned at final closing.
  - c. Construction/Permanent loan fees (for construction loans anticipated to convert to permanent loans) are earned at initial closing, except to the extent that the loan documents defer a portion to a later date.
3. Fees Paid At Initial Closing. "Cash Available to Borrower" is also known as excess mortgage proceeds, and also may be used at initial closing to pay construction and permanent loan discounts, including those for bond issuance costs and a Ginnie Mae indemnification escrow to the extent recognized by HUD under form HUD-92434M, paragraphs 20(c) through 20(e), if loan documents approved by HUD provide for the payment of such fees and charges at initial closing.
4. Fees Paid After Initial Closing. Excess mortgage proceeds may be used after initial closing to pay permanent loan discounts, including those for unitary loans, and construction and permanent loan extension fees approved by HUD in form HUD-92434M, paragraphs 20(c), (d), and (g), if loan documents approved by HUD provide for the payment of such fees after initial closing, subject to the following:
  - a. Lender is required to escrow sufficient funds on Borrower's behalf to cover fees approved in form HUD-92434M, paragraphs 20(c), (d), (e) and (h), for payment after initial closing.
  - b. Borrower is required to furnish a written acknowledgement to HUD that any disbursements from the escrow accounts require HUD's advance written approval. Lenders must provide a separate escrow account for each escrow, as needed, as well as a separate letter for each disbursement from the various escrow accounts.
  - c. A Letter of Credit will not be accepted at initial closing for any of the amounts to be satisfied from excess mortgage proceeds.
  - d. Such escrowed excess mortgage proceeds may be released when earned.
5. Deferred Fee Collection. Where Lender, bond underwriter or issuer may exercise the option for deferred collection of discounts, financing fees, etc., permitted by form HUD-92434M, Lender's Certificate, paragraph 20(h), deferred collection of these items must

be an obligation of a third party rather than of Borrower.

- a. Third-party obligees, and Lender, bond underwriter or issuer, must attest in writing that they will not seek payment from Borrower, Mortgaged Property, mortgage proceeds, any reserve or deposit required by HUD in connection with the mortgage transaction, or rents or other income of the Mortgaged Property. (See sample language for third-party obligee certification in Part 5 of the Closing Guide.)
- b. The HUD Closing Attorney will review the third party's promissory note (evidencing the third party's obligation to pay the deferred fee(s)) to ensure that it complies with the requirements for secondary financing and guidance for promissory notes as set forth in Section 3.3 of this Closing Guide, and meets the following criteria:

- i. The maker must be the third party obligated for payment of the fee.
- ii. The note may be unsecured or secured by pledging of specific assets. The assets must be completely separate from the Mortgaged Property, including the rental income and escrow accounts.
- iii. The note must include the following statement on its face:

*"The payee or any subsequent holder hereof may not assert any claim arising from this note against the interest of the maker in (a) property located at \_\_\_\_\_ which is financed by a mortgage insured by HUD under Project No. \_\_\_\_\_, or (b) any reserves or deposits required by HUD in connection with the mortgage transaction, or (c) the rents or other income from the property."*

6. Identities of Interest. The Lender's Certificate requires the Lender to disclose any identities of interest. See MAP Guide §2.6 (Identity of Interest) regarding identities of interest.

7. Broker's Fees. See form HUD-92434M, *Lender's Certificate*, paragraph 22.

- a. Referral fees are always prohibited.
- b. Lender may not pay anything of value directly or indirectly to any person or entity in connection with an insured transaction if the person or entity has received any other compensation from Borrower, seller, builder or any other person for services related to the transaction, or related to the purchase or sale of the Mortgaged Property, except as approved by HUD. See 24 CFR §§ 200.10 and 202.5(l).
- c. The Hub Director may approve compensation for services actually performed, which approval must be in writing and be based on the following findings:
  - i. The service performed is necessary,
  - ii. The service is actually rendered,
  - iii. Payment is reasonable and customary,
  - iv. The broker's fee is included in form HUD-92434M, and
  - v. Borrower submits a letter to HUD identifying the fee paid, the name of the

broker, the reasons why it was necessary to employ a broker, and certifying that there is no identity of interest between Borrower/Sponsor and the broker, or between Lender and the broker.

## 2.8 Escrow Agreements

- A. **General Requirements.** As set forth above, certain escrow agreements may be required to assure project completion.
- B. *Escrow Agreement for Operating Deficits:* If it is projected that delayed occupancy or other causes may result in operating deficits, the Firm Commitment may require an operating deficit escrow. See MAP Guide §7.14 (Calculating Operating Deficits) and use form HUD-92476a-M.
- C. *Escrow Agreement for Working Capital:* Except when no working capital deposits are required for refinancing, HUD requires that every Borrower deposit with Lender at initial endorsement a cash escrow or letter of credit. For new construction, at least 4% of the mortgage amount, with 2% held for contingencies, is required, and for rehabilitations, 2% of the mortgaged amount is required. Lenders may require larger deposits. The details of the working capital deposit are to be set forth in Section 9 of the Lender's Certificate, and in form HUD-92412M, *Escrow Agreement for Working Capital*, pursuant to MAP Guide §12.15.C(1-3) (Escrowed Funds, Letters of Credit, Deposits, Holdbacks and Related Matters).
- D. *Escrow Agreement for Incomplete Construction:* With respect to all incomplete items, the amount held in escrow for completion must be at least one and one-half (1½) times the estimated cost of completion. The amount of any escrow shall be sufficient to assure an incentive to complete the work, taking into consideration a possible rise in cost. Such escrow will be held by Lender in accordance with the terms of form HUD-92456M, *Escrow Agreement for Incomplete Construction*, and the Hub Director will ascertain that the items to be completed are properly identified in the attachment to form HUD-92403.
- E. *Escrow Agreement for Latent Defects:* This escrow agreement collateralizes the contractor's guarantee, running for a period of twelve months from the date of Project Substantial Completion and as defined in § 3.D of the Construction Contract for work completed after Project Substantial Completion, against latent defects due to faulty materials and/or workmanship. To this effect, the contractor must deposit with Lender, or a depository institution satisfactory to Lender and in accordance with Program Obligations, a sum equal to 2½% of the total amount of the Construction Contract. Contractor further covenants and agrees to correct latent defects within 60 days of a demand by the Borrower, Lender or HUD. If the contractor fails to do so, the Lender, with the approval of HUD, shall have the right to complete the correction and may use funds from the deposit. The details of the *Latent Defects Escrow* are set forth in form HUD-92414M. Performance may be ensured by a cash escrow, letter of credit, or surety bond.
- F. *Escrow for Non-critical, Deferred Repairs:* For projects with incomplete non-critical repairs, an escrow must be established at initial/final endorsement, as set forth on form HUD-92476.1M, *Escrow Agreement for Non-critical, Deferred Repairs*. These funds must be held by the Lender until all required non-critical repairs are complete, which must be within 12

months of the initial endorsement. The Borrower may request release of these funds after completion of the repairs and with written approval of HUD.

- G. *Escrow Agreement of Sponsor to Furnish Additional Funds*: If additional funds are needed for project completion, HUD may require the use of a Sponsor Escrow and a Sponsor Bond. The Sponsor must complete form HUD-92476M, *Agreement of Sponsor to Furnish Additional Funds*, and the Sponsor and Surety must complete form HUD-92477M, *Bond Guaranteeing Sponsor's Performance*. The Sponsor will deposit the necessary funds in escrow with Lender or an institution satisfactory to Lender and in accordance with Program Obligations. This deposit shall take the form of cash and/or one or more unconditional, irrevocable letter(s) of credit issued to Lender by a banking institution.

## 2.9 Opinion of Borrower's Counsel

- A. General. Borrower's attorney must submit a comprehensive opinion acceptable to HUD with the closing package. The opinion shall be addressed to HUD, Lender, and, if required by Lender, Lender's attorney, and shall opine as to the legal sufficiency of the security instruments and other additional agreements affecting Borrower or the project, as set forth in form HUD-91725M, *Opinion of Borrower's Counsel; Instructions to Opinion of Borrower's Counsel*; and *Exhibit A to Opinion of Borrower's Counsel, Certification of Borrower*. For final closings, see also Section 2.10.E., of this Closing Guide.
- B. Exhibits. As set forth in form HUD-91725M, the *Opinion of Borrower's Counsel* shall include the following exhibits: (A) *Certification of Borrower* (form HUD-91725M-CERT); (B) legal description of the project property; (C) status certificates indicating the Borrower's good standing in the applicable jurisdictions; (D) if the project is financed by bonds or Low Income Housing Tax Credits, a supporting opinion indicating that no conflicting provisions in other project documents supersede provisions in the HUD documents or in Program Obligations; (E) a listing of pending litigation matters, if applicable, including the results of docket searches; (F) disclosure of substantive changes to HUD forms; (G) redline comparison of the Opinion as required in confirmation (h) of the Opinion; and (H) other exhibits as appropriate.
- C. Alternate Provisions. Alternate provisions are set forth in form HUD-91725M, the *Opinion of Borrower's Counsel* and shall be used as applicable. These alternate provisions include, without limitation, provisions relating to: (1) the type of entity involved, and opinions on entities that are principals in Borrower, as applicable; (2) the other financing sources for the project; (3) off-site improvements; and (4) other project-specific circumstances.

## 2.10 Final Closing Forms and Requirements

### A. General Requirements.

1. The requirements for final closing are set out in the HUD Final Closing Checklist, included in Part 4 of this Closing Guide (Final Closing Checklist), and in form HUD-92580, *Maximum Insurable Mortgage* (Maximum Insurable Mortgage). These requirements may be modified to comply with local law requirements.
2. Borrower and Lender must prepare and submit the required deliverables to HUD, for HUD's review and approval, prior to final endorsement. Borrower and/or Lender, not HUD, are responsible for distribution of documents or other deliverables to third parties

or otherwise. The Final Closing Checklist indicates the number of originals and/or copies of each deliverable that are required. HUD encourages electronic retention of documents, to the extent possible. To that end, although one original set of hard copy documents shall be retained for the Washington Docket, HUD encourages the Hub Director, HUD Closing Attorney, Lender, and Borrower to consider retaining electronic versions of closing dockets instead of hard copy versions. Hard copies remain the default requirement unless otherwise requested by the HUD Closing Attorney.

- B. Executing and Recording Documents. Prior to final endorsement, all documents must be fully executed and, if applicable, properly recorded in the real property records of the county in which the project is located. For any recorded documents, Lender must bring to final closing the original recorded document and two copies, unless otherwise requested by the HUD Closing Attorney. If the original is not available, HUD requires a certification by either the title company or the recording official that the document presented is a true and correct copy of the recorded instrument. If applicable, the following documents more fully explained below must also be recorded: (i) Modification Agreement, (ii) Supplemental Security Instrument, (iii) Modification and Consolidation Agreement.
- C. Maximum Insurable Mortgage Form. Form HUD-92580, in addition to setting forth HUD's determination of the maximum insurable mortgage, may also contain, without limitation, the following:
1. A listing of items from form HUD-92330, *Cost Certification*, that remain "to be paid," and a description of the arrangements to hold such amounts in escrow pending resolution of any open matters (see Schedule 1(A) of form HUD-92580). Note that the Certificate of Borrower is attached to form HUD-92023M, *Request for Final Endorsement*;
  2. Amount of additional Mortgage Insurance Premium, if there is a mortgage increase.
- D. Modifications to the Original Loan Terms. When modifications are made to the original loan terms, such as a decrease to the original mortgage loan amount, a number of documents authorizing and evidencing such modifications may be necessary.
1. Modification Agreement. A recorded Modification Agreement, by and between Borrower and Lender, is required.
    - a. The Modification Agreement shall provide for HUD's signature to evidence HUD's acceptance and approval of the modification.
    - b. There is no prescribed form of modification agreement, although there is one mandatory provision, as follows:

“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 Borrower, those funds may be applied, at the discretion of HUD, to payment of the delinquent amounts due under the Note or the Security Instrument or as a partial prepayment of the Note.”



2. Allonge or Supplemental Note.
    - a. Allonge. If the amount of the insured loan is decreasing, an Allonge to the Note may be necessary under state law. The Allonge must be approved by HUD and shall be attached to the original Note. If state law does not require an Allonge, the modification agreement can be used to modify the Note terms as well as those of the Security Instrument.
    - b. Supplemental Note. If the amount of the insured loan increases, Lender must prepare a supplemental note using the Note form required for initial closings (HUD-94001M), but entitled “Supplemental Note.” The Supplemental Note shall contain a cross-default provision with the original Note. The principal amount of the Supplemental Note shall be for the amount of the increase to the insured loan amount, not for the new total insured loan amount. The amount of the payments to principal in the Supplemental Note shall be sufficient to amortize the increase amount over the Security Instrument term. Except for the foregoing, the terms and provisions of the Supplemental Note shall be the same as those in the Note used at initial endorsement.
  3. Supplemental Security Instrument for Increased Loan Amount. If the amount of the insured loan increases, Lender must prepare a supplemental security instrument using the Security Instrument form required for initial closings (HUD-94000M). “Supplemental” shall be added to the title of the instrument (Supplemental Security Instrument). The Supplemental Security Instrument shall contain a cross-default provision with the original Security Instrument. The Supplemental Security Instrument secures repayment of the Supplemental Note, and shall encumber the entire Mortgaged Property. The Regulatory Agreement incorporated by reference in the Supplemental Security Instrument shall be the Regulatory Agreement recorded at the time of initial closing. Except for the foregoing, the terms and provisions of the Supplemental Security Instrument shall be the same as those in the Security Instrument used at initial endorsement.
  4. Modification and Consolidation Agreement. If the amount of the insured loan increases, Lender must prepare a Modification and Consolidation Agreement, using a format approved by HUD, to evidence that the initial Note and the Supplemental Note represent and shall be deemed one indebtedness, to evidence that the initial Security Instrument and the Supplemental Security Instrument represent and shall be deemed one security instrument, and modifying the initial Security Instrument to provide for cross-default with the Supplemental Security Instrument. Prior to final endorsement, the Modification and Consolidation Agreement must be recorded in the county real property records where the project is located.
- E. Borrower’s Attorney’s Opinion. If there have been any modifications to the loan documents or other matters that require an attorney’s opinion, Borrower’s attorney must give an opinion specifically supplementing the opinion given at initial closing, and addressing any modifications to the loan documents that warrant an updated opinion, in the discretion of the HUD Closing Attorney, including without limitation:
1. The enforceability of the documents evidencing any modification to the insured loan’s terms, including a modification agreement, supplemental note, supplemental security instrument, or any and all of the foregoing, and the continued first priority position of the

insured loan's lien;

2. Any land use restrictive agreements or extended use agreements, or any other restrictive covenants, that have been placed on the property since initial closing, including those connected with Low Income Housing Tax Credits; and
3. Disclosure of any material modifications to the documents covered by the opinion given at initial closing, including any amendments or changes to the legal description.

F. Title Evidence at Final Endorsement. Prior to final endorsement, Lender must provide HUD with a new title policy, or, if approved by the HUD Closing Attorney, a title endorsement (and such endorsement or policy shall be provided as a *pro forma* for HUD's review prior to final closing), which must extend the title insurance coverage to the date of the final endorsement of the Note. Because local jurisdictions vary in the availability of title endorsements, the local office, as recommended by OGC with approval from Housing, can establish a policy requiring different endorsements that provide substantially similar coverage, as further discussed in Section 3.2.C of this Closing Guide. The original is to be delivered to Lender and a duplicate original, marked as such, delivered to HUD, along with two additional copies, unless otherwise requested by the HUD Closing Attorney. The title evidence must:

1. Show what, if any, matters have gone on record since initial closing; copies of such items must be submitted to HUD for review prior to final closing. Any exception to title not shown in the title evidence accepted at initial closing shall be examined carefully by the Hub Director 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 the Hub Director shall be removed from the title policy or its effect insured against by an appropriate endorsement to the title policy.
2. Bring the effective date forward to the day of final endorsement.
3. List any modification agreement or supplementary loan documents on Schedule A of the Title Policy, and insure the full amount of the HUD-insured loan, inclusive of amounts secured by the Security Instrument and any supplements and/or modifications, in 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 Security Instrument and the Supplemental Security Instrument, HUD will not endorse the Note for insurance at the increased amount.
4. Delete or amend any other matters covered by the initial title policy, as appropriate, such as updating the exception for unpaid property taxes and deleting the pending disbursements clause.
5. Adjust the amount of title coverage, if the mortgage loan amount has changed.

G. Final As-Built Survey & Surveyor's Report. This must be dated within 120 days before closing, meaning the surveyor's certification must show that the field work was made, or updated, no earlier than 120 days prior to closing. The survey must be prepared, signed and sealed by a licensed surveyor who must include a certification in the format set out in form HUD-91073M, *HUD Survey Instructions and Surveyor's Report*.

H. Updated Organizational Documents of Borrower. Borrower must provide:

1. A certification signed by the Borrower, including incumbency, either:
    - a. Confirming that no changes have been made to the Borrower's organizational documents, including incumbency, delivered to HUD at initial closing; or
    - b. Identifying any changes made to the organizational documents delivered to HUD at initial closing and attaching copies of the amendments or other documents effecting such changes.
  2. Current authorizing resolution, if required, or certification by appropriate officer of Borrower that the authorizing resolution given at initial closing covers the final closing and is still in effect (including any increase in the loan amount).
- I. Estoppel Letter and Certification from Lender. Lender must submit a letter dated the day of final endorsement stating that the loan is current, and that no event has occurred which with the giving of notice and/or passing of time will constitute an Event of Default, and providing the confirmations required by the Lender's Certificate at initial closing, such as the Borrower's receipt of necessary governmental certificates, permits, licenses, qualifications and approvals of Governmental Authorities, obtained after initial closing.
- J. Guarantee Following Completion.
1. Form HUD-92442M, *Construction Contract*, contains guarantees against any defects due to faulty materials or workmanship that appear within a period of one year following completion.
  2. The general contractor must provide assurance of performance under such guarantee, as follows:
    - a. *Bond*. If form HUD-92452M, *Performance Bond-Dual Obligee*, was used, no action is required, as it remains in effect for two (2) years from the date on which final payment under the construction contract becomes due. As part of this assurance, the surety will be required to perform when the general contractor fails to refund any overpayment to Borrower, a requirement of form HUD-92442M, Article 4 (Option 1 for Cost Plus Contract).
    - b. *Cash/Letter of Credit Assurance*. If form HUD-92450M, *Completion Assurance Agreement*, was used at initial closing, the remaining escrow funds may be released in accordance with the terms of that agreement, except that any amounts held to cover against latent defects must remain in escrow during the latent defects period, also pursuant to the terms of the form agreement.
  3. In addition, the guarantee funds are to be kept separate from any escrow that may have been provided to assure completion of any incomplete construction items.

## **2.11 Section 223(f) Closing Forms and Documents**

### **A. Promissory Note**

1. Endorsement of Note. In a Section 223(f) closing, HUD is not insuring advances from a construction loan, so there is no "initial closing" endorsement of the Note. Instead, there is one closing at which FHA endorses only the total sum of the loan, as stated in the 223(f) endorsement panel in the 2014 version of the Note.

2. Form HUD-94001M, the *Note*, includes alternate provisions relating to loans insured pursuant to Section 223(f) that shall be used for these transactions, including prepayment prohibitions. However, MAP Guide §3.9.G (Prepayment Provisions and Prohibition) includes conditions under which the Hub Director may override prepayment prohibitions.
- B. Evidence of Zoning and Building Code Compliance. Evidence of zoning compliance may be provided in the form of a zoning endorsement to the title policy (ALTA form 3.1 for improved land), but if such endorsement is only relevant to the condition of the project when it was first constructed, it may not be evidence of current code conditions. In such case, HUD will accept an alternative deemed acceptable to the Hub Director in consultation with the HUD Closing Attorney, such as a supplemental letter from appropriate local authorities stating that there are no known zoning code violations associated with the subject property, a similar letter from the building code enforcement office that there are no known building code violations, and/or a certification from the Borrower or project architect that no changes have occurred since the issuance of certificates of occupancy. Sample building code and zoning code assurance letters are included in Part 5 of this Closing Guide. See 24 CFR § 200.72 and Part II of form HUD-91070M, *Consolidated Certifications - Borrower*. The zoning laws and regulations must permit the construction and operation of multifamily rental housing of the type covered under the applicable section of the National Housing Act. See opinion 6 of form HUD-91725M, *Opinion of Borrower's Counsel*, as well as Section (1) of form HUD-92478M, *Borrower's Oath*.
  - C. Assurance of Funds to Meet Operating Deficits (if prescribed by the HUD Firm Commitment). For all facilities for which delayed completion of repairs will postpone or interrupt occupancy or income for any period, an additional deposit must be made to the operating deficit account in the amount specified by the Firm Commitment. See MAP Guide §7.13, and use form HUD-92476A, *Escrow Agreement for Operating Deficits*.
  - D. Certificate of Occupancy. This is not required unless local law requires issuance of a new certificate of occupancy which is not currently included in HUD's files.
  - E. Additional Documentation of Authority/Amendment of Organizational Documents. Borrower's organizational documents must be amended, if necessary, to include the HUD required provisions (see Section 3.1 of this Closing Guide). If Borrower's organizational documents require prior consent of, or notice to, the principals in Borrower for any proposed refinance, evidence of compliance therewith shall be submitted.
  - F. Request for Endorsement of Credit Instrument (form HUD-92455M). This form is for Insurance Upon Completion, in addition to refinancing under Sections 223(f) and 223(a)(7). The form includes a Certificate of Lender, a Certificate of Borrower, and a Certificate of General Contractor, although in a Section 223(f) closing, there generally is no contractor, so the form is modified for the Section 223(f) program to delete references to construction. It shall be completed so as to account for all of the funds required by the Firm Commitment.
  - G. Short Form Cost Certification. A modified form of cost certification for loans insured pursuant to Section 223(f) must be submitted prior to endorsement of the Note, using form HUD-2205-A, *Borrower's Certificate of Actual Cost*. See MAP Guide §13.4 (Projects with LIHTCs are Exempt from Cost Certification Requirements). No cost certification is required for Section 223(f) transactions where the mortgage is 80% of value or less.

- H. Certified Closing Statement. A closing statement is required.
- I. Critical Repairs. Critical repairs required by the Firm Commitment must be completed before endorsement. The closing files shall contain a memorandum stating that all critical repairs have been completed.
- J. Escrow Agreement for Non-critical, Deferred Repairs (form HUD-92476.1M). Generally, all work must be acceptable before the loan closing. Only noncritical repairs may be deferred until after endorsement. Noncritical repairs are those that will not endanger the safety and well-being of tenants, visitors and passersby, adversely affect ingress or egress, or prevent the project from reaching sustaining occupancy. If there are noncritical repairs necessary, Borrower must establish an escrow with Lender using form HUD-92476.1M as required by the Firm Commitment.
- K. Latent Defect Guarantee. Latent defects assurances are not required where the repairs relate only to deferred maintenance items and minor cosmetic repairs, such as painting. Counsel should check with Housing to determine whether the amount of repairs exceeds Housing's minimum threshold to require assurances. When repairs and replacements are more significant, assurance against latent defects must be established in accordance with the terms of form HUD-92476.1M in the form of cash, letter of credit, or a surety bond, in an amount equal to 2½ percent (or greater percentage if required by the Firm Commitment) of the repair cost. In the event the latent defects assurance is in the form of surety bond, form HUD-3259 is required and the surety must be on the U.S. Treasury Listing of Approved Sureties (Department Circular 570). The bond must run for a period of at least two years from the date of completion of repairs.
- L. Utilities. It can be assumed that an existing project has access to the appropriate utilities, unless the Firm Commitment specifically requires evidence of utilities at closing. Telecommunications services (such as cable television and internet services) shall be treated as other utilities.

## **2.12 Closing Forms and Documents for Insurance Upon Completion Closings**

- A. Documents Required at Closing. A checklist for Insurance Upon Completion closings is attached in Closing Guide Part 4.
  1. Security Instrument Term. The term of the Security Instrument commences on the date of HUD's endorsement. The Security Instrument is not recorded prior to commencement of construction; instead, it is recorded at closing or just prior to closing.
  2. Title Evidence. The title insurance policy must be dated the same day as the date of endorsement of the Note.
  3. Regulatory Agreement. The Regulatory Agreement must be recorded immediately following recordation of the Security Instrument.
  4. Assurance of Performance Under Guarantee. Before endorsement of the Note, Borrower must furnish satisfactory evidence that the work of the contractor is covered by a guarantee, running for a period of one year from the date of Project Substantial Completion, against defects due to faulty materials and/or workmanship. Performance

will be assured by one of the following:

- a. *Surety Bond*. Form HUD-3259, *Surety Bond Against Defects Due to Defective Materials and/or Faulty Workmanship*, by a surety on the U.S. Treasury Listing of Approved Sureties (Department Circular 570), and drawn in an amount not less than 10% of the cost of construction as estimated by Housing.
  - b. *Cash Escrow*. A cash escrow equal to 2½% of the principal amount of the Security Instrument, to be retained in escrow by Lender for a period of one year after endorsement.
5. Form HUD-92455M, *Request For Endorsement of Credit Instrument, Certificate of Lender, Borrower and General Contractor*, is required. Please note that the general contractor's certification must be given in connection with Insurance Upon Completion closings, as opposed to refinancings where it may not be applicable.
  6. Operating Deficit Escrow. If an operating deficit was projected on form HUD-92264, the sponsors, at closing, must provide funds to meet the deficit in the manner set forth in MAP Guide §8.13 (Determining the Estimated Cash Requirements for Completing the Project). Use form HUD-92476a-M, *Escrow Agreement for Operating Deficits*, which requires a specified sum to be held for a specified number of months after closing in accordance with Program Obligations.
  7. Contractor's Prevailing Wage Certificate. The Contractor must submit form HUD-92448, *Contractor's Requisition Project Mortgages*, to Lender, with the section entitled "Contractor's Prevailing Wage Certificate" completed.
- B. Ancillary Agreements. Other ancillary agreements are required as set forth in the MAP Guide and in the checklist for Insurance Upon Completion Closings included in Part 4 of this Closing Guide.
  - C. Excess (Unused) Mortgage Proceeds. Provisions for excess or unused proceeds are included in form HUD-93305M, *Agreement and Certification*. See Section 1.12.D. of this Closing Guide.
  - D. Labor Relations. The Hub Director must confirm to OGC that Labor Relations Staff have approved proceeding to final endorsement, and that, if required, deposits to the U.S. Treasury have been established as a condition of closing to ensure payment the correct amount of wages. Note: Labor Relations staff and the Hub Director must make the contractor aware that falling behind in the submission of weekly payrolls will cause substantial delay if the contractor submits them all at once at closing. See Section 1.6 above for further guidance.
  - E. Endorsement of Note. In Insurance Upon Completion closings, HUD is not insuring advances from a construction loan, so there is no "initial closing" endorsement of the Note. Instead, there is one closing at which FHA endorses only the "total sum" portion of the panel on the Note. The 2014 form HUD-94001M, Note (Multistate) contains a separate endorsement panel for Insurance Upon Completion closings.

## Part 3: Diligence and Other Closing Requirements

*This part of the Closing Guide discusses the documents and diligence required in addition to the base legal documents to close insured loans.*

### 3.1 Borrower Entity's Organizational Documents

A. General. Organizational documents for the Borrower entity are required to be submitted at closing, for all types of closings including initial, initial/final, and final endorsements (including initial TAP closings), as well as for all requests for loan modifications occurring after closing. These requirements also apply to all entities that become the FHA-insured Borrower by a Transfer of Physical Assets (TPA), reorganization, re-domestication or restructuring of the Borrower entity, provided the project previously closed under the closing documents revised in 2011. For multi-tier entities, Borrower entities will also be required to submit organizational documents for controlling entities (i.e., when the general partner or manager/managing member are business entities), in accordance with MAP Guide §8.3 (Firm Commitment Processing – Determining Acceptability of the Borrower, Manager, and General Contractor) if such entities appear in the Borrower's signature block in the loan documents. The following documents are required for all such Borrower entity types:

1. A certificate signed by the secretary or other appropriate officer or designee of the Borrower (which may be the individual executing the loan documents (a) indicating that the organizational documents attached to the certificate (which documents are listed below) are true and correct copies and have not been amended, modified, rescinded, or revoked and remain in full force and effect; and (b) including the name and title of the Borrower's officers and key principals and sample signature of the individuals authorized to execute the loan documents; and (c) dated the day of the closing. This secretary's certificate does not need to be further witnessed by others
2. Filed formation documents, including any and all amendments, certified copies from the secretary of state within 30 days of closing, or such longer period approved by the HUD Closing Attorney: certificate of limited partnership, for partnerships; articles of organization, for limited liability companies; articles of incorporation, for corporations; or other applicable document as appropriate.
3. The entity's governing document, including any and all amendments, executed or authorized by resolution, certified as complete and correct by an officer or other authorized representative of such entity, as appropriate (e.g., partnership agreement, operating agreements by-laws, etc.).
4. Evidence that the transaction is authorized, and that the Borrower has authority to execute the loan documents, if not provided explicitly in the governing document, such as a resolution, consent of the partners of a partnership, consent of the members of a limited liability company, or other evidence of proper authorization as local law and custom dictate.
5. Status certificate, such as a Certificate of Good Standing, from the secretary of state where the Borrower is organized, dated within 30 days of the closing, or such longer period approved by the HUD Closing Attorney. If Borrower is not organized in the state where the project is located, it also must submit a certificate from the secretary of state in

the project state, indicating its authority to conduct business in the project jurisdiction.

- B. HUD-Required Provisions. The organizational documents must provide that the Borrower be in existence at least as long as the term of the insured loan, and must include certain provisions required by HUD, including without limitation provisions that indicate that the HUD Regulatory Agreement takes precedence in the event of any conflict with the organizational documents; that the Borrower is authorized to enter into the transaction; and that the Borrower is a single-purpose, single-asset entity. Sample language relating to the HUD-required provisions is set forth in this Closing Guide in Part 5.
- C. Indemnification Limited. No organizational document provisions indemnifying the members, partners, officers, and directors of Borrower are acceptable, except as follows:
1. A nonprofit Borrower may indemnify its principals, but only to the extent mandated by state law or to the extent that such indemnification can be paid from available proceeds of liability insurance coverage or from allowable sources permitted by Program Obligations and approved by HUD (which allowable funds may, if the nonprofit is subject to a Residual Receipts requirement pursuant to another HUD program, be limited to Residual Receipts).
  2. A for-profit Borrower may indemnify its principals only to the extent that such indemnification is limited to available proceeds of liability insurance coverage or distributions from surplus cash, if available.
  3. Until funds from a permitted source for payment of indemnification costs are available for payment, the Borrower entity shall not (a) pay funds to any members, managers, partners, officers and directors, or (b) pay the deductible on an indemnification policy for any members, managers, partners, officers and directors.
- D. Limitation on Encumbrance of Entity. Neither Borrower, nor its members, managers, partners, officers or directors, shall, without HUD's prior written approval, grant a security interest in any of Borrower's or the project's assets (*see* Regulatory Agreement, §36).
- E. Notice 95-66 is no longer in effect. HUD seeks no recourse against entities or individuals in their capacities as managers or managing members of limited liability company borrowers. However, any entity or individual identified by HUD in the Firm Commitment and required to acknowledge Section 50 of the Regulatory Agreement may face liability directly (separately from the Borrower entity) for the acts listed in Section 50, and this would include an individual's personal capacity.
- F. Final Closings.
1. At final closing, Borrower shall provide certification signed by the Borrower either:
    - a. Confirming that no changes have been made to the Borrower's organizational documents delivered to HUD at initial closing; or
    - b. Identifying any changes made to the organizational documents delivered to HUD at initial closing and attaching copies of the amendments or other documents effecting such changes.
  2. In cases involving a mortgage loan increase, an authorizing resolution may be required, unless the governing organizational documents and previously delivered resolutions



establish authority to effect such an increase.

### **3.2 Title and Survey Matters**

- A. General Title Insurance Requirements. Borrower and/or Lender are responsible for providing the title documents, which HUD must review for initial closing.
1. Marketable title to the property must be vested in the Borrower on the date the Security Instrument is recorded. Please see 24 CFR §§ 200.61, 200.72, and 200.73.
  2. The Multifamily Hub Director is responsible for:
    - a. Ensuring that the project is free of unacceptable liens and encumbrances, and the project complies with the regulations cited immediately above. Any title exceptions must be consistent with the anticipated financial structure of the project and must not adversely affect the project value or marketability, except to the extent accounted for by HUD in the underwriting of the project. The HUD Closing Attorney shall bring any questionable title exceptions to the Hub Director's attention for review. When a clear determination cannot be made, the Hub Director shall refer the exception to Headquarters Office of Multifamily Housing Programs.
    - b. The Hub Director must determine that the project will not violate applicable zoning laws or regulations. See 24 CFR § 200.72. The zoning laws and regulations must permit the construction (if applicable) and operation of multifamily rental housing of the type covered under the applicable section of the National Housing Act.
    - c. Ensuring that the proposed construction contract documents and other contractual obligations do not violate any title conditions, covenants or restrictions identified by the HUD Closing Attorney. *See MAP Guide Chapter 5 and 6 for Architectural Analysis and Cost Processing requirements.*
    - d. Ensuring survey has been reviewed and HUD Closing Attorney has been provided with findings of completeness.
  3. The HUD Closing Attorney is responsible for:
    - a. Making the Lender and Borrower aware of any objections to the selected Title Company or Title Agent, including prior negative experience.
    - b. Determining that the insured mortgage constitutes a valid enforceable first lien against the Mortgaged Property, provided that absent his or her knowledge to the contrary, the HUD Closing Attorney may rely on the title policy.
    - c. Ensuring the elimination of any unacceptable exceptions or conditions, including covenants and restrictions that violate federal law or the Regulatory Agreement.
    - d. Bringing any title exceptions or conditions, including air right provisions, leasehold contracts, use restrictions, easements, and maintenance agreements, to the Hub Director's attention. The Hub Director shall decide whether to insure the loan with these exceptions.
  4. Lender must provide a policy of title insurance that is acceptable to HUD, at no expense to HUD. The Note cannot be endorsed without delivery to HUD of an original title policy or of an alternative acceptable to the HUD Closing Attorney. Marked up title commitments are not acceptable.

**B. Contents and Form of Title Insurance Policy.**

1. The title policy must be issued by a title company and in an ALTA format acceptable to HUD, with an effective date the day of HUD's endorsement of the Note.
2. Lender and/or the Secretary of Housing and Urban Development, "and their successors and/or assigns, as their interests may appear," must be the named insureds of the policy. It may not name other parties such as junior lenders. The amount of the policy must be at least equal to the full amount of the insured loan.
3. The insured loan shall be shown as the first lien. The Security Instrument, and the Regulatory Agreement because it is incorporated in the Security Instrument, must appear in Schedule A, and any UCC-1 Financing Statement filed in the real estate records must appear in Schedule B, Part II.
4. No other monetary lien may be shown, except that approved secondary financing liens, and other liens approved by the Hub Director, may be shown as subordinate to the lien of the insured loan. Real estate taxes shall be shown as not yet due and payable; all due and payable taxes shall be paid prior to or at closing.
5. The legal description in the title policy, on the survey, and attached to all recorded documents shall match exactly, provided that minor differences, such as differences in abbreviations or other minor stylistic differences, are allowed.
6. Only exceptions acceptable to HUD may be listed. All standard exceptions, including those concerning the survey or matters that a survey would show and those concerning mechanic's liens, must be deleted, except where such deletions are prohibited by applicable state law. Affirmative coverage shall be provided over any claims to project resources, such as water, patent reservations, *etc.* Mandatory arbitration requirements shall be deleted, except where such deletions are prohibited by state law.
7. Lender or Lender's counsel, as applicable, must disclose in writing to HUD at the time of submission of the draft closing package whether or not the title policy is issued by a broker title agent. If the title policy is issued by a broker title agent, rather than issued directly by the national title company, the agent shall provide a so-called closing protection or insured closing letter, or other equivalent letter of authority, on the letterhead of the national title company, indicating that the agent has the authority to issue the policy, which letter must be issued to Lender and HUD, as its interests may appear.

C. Endorsements to Title Insurance Policy. The title insurance policy must include the endorsements listed immediately below. However, in the event state or local title practice requires or prohibits certain endorsements, or makes certain endorsements prohibitively expensive, the HUD Closing Attorney may permit endorsements other than those listed below if such endorsements provide substantially equivalent coverage. If HUD Field Counsel exercises its discretion in this area, HUD Field Counsel must ensure that the each state has a consistent approach to title policy endorsements that is applied uniformly for all transactions in that state.

1. Restrictions, Encroachments, Minerals, ALTA Endorsement Form 9-06 and Private Rights, ALTA Endorsement Form 9.6-06;

2. Access, ALTA Endorsement Form 17-06;
3. Zoning, ALTA Endorsement Form 3.2-06 based on plans and specifications (for unimproved land) or Form 3.1-06 (for improved land and upon final closing), each with parking; provided, however, that a zoning letter may be accepted by the HUD Closing Attorney instead of a zoning endorsement, if zoning endorsements are not permitted in the project jurisdiction or are (in Housing's determination) prohibitively expensive;
4. Environmental Protection Lien, ALTA Endorsement Form 8.1-06;
5. Same as Survey, ALTA Endorsement Form 25-06;
6. Easement endorsements, including insurance over blanket easements or other easements that cannot be plotted;
7. Deletion of arbitration provisions, except where such deletions are prohibited by state law;
8. For Construction Loans with a Pending Disbursement clause, an endorsement, or a provision within the Pending Disbursement clause, stating the amount insured as of initial closing. At each draw for such loans, the amount insured must be sufficient to cover the total amounts drawn and the date of the title insurance policy brought forward to the date of the current draw, in a manner consistent with local practice (for example, a date down endorsement where such endorsement is consistent with local practice);
9. Leasehold, ALTA Endorsement Form 13.1-06, if a leasehold estate;
10. Any others determined necessary and appropriate by the HUD Closing Attorney.

D. ALTA Survey General Requirements.

1. An ALTA/ASCM Land Title Survey is required and must conform to the instructions set forth on form HUD-91073M, *HUD Survey Instructions and Surveyor's Report* (including the Table A items listed and certification set forth in the form), which instructions relate both to form HUD-91073M, *HUD Survey Instructions and Surveyor's Report*, and to the Survey that the surveyor must produce. The Survey shall be dated, signed and sealed within 120 days before initial closing, meaning that the field work was performed or updated no earlier than 120 days prior to closing. Local discretion, in accordance with local waiver procedures as applicable, is given to the HUB Director to waive the 120 day limit.
2. The Survey shall show all easements, apparent interests (including railroads) or encroachments upon the property or from the property onto contiguous parcels of land. These easements or encroachments must be acceptable to HUD.
  - a. All easements, restrictions and exceptions on the title policy shall be shown. Blanket easements that cannot be plotted shall be listed with their recording information.
  - b. Maintenance, joint use, easement and other agreements may be required. In cases where common facilities exist between the insured parcel and an adjacent parcel, Borrower must provide for recordation of an agreement for the common use of land and facilities (*e.g.*, common drives, common lobbies, elevators, walkways, utility roads, parking structures, recreation facilities, storm water management facilities

(retention ponds detention ponds, swales and culverts) or other common facilities). The agreement must grant rights to the HUD project site and its tenants to use the common facilities.

- c. If the HUD project is subject to condominium and property/homeowner association documents, these documents may provide for maintenance, access and cost sharing.
3. All access roads must be labeled as public or private roads.
4. Surveyor's Report. Lender must provide form HUD-91073M, *HUD Survey Instructions and Surveyor's Report*, signed within 120 days before initial closing by a licensed surveyor, not by an engineer, and bearing the surveyor's original signature and professional seal. Local discretion, in accordance with local waiver procedures as applicable, is given to the HUD director to waive the 120 day limit. The Surveyor's Report supplements the ALTA/ASCM Land Title Survey, and must describe with specificity where the conditions described in the Surveyor's Report are physically observed on the property.

#### E. Air Rights and Other Shared Interest Projects

1. For transactions involving air rights, a three dimensional air rights map is required. The existence of adequate vertical ways to the ground for required services (*e.g.*, utility and fire suppression lines, chimneys, trash chutes, elevators and emergency exit stairs) must be verified. In addition, there must be an acceptable discharge to a public way from all building egresses, including emergency exits, and services (*e.g.*, trash removal). See MAP Guide §11.5 (Title Matters) for additional requirements.
2. The Hub Director must:
  - a. Ensure that the integrity and maintenance of air rights platform foundations and other structural members are defined as the air rights provider's responsibility.
  - b. Verify that shared maintenance/operating costs are equitable and that enforcement rights protect the project interests.
  - c. Require easements, cross easements or other documents to provide the HUD project and its tenants the right to use the common facilities.

#### F. Projects Involving Leasehold Estates.

1. Ground Leases must conform to form HUD-92070M, *Lease Addendum*, which must be attached to or incorporated into the body of the Ground Lease, except as otherwise permitted for certain Section 223(a)(7) closings, as set forth in Section 2.2.C. of this Closing Guide.
2. The term of the leasehold must either (a) run for a term of 99 years and be renewable, or (b) satisfy the applicable following requirements:
  - a. for Sections 220 and 221(d) transactions, the term must run at least 10 years after the maturity date of the insured loan;
  - b. for Section 207/223(f) transactions, the term must run for at least 50 years from the date the Security Instrument is executed.
3. The leasehold estate must have been directly granted by the holder of the fee simple

estate (“landlord”). Unless otherwise approved by Housing, the landlord must be able to convey the fee to HUD in accord with form HUD-92070M without subdivision or any other government approval.

4. HUD must ensure the non-default status of the mortgaged leasehold at the time of endorsement. An estoppel certificate from the landlord dated within 30 days of the Note endorsement shall be required as a closing document. The landlord shall also confirm the property description is correct.
5. ALTA Endorsement Form 13.1-06 to the title insurance policy shall be required for Security Instruments secured by leaseholds.

G. Commercial Leases. Commercial leases must comply with the requirements as set forth in Section 4 of the Security Instrument, provided however that it is acknowledged that many commercial tenants will not execute a long-term lease unless they are given assurance of non-disturbance. Therefore, consistent with Housing Notice 2011-07 (or any successor Housing guidance), the Hub Director may approve the use of the form of Subordination, Non-Disturbance and Attornment Agreement promulgated by the referenced Notice for commercial leases, with modifications, as applicable, in accordance with Program Obligations. Unless otherwise provided by the Hub Director, telecommunications agreements, such as cable agreements, shall not be treated as commercial leases and shall not be subject to a Subordination, Non-Disturbance and Attornment Agreement.

H. Local Rent/Use Restrictions. Title encumbrances in the form of rent and affordability restrictions imposed on a project by a local jurisdiction or governing body, and not in connection with secondary financing as discussed further below in Section 3.3.C. of the Closing Guide, must be carefully reviewed by HUD staff in accordance with the procedures for reviewing title encumbrances set forth in Section 3.2.A. of the Closing Guide, above. These restrictions greatly affect underwriting, project marketability and viability, and potentially HUD’s recovery value in a Note or asset sale.

### **3.3 Secondary Financing**

#### **A. General**

1. Secondary financing must comply with the requirements set forth in MAP Guide §8.9 (Secondary Financing) and 24 CFR §§ 200.71 and 200.85. Approval of secondary financing is a Housing staff business decision. Unless approved by the Lender and HUD, no secondary financing may be secured by a lien encumbering the real property that is subject to the HUD-insured mortgage loan.
  - a. To the extent Housing approves secondary financing for a transaction, the HUD Closing Attorney shall ensure that the appropriate agreements and/or riders listed below are used.
  - b. Multifamily Housing staff shall coordinate the identification and handling of development-related liabilities and expenditures. The Hub Director will be responsible for approving the issuance of any promissory note before final endorsement and will prepare a list of all promissory notes approved before the final endorsement of the Note. The list must include the name of the payee, the amount,

and the reason for the issuance.

- c. Secondary financing from a private entity should be documented with an unsecured promissory note pursuant to paragraph D below. Liens against the Mortgaged Property to secure secondary financing from a private entity are not allowed, except as set forth in the MAP Guide, including (1) some Section 223(f) transactions; (2) operating loss loans under Section 223(d); (3) supplemental loans under Section 241; and (4) when the HUD-insured loan accounts for less than 50% of the project cost. A Secondary Financing Rider, and not the Subordination Agreement, must be used in those limited situations where secondary financing provided by a private entity is permitted to be secured. A sample Secondary Financing Rider is included in Part 5 of this Closing Guide. The Secondary Financing Rider sets forth HUD-required provisions and must be attached to any mortgage or similar security documents creating a lien on the project real estate.
  - d. Section 8.9 of the MAP Guide discusses secondary financing, bridge loans, and mezzanine financing not secured by a mortgage of the property.
2. Any liens created by secondary financing shall be shown on the title insurance policy in Schedule B, Part II.
  3. Provided that the terms of any secondary financing are explicitly subordinate to the HUD-insured loan in a manner approved by the HUD Closing Attorney, such secondary financing may be secured by a collateral assignment of any HAP contract for any loan or obligation relating to the Project, provided the proper documentation is used and approved by HUD. Please see the Section 8 Renewal Policy Guide Book, and sample documentation at page changes 4/13/2009, Attachments 21, 22, 23, and 24, on the HUD website:  
[http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/housing/mfh/mfhsec8](http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/mfhsec8).
- B. Subordination Agreement. When a government entity provides secondary financing that is secured by a lien against the Mortgaged Property, form HUD-92420M, *Subordination Agreement*, shall be executed and recorded. This includes HUD-held subordinate secured debt, such as Mark-to-Market Restructuring and Partial Payment of Claim loans.
1. Hub Directors, in consultation with the HUD Closing Attorney, may negotiate the Subordination Agreement with public agencies in order to facilitate, to the extent feasible, compliance with mandatory requirements of the governmental program providing such secondary financing. Negotiation can occur any time after the issuance of the firm commitment, and does not necessarily have to wait until after the interest rate is locked and the closing package is submitted. Any such negotiated changes shall be subject to the review of Headquarters Office of Multifamily Housing Programs, and the Assistant General Counsel for the Multifamily Mortgage Division (to the extent the changes involve purely legal issues), with Headquarters Office of Multifamily Housing Programs determining final approval of the negotiated document.
  2. Based on documentation prepared by Lender or Lender's counsel, or the counsel to the governmental agency, the HUD Closing Attorney must identify and segregate the specific provision of the Subordination Agreement that the parties wish to change as a consequence of the requirements of the governmental program providing secondary

financing. The HUD Closing Attorney should not send redline and/or clean documents to Headquarters for consideration. Rather, if necessary, a redline *excerpt* of the relevant document provision identifying the specific changes may be included. The HUD Closing Attorney should email the identified changes in narrative form to the Assistant General Counsel for the Multifamily Mortgage Division for review and approval on behalf of Headquarters Office of Multifamily Housing Programs. Please keep in mind that the HUD Closing Attorney should be the sole point of contact for any needed communications with Headquarters OGC, and not Lender' counsel or representatives from the government agency providing the secondary financing, unless explicitly requested by the HUD Closing Attorney.

3. Accompanying the requested changes to the Assistant General Counsel must be a detailed description justifying why they are required in conjunction with the governmental program providing the secondary financing. This documentation must be prepared by Lender or Lender's counsel, Borrower or Borrower's counsel, or the counsel to the governmental agency, and independently analyzed and confirmed by the HUD Closing Attorney. The justification, submitted to HUD HQ by the HUD Closing Attorney, must include enough detail, context, and rationale to allow Headquarters to make a determination, as well as to establish that HUD is not acting in an arbitrary and capricious manner in its decision making. Please note that non-substantive, stylistic changes will not be considered, and requested changes that are not sufficiently justified and tied to the mandatory requirements of the governmental program will not be accepted.
  - a. Once HUD has agreed to a final form of the modified Subordination Agreement, that version shall become a uniform template that must be used for subsequent transactions involving the same governmental program in that state (referred to as the "state/local program-specific template").
  - b. Note: HUD reserves the right, based on lessons learned at the local and national level, to request renegotiation of the state/local program-specific template upon the three-year renewal of Office of Management and Budget/Paperwork Reduction Act approval for form HUD-92420M, *Subordination Agreement*; this provision applies to new closings for new construction/substantial rehabilitation and refinances under Section 223(f) only.
4. To further facilitate the use of other public funds, the Office of Multifamily Housing Programs has given Hub Directors authority to permit limited changes to the business terms, on a case-by-case basis, to the state/local program-specific template (as well as to the HUD Rider/Amendment to the Restrictive Covenants, if applicable) that are necessary to accommodate affordable housing, and where there is minimal to no legal and business risk to HUD.
  - a. These limited changes may include provisions relating to the subordination of use restrictions/covenants (*e.g.*, a land use restriction might be permitted if it is an encumbrance, but not a lien that would place the FHA-insured mortgage in a subordinate position to another loan). Another provision that might be permitted on a case-by-case basis is a modification to Section 3 of the Subordination Agreement, which prohibits early balloon payments on subordinate debt from being made prior to maturity of the HUD senior loan. Such business-driven changes may be made if the

- Hub Director ensures that the changes are supported from a business and HUD mission perspective and that resulting risks are appropriately mitigated pursuant to Housing policy and are reflected in the deal terms. Please note such changes are not permitted across the board to the state/local program-specific template, but only on a case-by-case basis when supported by the merits of an individual transaction.
- b. Changes to the legal terms of the transaction may not be made absent approval by the Assistant General Counsel for the Multifamily Mortgage Division.
  - c. If either the negotiated changes found in the state/local program-specific template or the deal-specific changes to said template will result in significant changes to other closing documents, a request for such changes to the other documents must also be submitted to Headquarters OGC, Multifamily Mortgage Division, in accordance with the established protocols for form changes and Closing Guide waivers in Section 2.1.B of this Closing Guide.
  - d. All requested deal-specific deviations from the previously agreed upon state/local program-specific template are not permitted to be accepted by HUD field staff pursuant to existing Office of Multifamily Housing Programs guidance and are strongly discouraged. In the event of such a request, however, the changes must be specifically identified and supported with a detailed explanation justifying the basis for the request. This narrative must be submitted through email to the Assistant General Counsel for the Multifamily Mortgage Division in accordance with the procedures for form changes set forth in 2.1.B of this Closing Guide.
5. Instructions for submission to the HUD field office.
- a. Draft Submissions. A draft Subordination Agreement submitted to the HUD field office for review must include a clean version as well as a redline of the draft to show any and all changes to the established state/local program-specific template, including any changes required by the HUD Firm Commitment.
  - b. Closing Submissions. A redlined version of the Subordination Agreement shall be submitted at the closing table. All changes from the state/local program-specific template shall be shown in the redline, including any inapplicable provisions, approved deal-specific changes, and changes required in the HUD Firm Commitment.
- C. Restrictive Covenants and Use Agreements. The sources of the secondary financing or of the project's other approved financing (*e.g.*, LIHTCs, tax-exempt bonds, etc.) may impose affordability restrictions on rents and occupancy restrictions based on tenant incomes. When imposed in connection with the HUD-approved financing structure, such affordability restrictions, and the accompanying inferior encumbrances on title, such as use agreements and other restrictive covenants, must be documented in the Firm Commitment and must also be consistent with Program Obligations. The HUD Closing Attorney shall ensure that a Rider or Amendment to Restrictive Covenants, set forth in Section 5.3 of this Closing Guide, is used. The Rider/Amendment to Restrictive Covenants provides that the use restrictions terminate upon foreclosure. In limited circumstances, Housing has authorized the Hub Director, on a case-by-case basis, if any risks are appropriately mitigated from a business perspective, to permit affordability restrictions to remain in place after foreclosure. (See Section 3.3.B.4 above.) Such an exception to the requirement that the use restrictions



terminate upon foreclosure must be documented in the Firm Commitment, otherwise there is no guarantee that HUD will be able to accommodate last minute requests to permit the use restrictions ahead of the HUD-insured financing. All other requested changes to the Rider/Amendment shall be processed in Headquarters in accordance with the procedures set forth in Section 2.1.B of this Closing Guide.

Note: if there are affordability use restrictions imposed on the project that are not in connection with new secondary financing, but remain from previous financing sources, the guidance immediately above remains applicable, and the request will be reviewed on a case-by-case basis. The Hub Director, in consultation with the HUD Closing Attorney, will evaluate the extent to which this financing and/or related restrictions affect the FHA-financing structure, particularly in cases of Section 223(f) refinancings.

D. Rules Concerning Unsecured Promissory Notes.

1. Unsecured promissory notes may be used to evidence Borrower debt incurred for the development of the project if approved by HUD. Such promissory notes may include:
  - a. Surplus Cash Note, form HUD-92223M (when Borrower is a for-profit entity);
  - b. Residual Receipts Note, form HUD-91710M (when Borrower is a nonprofit entity); and
  - c. Residual Receipts Note, form HUD-91712M (when Borrower is a limited dividend entity).
2. Promissory notes may be used to evidence the following types of debt:
  - a. Discounts, financing fees, and/or extension fees paid by a third party on behalf of Borrower;
  - b. Secondary loans from a governmental or non-governmental source;
  - c. Deferral of the general contractor's profit in return for Borrower's agreement to pay it upon completion of the project, if such arrangements: (1) are disclosed by the parties before initial endorsement, and (2) are permitted only under those sections of the National Housing Act that do not provide for a builder's and sponsor's profit and risk allowance ("BSPRA").
  - d. Land acquisition costs that exceed HUD's warranted price of land fully improved.
3. Promissory notes may not be executed:
  - a. For costs disallowed in the cost certification review;
  - b. To determine the distribution of surplus cash; or
  - c. To establish an equity interest.

E. Bridge Loans. A payee certification is no longer necessary, but the HUD Closing Attorney shall review the bridge loan documents to ensure the following:

1. The note is nonrecourse to the Borrower, and repayment provisions are consistent with Program Obligations.
2. The bridge loan documents do not assert any lien against the Borrower, the HUD-insured

Mortgage Loan proceeds, the Mortgaged Property, any HUD-required reserve deposited under the Mortgage Loan, or the rents or other income from the Project.

3. The Borrower's obligations terminate automatically following acquisition of title to the Project by HUD pursuant to a foreclosure or deed in lieu of foreclosure.
4. Upon a transfer of physical assets with respect to the Mortgaged Property, the bridge loan note must be paid in full.

F. Secondary Financing That Is Unavailable At Initial Closing.

1. Secondary Financing from Federal, State or Local Government Agencies. If grant or loan funds from government sources are necessary to finance completion of the project but are not available at initial endorsement, HUD may proceed to initial endorsement, provided that insured mortgage proceeds shall only be disbursed *pro rata* with grant or loan proceeds, in accordance with procedures set forth in Program Obligations.
2. Grants or Loans From Private (Non-governmental) Sources. If grant or loan funds from private, non-government sources are necessary to finance completion of the project but are not available at initial endorsement, HUD shall require an amount deemed by HUD to be sufficient, when added to the proceeds of the insured mortgage loan, to ensure completion of the project, to be escrowed with Lender before or at initial endorsement, and shall require that such private grant or loan funds be disbursed in full for project costs prior to disbursement of the insured loan proceeds.
3. Notwithstanding the foregoing subsections 1 and 2, HUD shall not require an escrow of tax credit related equity (*e.g.*, proceeds from LIHTC, New Market Tax Credit Program, or historic rehabilitation tax credits), as set forth in 24 CFR § 200.54.

### **3.4 Construction Contract**

A. Construction Contract. Form HUD-92442M, *Construction Contract*, must be used for the construction contract. This form can be modified to provide for either "Lump Sum" or "Cost Plus" compensation. The Hub Director and the office's Architectural Staff are primarily responsible for reviewing the substantive terms of the construction contract.

1. "Lump Sum" may be used only when no identity of interest exists between Borrower and General Contractor.
2. "Cost Plus" may be used in any case and shall be used when an identity of interest exists between Borrower and General Contractor.

B. Supplementary Conditions of the Contract for Construction. Form HUD-92554M, *Supplementary Conditions of the Contract for Construction* (Supplementary Conditions), must be incorporated as a part of the construction contract.

1. Terms of the HUD Supplementary Conditions must take precedence over all provisions of the "General Conditions of the Contract for Construction" (AIA Document A201) inconsistent with the Supplementary Conditions. Both forms are referenced in the Construction Contract and are included in the Specifications Book.
2. Standard binding arbitration provisions in the A201 must be stricken, except where such deletions are prohibited by state law.

3. The Hub Director must confirm with the Office of Labor Relations that the Davis-Bacon prevailing wage determination is current as of the date of initial endorsement (except in the case of a HUD-approved Early Start, in which event the prevailing wage determination must have been current as of the approved date).
- C. Identity of Interest Amendment. The HUD identity of interest amendment to the construction contract (which can be found at MAP Guide Appendix §6B) is required to disclose whether an identity of interest relationship exists between the owner, contractor, subcontractor or architect. If there is no identity of interest, indicate “none” on the form.
- D. Contractor’s and/or Mortgagor’s Cost Breakdown (Form HUD-2328). This form contains a schedule of values of classes of work, equipment and materials and must be attached as an exhibit to the construction contract and as Exhibit B to form HUD-92441M, Building Loan Agreement. The cost breakdown is found as an attachment to the Firm Commitment (form HUD-92432). The copy used must be legible and must bear all required signatures, including signatures of HUD officials. See also *MAP Guide §6.2.B.1.d* (Review the Contractor’s and/or Borrower’s Cost Breakdown).
- E. Completion of Forms.
1. The Construction Contract is normally dated the same date as the other closing documents, which may be prior to the date the Note is endorsed by HUD for insurance, provided adequate title coverage is provided. In those instances where the assurance of completion is provided in the form of performance and payment bonds, the Construction Contract must be dated on or before the date of the surety bonds, and never after the date of the surety bonds.
  2. The reference to drawings and specifications in Article 2.A of the Construction Contract shall be identical to the reference in Section 2 of the Building Loan Agreement, and is taken from Paragraph 2 of the Firm Commitment (HUD-92432). However if the drawings and specifications are modified subsequent to the issuance of the Firm Commitment and before initial closing, a reference to the most recent version that will govern construction and that is approved in writing by all necessary parties (including HUD) should be used in the Construction Contract and Building Loan Agreement.
  3. The completion date in Article 3 is the date determined using the number of months for construction stated in form HUD-92264, the *Multifamily Summary Appraisal Report*.
  4. Initialing of Master Sets and Signing Cover Sheets. MAP Guide §5.7.C.3 (Drawings and Specifications) requires that each cover sheet and last page of each set of drawings and each first and last page of specifications be signed and any handwritten changes be initialed at the closing by authorized representatives of the Borrower, design architect, architect administering the contract, contractor, Lender, and surety, if any.
  5. If a Section 241 transaction is not subject to prevailing wage requirements because the underlying loan is not subject to prevailing wage requirements, the provisions of the Construction Contract regarding prevailing wages may be deleted.
  6. Liquidated Damages. Article 3.E of the Contract calls for the insertion of a liquidated damages amount. Determining the amount of liquidated damages is a business, not a legal, decision, and will be set forth in the MAP Guide. The following calculations are

set forth for informational purposes: Liquidated damages shall equal 1 cent for each ¼ per cent of construction interest rate for each \$1000 of mortgage amount divided by the number of units. Written arithmetically and expressed in dollars (not cents) the formula should read:  $(\$0.01) (\text{construction rate}/.0025)(\text{mortgage amount}/1000)/(\text{number of units}) = \text{Liquidated Damages } \$/\text{Unit}/\text{Day}$ . This may be simplified and restated as:  $\$4 \times \text{construction rate} \times \text{mortgage amount}/1000/\text{number of units} = \text{Liquidated Damages } \$/\text{Unit}/\text{Day}$ .

7. **Cost Certification.** Pursuant to MAP Guide §13.4 (Projects with LIHTCs are Exempt from Cost Certification Requirements) (and HERA §227), in a transaction involving Low-Income Housing Tax Credits, if the ratio of loan proceeds to the actual cost of the project less than 80 percent, a cost certification is not required. Neither the borrower nor contractor is required to certify costs. Therefore, in such circumstance, the cost certification provisions, set forth in Article 13 of the Construction Contract, may be stricken upon the parties' request.
- F. **Side Agreements.** As set forth in Article 1 of the Contract, side agreements, including documents defining business agreements between identity of interest parties on transactions involving Builder's and Sponsor's Profit and Risk Allowance (BSPRA), between the Borrower and general contractor must be disclosed to HUD and provided to the HUD Closing Attorney with the Contract. Such side agreements must include language that in the event of a conflict between the side agreement and the Construction Contract, the Construction Contract will prevail. The HUD Closing Attorney will ensure the required conflict language is included but shall not otherwise review the side agreement.

### **3.5 Assurance of Completion and Related Requirements**

- A. **General Requirements.** Assurance of project completion by the general contractor must be provided for the protection of HUD and Lender and to meet state and local requirements protecting material suppliers, mechanics, and subcontractors. Applicable assurances must be listed in form HUD-92434M, *Lender's Certificate* (Paragraph 11). Lender or Borrower may impose additional or more stringent requirements than HUD.
  1. **Performance Bond,** form HUD-92452M, protects against financial loss caused by the failure of the contractor to build the project in accordance with the terms and conditions of the contract. The Performance Bond must name Lender and HUD as obligees. If there is other approved financing in the transaction, other parties may also be named as obligees of the Performance Bond, subject to the Hub Director's approval. In the event other parties wish to be named as obligees to the performance bond, the HUD Closing Attorney shall provide a recommendation to the Hub Director, who shall make the final determination, taking into consideration the extent to which each lender is financing the construction or rehabilitation. An agreement setting forth the rights of, priorities of and/restrictions on each lender to call on the performance bond may be necessary. In any case, the FHA-insured lender and HUD shall have the first priority right to call on the performance bond. When Ginnie Mae securities are issued in connection with the project loan, Ginnie Mae may be allowed as an additional obligee.
  2. **Payment Bond,** form HUD-92452A-M, guarantees that certain labor and material bills associated with the project will be paid. The Payment Bond must name Lender, HUD,

and Borrower as obligees. Payment bonds are for the purpose of protecting subcontractors and the contractors' payees, so the considerations that apply to performance bonds do not apply with respect to payment bonds.

3. Completion Assurance Agreement, form HUD-92450M, is the alternative to the performance and payment surety bonds listed immediately above to assure project completion; it must be executed by the Borrower, Lender, and contractor. The contractor must fund its obligations with a cash deposit or letter of credit. MAP Guide §3.4.M (Assurance of Completion) details the requirements for Completion Assurance Agreements. The Hub Director and the Multifamily Housing staff have primary responsibility to review the substantive terms of any Completion Assurance Agreements.
- B. Notes regarding Bonds. Sureties must be on the accredited U.S. Treasury list, Circular 570, available online at [www.fms.treas.gov/c570/c570.html](http://www.fms.treas.gov/c570/c570.html), and published annually in the Federal Register on or about July 1. Bonds must not exceed limits listed in Circular 570. An original power-of-attorney from the surety company to its agent must be attached to each performance and payment bond. A facsimile transmission (or PDF file sent via email) addressed to the HUD Closing Attorney must be received in hand on the day of closing from the surety company (not local agent's office) confirming the agent's power-of-attorney to bind the surety company as of the date the bonds are executed and delivered to Lender and HUD. The facsimile or PDF transmission shall identify the agent, date of bonds, amount of each bond, obligee(s), principal, FHA project name and number, and name and title of sender. The bonds cannot be dated prior to the date of the Construction Contract to which they refer, but they may be dated the same date as that contract, or a later date.
- C. Notes regarding Letters of Credit. Letters of credit may be used instead of cash for all assurances of completion and escrows required at initial and final endorsement, or during construction, except for up-front cash escrows and the estimated costs of deferred Section 223(f) repairs that are required to be withheld in cash from mortgage loan proceeds and placed in escrow. Acceptance of a letter of credit is at the Lender's option, but when used, copies of the Letters of Credit must be attached to the escrows and assurance agreements they collateralize. Lenders are responsible for ensuring that letters of credit are current. Enforceability and acceptability of letters of credit are the responsibility of the Lender, and HUD will neither review the letter of credit nor render an opinion on its sufficiency. See 24 CFR § 200.63. Additional requirements for letters of credit are detailed in MAP Guide §8.4.C.7 (Ratings and requirements for bank issued letters of credit).
- D. Assurance of Completion for Off-Site Improvements. When the Firm Commitment requires Borrower to fund construction of elements outside the project's property boundaries, HUD may require submittal of one or more of the following items, each in the discretion of the Hub Director and in such form and substance as may be acceptable to the Hub Director:
  1. Plans and specifications for the off-site improvements;
  2. Contracts or other agreements governing the construction of the off-site improvements;
  3. An Off-Site Bond, form HUD-92479M;
  4. Escrow Agreement for Off-Site Facilities, form HUD-91071M;
  5. A Letter of Credit;

6. If the municipality or other governmental locality will be responsible for completion of the off-site improvements, evidence of the locality's plans; and
7. Other evidence as deemed appropriate in the Hub Director's discretion.

### **3.6 Owner-Architect Agreement**

- A. General Requirements. The AIA Document B108, Standard Form of Agreement Between Owner and Architect (Owner-Architect Agreement) shall be used. The Housing program office is primarily responsible for reviewing the substantive terms of the Owner-Architect Agreement. The arbitration provision and related references to such provision in the Owner-Architect Agreement shall be deleted. MAP Guide §5.2.C – D detail requirements for the Owner-Architect Agreement.
- B. HUD Amendment to AIA Document B108 (HUD Amendment). Form HUD-92408M must be included as a rider to the AIA Document B108, Standard Form of Agreement Between Owner and Architect. The required inclusion of the HUD Amendment in Article 13.3 of the AIA Document B108 is sufficient to incorporate HUD requirements. No modification of the HUD Amendment is permitted except as provided in the following sentence. If the design architect and the supervisory architect are different, a separate Owner-Architect Agreement and HUD Amendment must be executed for each architect, with appropriate modifications to reflect the responsibilities of each architect. All other requested changes to the HUD Amendment must be processed according to the procedures set forth in Section 2.1.C. of this Closing Guide.
- C. Professional Liability Insurance. Form HUD-92432, *Commitment for Insurance of Advances*, Section 12, and MAP Guide §5.2.A.2 provide that the Design Architect and the Architect administering the construction contract shall each be covered by a policy of professional liability insurance in an amount consistent with insurance industry practice and approved by the Hub Director. An insurance agent's certificate of insurance, substantially in the form prescribed, must be provided to the Hub Director at or prior to initial closing.

### **3.7 Miscellaneous Other Closing Requirements**

- A. Insurance. Form HUD-92447, *Property Insurance Requirements* and form HUD-92329, *Property Insurance Schedule* are to be provided by the Hub Director together with the Firm Commitment.
  1. Lender is solely responsible for determination of whether the insurance requirements set forth in form HUD-92447 have been satisfied. There is no need for HUD to either review or obtain the policy(ies), except for flood insurance. Evidence of flood insurance will be provided on an ACORD 28 or FEMA form. Lender will certify to insurance compliance in form HUD-92434M, *Lender's Certificate*, Paragraph 34. Flood insurance is only required to the extent buildings or other improvements are located within the area of special flood hazards.
  2. Prior to Final Closing and after receipt of the cost certification audit, the Hub Director will determine whether any changes in drawings and specifications, or any appreciable change in the cost of construction of the project, have occurred during the course of construction that would require revision of form HUD-92329, *Property Insurance Schedule*. If revision of form HUD-92329 is necessary, the Hub Director shall inform the Lender. It is the Lender's responsibility to ensure that the proper insurance is maintained

and that form HUD-92329 is properly updated and resubmitted to HUD.

- B. Litigation Docket and UCC Searches. A search of (i) the litigation dockets against the Borrower and its general partner, manager or managing member shall be performed in the state and federal district and bankruptcy courts of the jurisdiction where the project is located, and in the county or applicable jurisdiction in which the Borrower and its general partner, manager or managing member have their principal places of business; and (ii) UCC filings against the Borrower shall be performed in the records of the county where the project is located (or other applicable jurisdiction) and the state of organization of the Borrower. If a Lender requires other searches, the HUD Closing Attorney and/or Hub Director may also request to review such searches. The litigation docket and UCC searches must be performed within 30 days of closing. Local discretion is given to the Field Office to permit a one-time variance from this 30-day requirement by a reasonable number of days, as a result of delays in closing. Although Lender is free to perform or require additional searches, HUD does not require litigation docket or UCC searches for single-purpose entities formed within 30 days of closing. Any litigation that is disclosed by the litigation docket searches and any litigation arising after the date of the litigation searches and of which Borrower or Borrower's counsel is aware on or before the date of closing, must be disclosed and explained by the Borrower or Borrower's counsel to the reasonable satisfaction of the Lender and HUD. Such disclosure and explanation must be made as soon as possible after Borrower or Borrower's counsel becomes aware of it. Any UCC filings by other creditors discovered in the UCC search shall be evaluated by the Hub Director and HUD Closing Attorney, and removed prior to closing (or concurrently with closing, in the case of a refinancing and the existing UCC filing results from the existing financing), unless otherwise approved. The financing statement evidencing the FHA Lender's lien may be filed in advance of closing, and if so, may be identified on the searches conducted.
- C. Agreement and Certification. Form HUD-93305M, *Agreement and Certification*, obligates Borrower, among other promises, to:
1. Certify its actual costs of project construction or rehabilitation costs;
  2. Disclose any identity of interest among project participants; and
  3. Agree, in certain cases, to a reduction of the amount of the mortgage loan.
- D. Miscellaneous Certifications. As of 2014, HUD has developed a new form that contains many miscellaneous certifications that were previously submitted with the Firm Commitment application and at initial or initial/final closing. These certifications have been consolidated into form HUD-91070M, *Consolidated Certifications – Borrower*. Housing will add this document to the required Firm Commitment application exhibits in the next issuance of the MAP Guide, in addition to the Lender's Byrd Certificate. Consistent with this forthcoming revision, form HUD-91070M should not be collected at closing, so as to avoid unnecessary duplication of work and signatures. The relevant old certifications have been removed from the Closing Checklists, with the exception of the Lender's Byrd Certificate (until it is added to the required Firm Commitment exhibits collected at application stage). The Hub Director and HUD Closing Attorney must make sure that either the old certifications (until the revised MAP Guide is issued) or the executed form HUD-91070M is included with the Washington Docket. Please note that form HUD-91070M does not cover form HUD-92478M, *Borrower's Oath*. This item remains on the Closing Checklists.

- E. Permits and Governmental Approvals. The Hub Director must determine that all building and other permits, governmental approvals, and plans required to construct or to rehabilitate the project improvements have been provided and are consistent with the plans and specifications reviewed and approved by HUD. The permits and approvals must be final, full, and subject only to conditions acceptable to the Hub Director.
- F. Additional Agreements. Borrower is required to disclose any additional agreements affecting the property or financing of the project. When possible, these agreements shall be submitted to HUD for approval prior to execution, and executed copies shall be submitted with the closing package. These agreements cannot alter or amend HUD documents or alter the obligations of the parties thereto without the written approval of the Hub Director. This requirement includes, but is not limited to, disclosure of:
1. Easements and joint use agreements.
  2. Construction agreements between the Borrower and the general contractor and other agreements as required to be disclosed pursuant to the Identity of Interest Amendment to the Construction Contract.
  3. Indemnifications, guarantees and hold harmless agreements executed by Borrower.
  4. Any document or information that would otherwise require reprocessing of the HUD Firm Commitment, increase Borrower's cash requirements, or increase the general contractor's bond requirement.
- G. Closing Statement. A closing statement is required for each transaction type. Lender shall provide a certified Closing Statement signed by Lender and Borrower detailing the amount of any promissory notes made by Borrower and any cash contribution made by Borrower and itemizing the disbursement of the mortgage proceeds and of Borrower's cash contribution, if any. The statement shall list the amounts to be paid to satisfy Borrower's obligations for existing or other indebtedness, acquisition, repairs, discounts, financing fees, legal expenses, organizational expenses, title and recording costs, and like items, and any Lender-required escrows for taxes, insurance or other items. If the funds are processed through a title company or other escrow officer, the escrow officer shall provide a closing statement signed by the escrow officer, Lender, and Borrower. The certified Closing Statement is reviewed by the Mortgage Credit Analyst prior to closing.

### **3.8 Bond-Financed Projects.**

- A. Tax Exempt Bond/IRS Code 142(d) Projects. Projects financed with the proceeds from tax-exempt bonds pursuant to the Internal Revenue Code, Section 142(d), must meet minimum low-income occupancy restrictions to exempt the earned interest income from federal income taxation. Such projects typically contain special deed covenants and/or other recorded restrictions to ensure owner compliance with occupancy and use requirements.
1. The Internal Revenue Code currently requires that Owners of residential rental projects must either meet the 20-50 test or the 40-60 test, *e.g.*, set aside a minimum of either:
    - a. Twenty percent of the units for occupancy by individuals whose income is 50 percent or less of the area median gross income (with adjustments for family



- size) for the term of the qualified project period (20-50 test), or
- b. Forty percent (25 percent in New York City) of the units for occupancy by individuals whose median gross income is 60 percent or less of the area median gross income (with adjustments for family size) for the term of the qualified project period (40-60 test).
2. Under current Internal Revenue Code requirements, "Qualified Project Period" means the period beginning on the 1st day on which 10 percent of the residential units in the project are occupied and ends on the latest of:
    - a. The date which is 15 years after the date on which 50 percent of the project units are occupied,
    - b. The 1st day on which no tax-exempt private activity bond issued with respect to the project is outstanding, or
    - c. The date on which any assistance provided with respect to the project under Section 8 ends.
- B. Underwriting Review. In addition to the standard HUD Closing Attorney review, the legal instruments, *e.g.*, deed, land use restriction agreement (*a.k.a.*, extended use agreement), tax regulatory agreement, *etc.*, containing tax exempt financing-required covenants must be reviewed by the Hub Director prior to initial closing to determine any effect on the mortgage insurance underwriting.
- C. Prepayment of Note. The Note used to evidence the FHA-insured loan (form HUD-94001M), contains alternate language regarding prepayment that shall be used for transactions involving tax-exempt bond financing.
- D. HUD Subordination Language. The subordination provisions set forth in the HUD Rider/Amendment to Restrictive Covenants included in Part 5 of this Closing Guide shall be incorporated into any recorded document containing restrictive covenants. If there is an unrecorded legal instrument containing rent restrictions, such document must include language subordinating the rent restrictions to all applicable HUD mortgage insurance regulations and related administrative requirements, including Program Obligations, as defined in the HUD loan documents. Such instruments must not result in any claim against the project, the mortgage loan proceeds, any reserve or deposit required by HUD in connection with the mortgage loan transaction, or the rents or other income from the property (other than available surplus cash or, in the case of a nonprofit, residual receipts authorized for release by HUD).
- E. Bond Counsel Opinion (Taxable and Tax-exempt Bond Financing). The initial closing review package must include a copy of the bond counsel's opinion relating to the enforceability of the bond documents, as well as the tax-exempt nature of the bonds, if applicable. The bond counsel opinion may need to contain the language outlined in Section F immediately below, but the opinion does not need to be addressed to HUD or name HUD as a party relying on the opinion. HUD will review the bond documents only to determine that they do not conflict with HUD occupancy or other requirements.
- F. Borrower's Counsel Opinion (Taxable and Tax-exempt Bond Financing). Form HUD-91725M, *Opinion of Borrower's Counsel*, includes alternate language that must be used if the

project involves either taxable or tax-exempt bond financing. If Borrower's counsel is relying on the bond counsel opinion to provide the required opinion in the Opinion of Borrower's Counsel about the bond Source Documents (as that term is defined in form HUD-91725M and further explained in form HUD-91725M-INST), the bond counsel opinion must explicitly state "to the extent that any of the provisions of the Source Documents are inconsistent with any of the provisions of the Loan Documents or Supporting Documents, the provisions of the Loan Documents or Supporting Documents shall govern." (See opinion 10 of HUD-91725M). Accordingly, the definitions of the capitalized terms must be identical to those used in the Opinion of Borrower's Counsel. If the bond counsel opinion does not include language to this effect, in giving opinion 10, the Borrower's counsel may not rely on or attach the bond counsel opinion to the Opinion of Borrower's Counsel. Rather, Borrower's counsel must undertake its own due diligence in giving the required opinion.

### **3.9 Low-Income Housing Tax Credit-Financed Projects (LIHTC).**

- A. Introduction. In order to qualify for Low-Income Housing Tax Credits pursuant to Section 42 of the Internal Revenue Code, Borrower will typically execute and record a Land Use Restriction Agreement (LURA), or similarly named restrictive covenant imposing affordability restrictions on the project. The LURA shall be recorded no later than final endorsement or initial/final endorsement, as applicable.
  - 1. For a minimum of 30 years the owner must ensure occupancy that meets either the 20-50 or 40-60 test, as described above, in Section 3.8.A.1.
  - 2. Gross rents, inclusive of utility costs, for the project's low-income units may not exceed 30 percent of the applicable qualifying low-income limit, adjusted for family size.
- B. Borrower's Attorney's Opinion (Tax Credits). Borrower's counsel must provide the same opinions required above (see section 3.8.F) regarding taxable and tax-exempt bond financing, except that references to tax credits shall be substituted for references to bond financing.
- C. Other tax-exempt bond requirements apply. The requirements above pertaining to subordination, termination, *etc.*, relating to bond financing restrictive covenants apply to the LIHTC restrictive covenants as well.
- D. Bridge Loan Financing. Pursuant to Housing and Economic Development Recovery Act of 2008 (HERA), Public Law 110-289, HUD does not require LIHTC equity to be escrowed, but at least 20% of tax credit equity must be invested at the time of initial endorsement (and then subsequently be available) to provide a reasonable degree of assurance that the relationship between the Borrower and tax credit investor will be maintained and HUD's exposure under the loan is acceptable. HUD may also require that disbursement of such funds be governed by a disbursement agreement, as set forth in form HUD-92441M, *Building Loan Agreement*, Paragraphs 4(c) and 5.
- E. LLCI/Passive Investor Certification. LIHTC syndicators and investors are not required to submit forms HUD-2530 for previous participation clearance unless they are going to have day-to-day control over the project (such as creating a general partner entity). In lieu of a HUD-2530 form, syndicators and investors acting as limited partners or investor members in the project's owner entity may submit the LLCI certification set forth in Part 5 of this Closing Guide. Although an organizational chart must be submitted, as set forth in the

certification, only one certification must be submitted for the limited partner or investor member (*i.e.*, its members or partners do not also need to submit certifications or HUD-2530 forms).

- F. Sample Language and Guide Forms. Sample language and guide forms for LIHTC closings have been included in the Closing Guide, Part 5 (5.3 HUD Rider/Amendment to Restrictive Covenants and 5.4 HUD Rider to Security Instrument LIHTC Properties). The first guide form (5.3) contains alternative provisions for HUD requirements for incorporation into the restrictive covenants, as well as the requirements for amendment of previously-recorded restrictive covenants, depending on the circumstances of the transaction. The second form (see 5.4) is described immediately below.
- G. LIHTC Rider. The sample Rider to Security Instrument - LIHTC Properties (“LIHTC Rider”) set forth in Part 5 of this Closing Guide may be used in any LIHTC transactions if requested by the parties. Parties may request use of the LIHTC Rider even if pre-approval of the “special limited partner” or similar entity, as set forth below, is not requested. In such circumstance, the provisions relating to pre-approval of such entity shall be omitted from the LIHTC Rider and only applicable provisions shall be included.
- H. Instructions for Pre-Approval of Special Limited Partners (SLP) as Interim Replacement GP/MM for LIHTC Transactions. An LIHTC Investor may request that the LIHTC Rider include a provision allowing its affiliated entity to take control of the Borrower under certain triggering default conditions set forth in the Borrower’s partnership or operating agreement. (Such affiliated special limited partner, special investor member, or other entity seeking pre-approval is referred to herein as an SLP.) Such transfer of control would typically require HUD consent at the time of such transfer, but pre-approval may be given in advance, either at closing or after closing, subject to the requirements below.

Note: this pre-approval process is only for SLPs seeking pre-approval; unless pre-approval is requested, the SLP shall be treated as a passive investor and this process is not necessary.

Once pre-approved, neither HUD consent nor 2530 re-clearance shall be required at the time of the triggering event for the SLP to serve as an Interim Replacement General Partner (GP)/Managing Member (MM), subject to the limitations set forth in the LIHTC Rider to the Security Instrument.

Note: as stated in the Rider to the Security Instrument LIHTC Properties, this approval is for a limited duration. If the SLP seeks to act as a long-term replacement GP/MM, the SLP may apply for such approval at the time of the GP/MM’s removal.

Pre-approval applies only for the particular project for which pre-approval is sought.

1. Requirements to Pre-Approve SLP Prior to Closing. Attaching the LIHTC Rider to the Security Instrument with pre-approval provisions included provides evidence of and gives effect to the pre-approval. The pre-approval provisions may be included in an executed LIHTC Rider to the Security Instrument and attached to the Security Instrument if the items below are received and approved by Housing and the HUD closing attorney. This is similar to the TPA process. Housing may waive receipt of certain documents if it has recently received such materials in connection with another pre-approval request.

- a. Synopsis of the transaction. Investor shall provide a written request to pre-approve the SLP as a temporary replacement GP/MM. This request shall give an overview of the transaction and contain an organizational chart that includes the relationship between the proposed interim GP/MM and the parent organization requesting approval. This request may be sent via email.
  - b. 2530 clearance. The SLP shall complete the APPS or Previous Participation Certification (Form HUD-2530) or successor form or system.
  - c. Organizational documents. The HUD closing attorney shall review Borrower's organizational documents in accordance with Program Obligations and shall note the default events that may trigger the removal and replacement of the GP/MM. The HUD closing attorney will discuss with Housing any such triggers that he or she finds concerning, in his or her discretion. In addition, the HUD closing attorney shall review the SLP's organizational documents.
  - d. Legal opinion. A legal opinion acceptable to the HUD closing attorney shall be submitted stating that removal of the GP/MM and replacement with the SLP does not cause the dissolution of the Borrower under applicable state law. The attorney giving the opinion must not have an identity of interest with the Borrower and must be licensed within the applicable state.
  - e. Other evidence of determinative criteria. SLP shall submit for Housing's and the HUD Closing Attorney's review, as applicable, such other evidence of the determinative criteria discussed below, as appropriate, including any financial information Housing deems relevant.
2. Determinative Criteria for SLP Pre-Approval. Housing shall approve the SLP as a temporary replacement GP/MM unless Housing, with the advice of the HUD closing attorney, reasonably determines that the SLP would not be an appropriate temporary replacement general partner/managing member, or that such pre-approval is otherwise not in HUD's interests. In making such determination, Housing and the HUD closing attorney shall consider the following factors:
    - a. The number of projects the SLP and/or affiliated entities have under asset management.
    - b. The number of times SLP and/or affiliated entities have replaced general partners/managing members and the results of such replacement. Specific examples should be provided and considered, to the extent possible.
    - c. The process the SLP and/or affiliated entities follow to monitor projects and determine whether replacement of the general partner/managing member is appropriate.
    - d. How the asset management unit of the SLP and/or affiliated entities is staffed in relation to the number of projects it oversees.
  3. Requirements to Pre-Approve SLP after Closing. If the closing timeline does not allow for this process to be completed prior to closing, the investor may ask for such approval to be given after closing. In such circumstance, documents and information may be submitted after closing. Because the modified language set forth below makes approval

conditional, the language may be used even if any or all of the required information has not been submitted.

- a. Same requirements and determinative criteria. The same requirements apply to pre-approval prior to closing and to pre-approval after closing.
- b. Revise LIHTC Rider to the Security Instrument. Revise paragraph 2(c) of the LIHTC Rider to the Security Instrument to read:

Borrower has requested that HUD and Lender pre-approve the replacement of the Borrower's GP/MM in accordance with Program Obligations and pre-approve [SPECIAL LIMITED PARTNER ENTITY] ("Interim Replacement GP/MM") to act as a temporary replacement general partner/managing member of Borrower, in the event Equity Investor removes Borrower's GP/MM for cause in accordance with Borrower's organizational documents. If granted, HUD shall send a letter to Interim Replacement GP/MM giving effect to and providing evidence of such pre-approval. Such approval of such Interim Replacement GP/MM is expressly limited to a period of only 90 days that commences the date of such removal, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days.

- c. HUD actions upon completion of review. If the SLP secures approval, HUD shall send the Investor and SLP a letter indicating pre-approval. Sample language for such letter follows below. It is the Investor's responsibility to safeguard such evidence of pre-approval. If the SLP fails to secure approval, HUD shall send written notice to the Investor and SLP that the SLP has not been pre-approved and that paragraph 2 of the LIHTC Rider to the Security Instrument is inoperable because the conditions stated therein have not been met. This notice does not preclude the SLP from curing any deficiencies that caused such denial of pre-approval and re-submitting a request for pre-approval.
4. Sample language for post-closing letters, if necessary
    - a. Sample language for letter indicating SLP pre-approval post-closing:

This letter authorizes approval for [Special Limited Partner Entity], to serve as the interim general partner/managing member of [Name of Borrower] (the "Borrower") in accordance with the terms set forth in, and as expressly limited by, the Rider to Security Instrument LIHTC Properties ("LIHTC Rider to Security Instrument") attached to that certain [Name of Security Instrument] dated as of [date]. HUD review of the request for preapproval has been analyzed in accordance with the modified transfer of physical assets ("modified TPA") process.

Should [Special Limited Partner Entity] wish to serve as general partner/managing member for more than the interim period specified in the LIHTC Rider to Security Instrument, it must: (1) submit a request for approval to serve as replacement general partner/managing member, (2) certify that none of the documents submitted pursuant to this preapproval request have changed (*i.e.*, organizational documents have not been further amended, etc.), and (3) complete an updated Previous Participation Clearance through HUD's APPS system or Form HUD-2530.

- b. Sample language for letter denying SLP pre-approval post-closing:

This letter denies pre-approval of [Special Limited Partner Entity] to serve as the interim general partner/managing member of [Name of Borrower] (the “Borrower”). [Special Limited Partner Entity] had requested such pre-approval in accordance with the terms set forth in the Rider to Security Instrument LIHTC Properties (“LIHTC Rider to Security Instrument”) attached to that certain [Name of Security Instrument] dated as of [date]. [Special Limited Partner Entity] has not met the requirements necessary for such pre-approval. As a result, because the conditions stated therein have not been met, paragraph 2 of the LIHTC Rider to Security Instrument is of no force or effect.

### **3.10 223(f) Transactions – Additional Closing Requirements**

- A. Repairs. Note that if repairs constitute “substantial rehabilitation,” the project must be processed in accordance with MAP Guide §3.4.C (Multifamily projects under Section 221 of the National Housing Act).
- B. Architectural Issues. See MAP Guide §5.23 through §5.27.
- C. Cost. See MAP Guide §6.9 through §6.9.2 for cost issues in the 223(f) program.
- D. Valuation. See MAP Guide §7.11 for valuation issues in the 223(f) program.
- E. Underwriting. See MAP Guide §8.8 for a discussion of the underwriting of a Section 223(f) loan. Note that Mortgages insured under this section follow the “85% rules” (see MAP Guide §3.8.K and §8.9).
- F. Term. Note that the mortgage term is usually limited to 35 years (MAP Guide §3.8.P and §8.5).
- G. Endorsement. Note that the correct designation of a Section 223(f) loan is “Insured under Section 207 pursuant to Section 223(f) of the National Housing Act”.

### **3.11 Insurance Upon Completion – Additional Closing Requirements**

- A. Construction Completion. Completion must be achieved prior to closing Insurance Upon Completion transactions. However, in some instances, such transactions may be closed prior to fully achieving 100% completion if only minor items remain outstanding, as determined by the Hub Director, and adequate assurances of completion are received, as the Hub Director may require (such as those set forth above in Section 3.5). Such transactions shall not close unless all on- and off-site sewer, water, electrical, and gas utilities are completely and properly installed, and other incomplete off-site facilities, such as streets, walks, curbs and gutters, are useable and safe and that all buildings have all-weather vehicular and pedestrian access. Adequate facilities for ingress and egress must be provided.
- B. Zoning. Prior to issuing a Firm Commitment, the Hub Director must determine that the proposed project will not violate applicable zoning laws or regulations, consistent with 24 CFR § 200.72. No further zoning evidence will be required prior to final endorsement of the credit instrument, unless questions, changes, challenges, or litigation have arisen in connection with zoning. If such challenges have arisen, additional evidence of zoning compliance may be necessary, in the discretion of either the Hub Director or HUD Closing Attorney. Current letters from the zoning authority or zoning endorsements to the title policy are two common forms of assurance.

- C. Conditions for Endorsing Note. The Hub Director may consult with other HUD staff, including the HUD Closing Attorney, prior to endorsing the credit instrument. The Hub Director, however, is fully authorized, pursuant to current delegations of authority, to endorse the Note after receiving the first year's mortgage insurance premium and inspection fee and concluding that all requirements for closing have been met. In no event shall the Hub Director endorse the Note for an amount greater than the principal balance of the Note that would have been outstanding if all payments to principal due before the date of endorsement (including required advance amortization payments, if any) had been paid. Nor shall the Hub Director endorse for insurance on a date after the first principal payment is due until the Hub Director has determined that all principal payments due have actually been made and the Note is otherwise is current.

### **3.12 Building Components Stored Offsite**

- A. Introduction. Eligible building components may qualify for insurance of advances when stored offsite under the conditions listed in MAP Guide Appendix 12B (Contractor's Monthly Requisition and Related Matters), paragraph B (Components Stored Offsite), and HUD Handbook 4435.1, (*Project Construction and Servicing Before Final Closing*), paragraph 1-6. (*See MAP Guide appendix 12B*)
- B. HUD Review of Requirements for Purchase of Building Components Stored Offsite.
1. The HUD Closing Attorney's role includes, at the Hub Director's request, review of legal documents submitted in connection with requests for approval of insured advances of funds to pay for such components.
  2. The UCC Financing Statement(s) filed at initial endorsement shall have perfected a first security interest in such components until they are incorporated into the building(s). Whatever additional filings are determined to be necessary to maintain a first security interest on the components shall be made at this time.
  3. The Construction Contract must include the rider entitled "Amendment to the Construction Contract for Components Stored Offsite" entered into at initial endorsement. (See Appendix 12B of the MAP Guide.)
  4. Insured advances for components stored offsite may not be approved where the contractor does not have a 100% performance and payment bond securing the contractor's performance under the Construction Contract.
  5. A Bill of Sale running to the Borrower for the components and an itemized invoice transferring title of the components must be submitted.
  6. Lender must certify to HUD unconditionally that the security agreement is a "first lien" on the components covered by the instrument.
  7. Lender's counsel must submit an opinion stating that he/she has reviewed the security agreement contained in form HUD-94000M, *Security Instrument*, UCC-1 Financing Statements, and any associated documents, as necessary, relating to the building components and that such documents create a valid security interest in the collateral and that when the financing statements are duly filed, the secured party will have a first lien.

## **Part 4: Checklists**

- 4.1 Initial Closing Checklist**
- 4.2 Final Closing Checklist**
- 4.3 Section 223(a)(7) Initial/Final Closing Checklist**
- 4.4 Section 223(f) Initial/Final Closing Checklist**
- 4.5 Insurance Upon Completion Checklist**
- 4.6 Workout / Interim Closing Checklist**



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
 FHA Insured Initial Closing Checklist – For §§§ 207, 220, and 221 Projects

Project Name \_\_\_\_\_

Checklist Draft Date \_\_\_\_\_

FHA Project Number \_\_\_\_\_

Initial Closing Date \_\_\_\_\_

*Unless otherwise agreed, the HUD Attorney will obtain 3 sets of all documents: originals (O), certified copies (Cert), or photocopies (C), as noted. Where originals are requested, only 1 needs to be an original, and the rest may be copies. If a copy is requested, an original will be accepted.*

Item		HUD Form	#	Status and Comment
<b>I. FHA Commitment</b>				
1.	a. FHA Firm Commitment	HUD-92432	C	<i>Include all attachments including HUD-executed 92264, 92264-A, and property insurance requirements and schedule. Include extensions, if applicable.</i>
	b. Amendments, if any		C	
	c. Assignments, if any		C	
<b>II. Organizational, Due Diligence, and Other Supporting Documents</b>				
2.	Borrower's Incumbency Certificate with Organizational Documents attached		O	<i>Update checklist as appropriate for entity type.</i>
	a. Filed formation documents, from Secretary of State, as amended		C	<i>e.g., Articles of Organization, Certificate of Limited Partnership, or Articles of Incorporation.</i>
	b. Operating Agreement / Partnership Agreement / Bylaws, as amended		C	<i>Should include HUD-required provisions and be certified by Borrower as current and correct.</i>
	c. Authorizing Resolution		C	<i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C	<i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C	<i>For out-of-state entities, if applicable.</i>
3.	Borrower's Managing Member / General Partner's Incumbency Certificate with Organizational Documents attached		O	<i>As applicable.</i>
	a. Filed formation documents, from Secretary of State, as amended		C	<i>e.g., Articles of Organization, Certificate of Limited Partnership, or Articles of Incorporation.</i>
	b. Operating Agreement / Partnership Agreement / Bylaws, as amended		C	<i>Should be certified by entity as current and correct.</i>
	c. Authorizing Resolution		C	<i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C	<i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C	<i>For out-of-state entities, if applicable, and if required by state law.</i>
4.	ALTA Survey Plat with HUD Survey Certification		O	<i>Dated within 120 days of closing.</i>
5.	HUD Survey Instructions and Surveyor's Report	HUD-91073M	O	<i>Last inspection within 120 days of closing.</i>
6.	Title Insurance Policy, with endorsements		O	<i>2006 ALTA form, where approved for use in the applicable jurisdiction. HUD-required endorsements shall be attached.</i>

## Initial Closing Checklist

Project Name and/or Number: \_\_\_\_\_

Item	HUD Form	#	Status and Comment
			<i>Title exception documents and pro forma policy should be received &amp; reviewed prior to closing. Include authority letter for title agent, if applicable.</i>
a. Title Exception Documents		C	
b. UCC Search Report		C	
7. Deed or Ground Lease	HUD-92070M, if Ground Lease	C	
8. Evidence of Zoning Compliance		C	<i>Usually a zoning endorsement to Title Policy; if not, a zoning opinion or letter from the zoning authority may be needed.</i>
9. Assurance of Utility Service		C	<i>Letters: water, sanitary &amp; storm sewer, electricity, gas, &amp; phone.</i>
10. Opinion of Borrower's Counsel	HUD-91725M	O	<i>Should include appropriate attachments.</i>
a. Certification of Borrower	HUD-91725M- CERT	O	
b. Supporting legal opinion		C	<i>Bond/LIHTC opinions, if applicable.</i>
c. List of pending litigation		C	<i>If applicable.</i>
11. Application for Insurance of Advance of Mortgage Proceeds	HUD-92403	O	
12. Inspection Fee Check		O	<i>If applicable.</i>
13. Mortgage Insurance Premium (MIP) Check		O	<i>If applicable.</i>
14. Additional Examination Fee Check		O	<i>If applicable.</i>
15. Special Conditions from Firm Commitment			<i>If applicable.</i>
16. Local Requirements			
17. Attendance List		O	<i>If applicable.</i>
<b>III. HUD Loan Documents</b>			
18. Note (Multistate)	HUD-94001M & state addendum	C	<i>State-specific provisions and/or addenda may be required.</i>
19. Security Instrument	HUD-94000M & state addendum	O	<i>State-specific provisions and/or addenda may be required.</i>
20. Regulatory Agreement	HUD-92466M	O	
21. UCC Financing Statements (State & County)		C	
22. Building Loan Agreement	HUD-92441M	O	
23. Lender's Certificate	HUD-92434M	O	<i>With all applicable exhibits and attachments.</i>

## Initial Closing Checklist

Project Name and/or Number: \_\_\_\_\_

	Item	HUD Form	#	Status and Comment
24.	Lender's Assurance of Permanent Financing		O	
25.	Certified Closing Statement		O	
26.	Agreement and Certification	HUD-93305M	O	
27.	Operating Deficit Escrow	HUD-92476a-M	O	
28.	Escrow Agreement for Working Capital	HUD-92412M	O	
29.	Other escrow agreements, if applicable		O	<i>List as required, see Closing Guide § 2.8.</i>
30.	Borrower's Oath	HUD-92478M	O	<i>Must be given under oath in accordance with state law requirements for taking an oath, in order to fulfill National Housing Act requirements.</i>
<b>IV. Construction Documents</b>				
31.	Owner-Architect Agreement (B108) & HUD Amendment	HUD-92408-M	C	
32.	Certification of Architectural / Engineering Fees		O	<i>See sample language in Closing Guide § 5.7.</i>
33.	Mortgagor's and Architect's Certificate of Payment	HUD-92403.1	O	
34.	Architect's Insurance Agent's Certificate		C	<i>For both design and supervisory architects, if different.</i>
35.	Building Permit(s)			
36.	Construction Contract and HUD Supplementary Conditions	HUD-92442M HUD-92554M	O	<i>Include all appropriate exhibits.</i>
37.	Assurance of Completion for Project			<i>Either bonds or completion assurance agreement.</i>
	a. Bonds			
	i. Performance Bond	HUD-92454M	C	
	ii. Payment Bond	HUD-92452A-M	C	
	iii. Surety's Power of Attorney		O	<i>Original to be attached to each bond or to each Performance/Payment Bond set.</i>
	iv. Surety's Fax/Email Letter		C	<i>To be sent on closing day from surety's corporate office, not broker's office, confirming Power of Attorney.</i>
	b. Completion Assurance Agreement	HUD-92450M	O	
	i. Evidence of Deposit or Letter of Credit		C	<i>As applicable.</i>
38.	Plans and Specifications		O	<i>Final, signed by Architect and collected by housing staff.</i>
39.	Completion Assurance Documents for Off-Site Improvements	HUD-92479M, if using bond, HUD-91071M if	O	<i>Also, list other required documents if applicable and as required by HUD, pursuant to § 3.5.D. of the Closing Guide.</i>

## Initial Closing Checklist

Project Name and/or Number: \_\_\_\_\_

Item	HUD Form	#	Status and Comment
	using escrow		
40.	Notice of Commencement	C	<i>If project jurisdiction requires. Recording may also be required.</i>
<b>V. Secondary Financing Documents</b>			
41.	Restrictive Covenants / Use Agreements	C	<i>With HUD rider if applicable.</i>
42.	Secondary Financing Loan Documents	C	
	a. Loan Agreement	C	
	b. Note	C	
	c. Mortgage	C	
	d. Subordination Agreement, or Rider to Note and Mortgage	HUD-92420M	<i>If private, non-governmental secondary financing is approved, a Rider to the second mortgage is used (see Closing Guide § 5.1); if public financing, the HUD Subordination Agreement is required.</i>
43.	Disbursement Agreement	O	<i>If applicable.</i>
<b>VI. Supplemental Bond/LIHTC Deliverables</b>			
44.	Restrictive Covenants / Use Agreements	C	<i>With HUD rider if applicable.</i>
45.	Bond Counsel Opinion	C	
<b>VII. HUD Administrative Documents and Additional Requirements</b>			
46.	Administrative Memo with attached Waivers and HUD-2 forms	O	<i>If applicable.</i>
47.	Document Review Worksheets, if applicable	O	<i>If used by program staff to document compliance with cost, valuation, architectural, or other underwriting requirements.</i>
48.	Previous Participation Certification Clearance	HUD-92530	C
49.	Closing Memorandum	HUD-290	O
50.	Environmental Permits		C <i>As applicable: U.S. and State Environmental Protection Agency Permit, Wetlands Permits from Army Corps of Engineers.</i>
51.	Bond Guaranteeing Sponsor's Performance	HUD-92477M	O <i>If applicable.</i>
52.	Commercial Space Leases (with Tenant Estoppel Certificates)		C <i>If applicable.</i>
53.	Subordination, Non-Disturbance and Attornment Agreements		C <i>If applicable. See sample form in Housing Notice 2011-07.</i>
54.	Lender's Byrd Amendment Certificate		O <i>Unless collected previously by Housing.</i>

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

FHA Insured Final Closing Checklist

(For §§§ 207, 220, and 221 Projects)

Project Name \_\_\_\_\_

Checklist Draft Date \_\_\_\_\_

FHA Project Number \_\_\_\_\_

Final Closing Date \_\_\_\_\_

*Unless otherwise agreed, the HUD Attorney will obtain 3 sets of all documents: originals (O), certified copies (Cert), or photocopies (C), as noted. Where originals are requested, only 1 needs to be an original, and the rest may be copies. If a copy is requested, an original will be accepted.*

Item	HUD Form	#	Status and Comment
<b>I. Organizational, Due Diligence, and Other Supporting Documents</b>			
1.	Borrower's Incumbency Certificate with Organizational Documents attached, or certification of no change since initial closing		<i>Update required documents as appropriate for entity type.</i>
	a. Filed formation documents, from Secretary of State, as amended		C <i>e.g., Articles of Organization, Certificate of Limited Partnership, Articles of Incorporation.</i>
	b. Operating Agreement/Partnership Agreement/Bylaws		C <i>Should include HUD-required provisions and be certified by Borrower as current and correct.</i>
	c. Authorizing Resolution		C <i>If applicable (authority may be granted in governing agreement).</i>
	d. Status Certificate		C <i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C <i>For out-of-state entities, if applicable.</i>
2.	Borrower's Managing Member or General Partner's Incumbency Certificate with the Organizational Documents attached, or certification of no change since initial closing		<i>As applicable.</i>
	a. Filed formation documents, from Secretary of State, as amended		C <i>e.g., Articles of Organization, Certificate of Limited Partnership.</i>
	b. Operating Agreement/Partnership Agreement/Bylaws		C <i>Should be certified by entity as current and correct.</i>
	c. Authorizing Resolution		C <i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C <i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C <i>For out-of-state entities, if applicable, and if required by state law.</i>
3.	Opinion of Borrower's Counsel	HUD-91725M	O <i>If and as applicable. See Closing Guide § 2.10.E.</i>
	a. Certification of Borrower	HUD-91725M-CERT	O
	b. Supporting legal opinion		O <i>Bond/LIHTC opinions, if applicable.</i>
	c. List of pending litigation		O <i>If applicable.</i>
4.	ALTA Survey Plat with HUD Survey Certification		O <i>Dated within 120 days of closing.</i>
5.	HUD Survey Instructions and Surveyor's Report	HUD-91073M	O <i>Last inspection within 120 days of closing.</i>
6.	Title Insurance Policy, with endorsements		O <i>Either a new policy or a date-down endorsement</i>

Final Closing Checklist

Project Name and/or Number: \_\_\_\_\_

Item		HUD Form	#	Status and Comment
				<i>updating the original policy to final endorsement date. Include authority letter for title agent, if applicable.</i>
	a. Title Exception Documents		C	<i>Including any new additional restrictive covenants related to secondary financing, if applicable.</i>
7.	Certificate of Occupancy		C	
8.	Certificates			
	a. Request for Final Endorsement of Credit Instrument	HUD-92023M	O	
	b. Lender's Current Payment Letter		O	<i>If applicable.</i>
	c. Contractor's Requisition	HUD-92448	O	
9.	Certificate Regarding Tenants' Security Deposits		O	<i>If applicable.</i>
10.	Special Conditions from Firm Commitment			<i>If applicable.</i>
11.	Attendance List			<i>If applicable.</i>
<b>III. HUD Loan Documents</b>				
11.	Modification and Consolidation Agreement		O	<i>If applicable.</i>
12.	Allonge or Supplemental Note	HUD-94001M, if applicable	C	<i>If applicable, include state-specific requirements, if any.</i>
13.	Modification to or Supplemental Security Instrument	HUD-94000M, if applicable	O	<i>Include state-specific provisions and/or addenda, if applicable.</i>
14.	Increase Mortgage Insurance Premium Check		O	<i>If applicable.</i>
15.	Mortgage Note, with final endorsement	HUD-94001M	C	
16.	Application for Insurance of Advance of Mortgage Proceeds	HUD-92403	O	
17.	Guarantee following completion		O	<i>If applicable.</i>
18.	Escrow Agreements			<i>If applicable.</i>
	a. Escrow Agreement for Incomplete Construction	HUD-92456M	O	
	b. Escrow Agreement for Non-critical, Deferred Repairs	HUD-92476.1M	O	
	c. Other Escrow Agreements, as required			<i>For example, Deposit Agreement for Davis-Bacon non-compliance, Excess Mortgage Proceeds Escrow, Latent Defects Escrow, and Escrow Agreement for Unpaid Construction Costs, Repairs, or Needs Assessments.</i>
<b>IV. HUD Administrative Documents and Additional Requirements</b>				
19.	Administrative Memo with attached Waivers and HUD-2 forms		O	<i>If applicable.</i>

Final Closing Checklist

Project Name and/or Number: \_\_\_\_\_

	Item	HUD Form	#	Status and Comment
20.	Maximum Insurable Mortgage	HUD-92580	O	
21.	Labor Relations Clearance		C	
22.	Labor Standards Deposit Agreement	HUD-4732	O	<i>If required.</i>
23.	Local Requirements			<i>If applicable.</i>
24.	Secondary financing documents			<i>If there are any new documents related to secondary financing since initial closing.</i>

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
Section 223(a)(7) Initial/Final Closing Checklist

Project Name \_\_\_\_\_

Checklist Draft Date \_\_\_\_\_

FHA Project Number \_\_\_\_\_

Initial/Final Closing Date \_\_\_\_\_

*Unless otherwise agreed, the HUD Attorney will obtain 3 sets of all documents: originals (O), certified copies (Cert), or photocopies (C), as noted. Where originals are requested, only 1 needs to be an original, and the rest may be copies. If a copy is requested, an original will be accepted.*

Item		HUD Form #	#	Status and Comment
<b>A. FHA Commitment</b>				
1.	a. FHA Firm Commitment	FHA-2453	C	<i>Include all attachments including HUD-executed 92264, 92264-A, and property insurance requirements and schedule. Include extensions, if applicable.</i>
	b. Amendments, if any		C	
	c. Assignments, if any		C	
<b>II. Organizational, Due Diligence, and Other Supporting Documents</b>				
2.	Borrower's Incumbency Certificate with Organizational Documents attached		O	<i>Update checklist as appropriate for entity type.</i>
	a. Filed formation documents, from Secretary of State, as amended		C	<i>e.g., Articles of Organization, Certificate of Limited Partnership, or Articles of Incorporation.</i>
	b. Operating Agreement / Partnership Agreement / Bylaws, as amended		C	<i>Should include HUD-required provisions and be certified by Borrower as current and correct.</i>
	c. Authorizing Resolution		C	<i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C	<i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C	<i>For out-of-state entities, if applicable.</i>
3.	Borrower's Managing Member / General Partner's Incumbency Certificate with Organizational Documents attached		O	<i>As applicable.</i>
	a. Filed formation documents, from Secretary of State, as amended		C	<i>e.g., Articles of Organization, Certificate of Limited Partnership, or Articles of Incorporation.</i>
	b. Operating Agreement / Partnership Agreement / Bylaws, as amended		C	<i>Should be certified by entity as current and correct.</i>
	c. Authorizing Resolution		C	<i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C	<i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C	<i>For out-of-state entities, if applicable, and if required by state law.</i>
4.	ALTA Survey Plat with HUD Survey Certification		O	<i>Dated within 120 days of closing, if applicable.</i>
5.	Certificate of No Change to Survey		O	<i>If applicable.</i>



Section 223(a)(7) Initial/Final Closing Checklist

Project Name and/or Number: \_\_\_\_\_

	Item	HUD Form	#	Status and Comment
6.	HUD Survey Instructions and Surveyor's Report	HUD-91073M	O	<i>Last inspection within 120 days of closing, if applicable.</i>
7.	Title Insurance Policy, with endorsements		O	<i>2006 ALTA form, where approved for use in the applicable jurisdiction. HUD-required endorsements should be attached. Title exception documents and pro forma policy should be received &amp; reviewed prior to closing. Include authority letter for title agent, if applicable.</i>
	a. Title Exception Documents		C	
	b. UCC Search Report		C	
8.	Evidence of Zoning Compliance		C	<i>Usually a zoning endorsement to Title Policy; if not, a zoning opinion or letter from the zoning authority may be needed.</i>
9.	Evidence of Building Code Compliance		C	
10.	Opinion of Borrower's Counsel	HUD-91725M	O	<i>Should include appropriate attachments.</i>
	a. Certification of Borrower	HUD-91725M-CERT	O	
	b. Supporting legal opinion		O	<i>Bonds/LIHTC opinions, if applicable.</i>
	c. List of pending litigation		C	<i>If applicable.</i>
11.	Inspection Fee Check		O	
12.	Mortgage Insurance Premium (MIP) Check		O	
13.	Special Conditions from Firm Commitment			<i>If applicable.</i>
14.	Attendance List		O	<i>If applicable.</i>
<b>III. HUD Loan Documents</b>				
15.	Note (Multistate)	HUD-94001M & state addendum	C	<i>State-specific provisions and/or addenda may be required.</i>
16.	Security Instrument	HUD-94000M & state addendum	O	<i>State-specific provisions and/or addenda may be required.</i>
17.	Regulatory Agreement	HUD-92466M	O	
18.	UCC Financing Statements (State & County)		C	
19.	Request for Endorsement of Credit Instrument	HUD-92455M	O	<i>With all applicable exhibits and attachments.</i>
20.	Certified Closing Statement		O	
21.	Agreement and Certification	HUD 93305-M	O	<i>If applicable.</i>
22.	Certificate Regarding Tenant's Security Deposit		O	<i>If applicable.</i>

## Section 223(a)(7) Initial/Final Closing Checklist

Project Name and/or Number: \_\_\_\_\_

	<b>Item</b>	<b>HUD Form</b>	<b>#</b>	<b>Status and Comment</b>
23.	Lender's Assurance of Permanent Financing		O	
24.	Escrow Agreement for Non-critical, Deferred Repairs	HUD-92476.1M	O	
25.	Other escrow agreements, if applicable		O	<i>List as required, see Closing Guide § 2.8.</i>
26.	Borrower's Oath	HUD-92478M	O	<i>Must be given under oath in accordance with state law requirements for taking an oath, in order to fulfil National Housing Act requirements.</i>
<b>VI. Secondary Financing Loan Documents</b>				
27.	Subordination Agreement, or Rider to Note and Mortgage	HUD-92420M	C	<i>If private, non-governmental secondary financing is approved, a Rider to the second mortgage is used (see Closing Guide § 5.1); if public financing, the HUD Subordination Agreement is required.</i>
28.	Disbursement Agreement		O	<i>If applicable.</i>
<b>VII. HUD Administrative Documents and Additional Requirements</b>				
29.	Administrative Memo with attached Waivers and HUD-2 forms		O	<i>If applicable.</i>
30.	Document Review Worksheets, if applicable		O	<i>If used by program staff to document compliance with cost, valuation, architectural, or other underwriting requirements.</i>
31.	Previous Participation Certification Clearance	HUD-92530	C	
32.	HUD Representative's Trip Report	HUD-95379	O	
33.	Restrictive Covenants/Use Agreements		O	<i>With HUD rider if applicable.</i>
34.	Commercial Space Leases (with Tenant Estoppel Certificates)		C	<i>If applicable.</i>
35.	Subordination, Non-Disturbance and Attornment Agreements		C	<i>If applicable. See sample form in Housing Notice 2011-07.</i>
36.	Lender's Byrd Amendment Certificate		O	<i>Unless collected previously by Housing.</i>

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
Section 223(f) Initial/Final Closing Checklist

Project Name \_\_\_\_\_

Checklist Draft Date \_\_\_\_\_

FHA Project Number \_\_\_\_\_

Initial/Final Closing Date \_\_\_\_\_

*Unless otherwise agreed, the HUD Attorney will obtain 3 sets of all documents: originals (O), certified copies (Cert), or photocopies (C), as noted. Where originals are requested, only 1 needs to be an original, and the rest may be copies. If a copy is requested, an original will be accepted.*

Item		HUD Form	#	Status and Comment
<b>I. FHA Commitment</b>				
1.	a. FHA Firm Commitment	HUD-92432	C	<i>Include all attachments including HUD-executed 92264, 92264-A, and property insurance requirements and schedule. Include extensions, if applicable.</i>
	b. Amendments, if any		C	
	c. Assignments, if any		C	
<b>II. Organizational, Due Diligence, and Other Supporting Documents</b>				
2.	Borrower's Incumbency Certificate with Organizational Documents attached		O	<i>Update checklist as appropriate for entity type.</i>
	a. Filed formation documents, from Secretary of State, as amended		C	<i>e.g., Articles of Organization, Certificate of Limited Partnership, or Articles of Incorporation.</i>
	b. Operating Agreement / Partnership Agreement / Bylaws, as amended		C	<i>Should include HUD-required provisions and be certified by Borrower as current and correct.</i>
	c. Authorizing Resolution		C	<i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C	<i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C	<i>For out-of-state entities, if applicable.</i>
3.	Borrower's Managing Member / General Partner's Incumbency Certificate with Organizational Documents attached		O	<i>As applicable.</i>
	a. Filed formation documents, from Secretary of State, as amended		C	<i>e.g., Articles of Organization, Certificate of Limited Partnership, or Articles of Incorporation.</i>
	b. Operating Agreement / Partnership Agreement / Bylaws, as amended		C	<i>Should be certified by entity as current and correct.</i>
	c. Authorizing Resolution		C	<i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C	<i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C	<i>For out-of-state entities, if applicable, and if required by state law.</i>
4.	ALTA Survey Plat with HUD Survey Certification		O	<i>Dated within 120 days of closing.</i>
5.	HUD Survey Instructions and Surveyor's Report	HUD-91073M	O	<i>Last inspection within 120 days of closing.</i>
6.	Title Insurance Policy, with endorsements		O	<i>2006 ALTA form, where approved for use in the applicable</i>

## Section 223(f) Initial/Final Closing Checklist

Project Name and/or Number: \_\_\_\_\_

Item	HUD Form	#	Status and Comment
			<i>jurisdiction. HUD-required endorsements should be attached. Title exception documents and pro forma policy should be received &amp; reviewed prior to closing. Include authority letter for title agent, if applicable.</i>
a. Title Exception Documents		C	
b. UCC Search Report		C	
7. Deed or Ground Lease	HUD-92070M, if Ground Lease	C	
8. Evidence of Zoning Compliance		C	<i>Usually a zoning endorsement to Title Policy; if not, a zoning opinion or letter from the zoning authority may be needed.</i>
9. Evidence of Building Code Compliance		C	
10. Opinion of Borrower's Counsel	HUD-91725M	O	<i>Should include appropriate attachments.</i>
a. Certification of Borrower	HUD-91725M- CERT	O	
b. Supporting legal opinion		C	<i>Bond/LIHTC opinions, if applicable.</i>
c. List of pending litigation		C	<i>If applicable.</i>
11. Inspection Fee Check		O	
12. Mortgage Insurance Premium (MIP) Check		O	
13. Special Conditions from Firm Commitment		C	<i>If applicable.</i>
14. Local Requirements		C	<i>If applicable.</i>
15. Attendance List		O	<i>If applicable.</i>
<b>HUD Loan Documents</b>			
16. Note (Multistate)	HUD-94001M & state addendum	C	<i>State-specific provisions and/or addenda may be required.</i>
17. Security Instrument	HUD-94000M & state addendum	O	<i>State-specific provisions and/or addenda may be required.</i>
18. Regulatory Agreement	HUD-92466M	O	
19. UCC Financing Statements (State & County)		C	
20. Request for Endorsement of Credit Instrument	HUD-92455M	O	<i>With all applicable exhibits and attachments.</i>
21. Agreement and Certification	HUD-93305M	O	<i>If applicable.</i>
22. Short Form Cost Certification	HUD-2205-A	O	<i>If applicable.</i>
23. Certified Closing Statement		O	
24. Certificate Regarding Tenant's Security Deposit		O	<i>If applicable.</i>

## Section 223(f) Initial/Final Closing Checklist

Project Name and/or Number: \_\_\_\_\_

	<b>Item</b>	<b>HUD Form</b>	<b>#</b>	<b>Status and Comment</b>
25.	Lender's Assurance of Permanent Financing		O	
26.	Escrow Agreement for Non-critical, Deferred Repairs	HUD-92476.1M	O	<i>If applicable.</i>
27.	Operating Deficit Escrow	HUD-92476a-M	O	<i>If applicable.</i>
28.	Escrow Agreement for Off-Site Facilities	HUD-91071M	O	
29.	Excess Mortgage Proceeds Escrow		O	
30.	Other escrow agreements, if applicable		O	<i>List as required, see Closing Guide § 2.8.</i>
31.	Borrower's Oath	HUD-92478M	O	<i>Must be given under oath in accordance with state law requirements for taking an oath, in order to fulfill National Housing Act requirements.</i>
<b>IV. Secondary Financing Loan Documents</b>				
32.	Restrictive Covenants/Use Agreements		C	<i>With HUD rider if applicable.</i>
33.	Secondary Financing Loan Documents		C	
	a. Loan Agreement		C	
	b. Note		C	
	c. Mortgage		C	
	d. Subordination Agreement, or Rider to Note and Mortgage	HUD-92420M	O	<i>If private, non-governmental secondary financing is approved, a Rider to the second mortgage is used (see Closing Guide § 5.1); if public financing, the HUD Subordination Agreement is required.</i>
34.	Disbursement Agreement		O	<i>If applicable.</i>
<b>V. HUD Administrative Documents and Additional Requirements</b>				
35.	Administrative Memo with attached Waivers and HUD-2 forms		O	<i>If applicable.</i>
36.	Document Review Worksheets, if applicable		O	<i>To the extent the field office program staff uses checklists or otherwise documents compliance with architectural, cost, valuation, or other underwriting requirements or Program Obligations, such documentation shall be retained.</i>
37.	Previous Participation Certification Clearance	HUD-92530	C	
38.	HUD Representative's Trip Report	HUD-95379	O	
39.	Commercial Space Leases (with Tenant Estoppel Certificates)		C	<i>If applicable.</i>
40.	Subordination, Non-Disturbance and Attornment Agreements		C	<i>If applicable. See sample form in Housing Notice 2011-07.</i>

Section 223(f) Initial/Final Closing Checklist

Project Name and/or Number: \_\_\_\_\_

	<b>Item</b>	<b>HUD Form</b>	<b>#</b>	<b>Status and Comment</b>
41.	Lender's Byrd Amendment Certificate		O	<i>Unless collected previously by Housing.</i>

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Insurance Upon Completion Closing Checklist

Project Name \_\_\_\_\_

Checklist Draft Date \_\_\_\_\_

FHA Project Number \_\_\_\_\_

Final Closing Date \_\_\_\_\_

*Unless otherwise agreed, the HUD Attorney will obtain 3 sets of all documents: originals (O), certified copies (Cert), or photocopies (C), as noted. Where originals are requested, only 1 needs to be an original, and the rest may be copies. If a copy is requested, an original will be accepted.*

Item		HUD Form	#	Status and Comment
<b>I. FHA Commitment</b>				
1.	a. FHA Firm Commitment	FHA 2453-MM	C	<i>Include all attachments including HUD-executed 92264, 92264-A, and property insurance requirements and schedule. Include extensions, if applicable.</i>
	b. Amendments, if any		C	
	c. Assignments, if any		C	
<b>II. Organizational, Due Diligence, and Other Supporting Documents</b>				
2.	Borrower's Incumbency Certificate with Organizational Documents attached		O	<i>Update checklist as appropriate for entity type.</i>
3.	a. Filed formation documents, from Secretary of State, as amended		C	<i>e.g., Articles of Organization, Certificate of Limited Partnership, or Articles of Incorporation.</i>
	b. Operating Agreement / Partnership Agreement / Bylaws, as amended		C	<i>Should include HUD-required provisions and be certified by Borrower as current and correct.</i>
	c. Authorizing Resolution		C	<i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C	<i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C	<i>For out-of-state entities, if applicable.</i>
4.	Borrower's Managing Member / General Partner's Incumbency Certificate with Organizational Documents attached		O	<i>As applicable.</i>
	a. Filed formation documents, from Secretary of State, as amended		C	<i>e.g., Articles of Organization, Certificate of Limited Partnership, or Articles of Incorporation.</i>
	b. Operating Agreement / Partnership Agreement / Bylaws, as amended		C	<i>Should be certified by entity as current and correct.</i>
	c. Authorizing Resolution		C	<i>If applicable (authority may be granted in governing agreement).</i>
	d. Status certificate		C	<i>Should be dated w/in 30 days of closing.</i>
	e. Qualification to Do Business in Project State		C	<i>For out-of-state entities, if applicable, and if required by state law.</i>
5.	ALTA Survey Plat with HUD Survey Certification		O	<i>Dated within 120 days of closing.</i>

FHA Insurance Upon Completion Checklist

Project Name and/or Number: \_\_\_\_\_

	Item	HUD Form	#	Status and Comment
6.	HUD Survey Instructions and Surveyor's Report	HUD-91073M	O	<i>Last inspection within 120 days of closing.</i>
7.	Title Insurance Policy, with endorsements		O	<i>2006 ALTA form, where approved for use in the applicable jurisdiction. HUD-required endorsements shall be attached. Title exception documents and pro forma policy should be received &amp; reviewed prior to closing. Include authority letter for title agent, if applicable.</i>
	a. Title Exception Documents		C	
	b. UCC Search Report			
8.	Deed or Ground Lease	HUD-92070M, if Ground Lease	C	
9.	Evidence of Zoning Compliance		C	<i>Usually a zoning endorsement to Title Policy; if not, a zoning opinion or letter from the zoning authority may be needed.</i>
10.	Assurance of Utility Service		C	<i>Letters: water, sanitary sewer, storm sewer, electricity, gas, and phone.</i>
11.	Opinion of Borrower's Counsel	HUD-91725M	O	<i>Should include appropriate attachments.</i>
	a. Certification of Borrower	HUD-91725M- CERT	O	
	b. Supporting legal opinion		C	<i>Bond/LIHTC opinions, if applicable.</i>
c. List of pending litigation		C	<i>If applicable.</i>	
12.	Inspection Fee Check		O	<i>If applicable.</i>
13.	Mortgage Insurance Premium (MIP) Check		O	<i>If applicable.</i>
14.	Additional Examination Fee Check		O	<i>If applicable.</i>
15.	Certificate Regarding Tenant's Security Deposits		O	<i>If applicable.</i>
16.	Special Conditions/Local Requirements			<i>If applicable.</i>
17.	Attendance List		O	<i>If applicable.</i>
<b>III. HUD Loan Documents</b>				
18.	Note (Multistate)	HUD-94001M & state addendum	C	<i>State-specific provisions and/or addenda may be required.</i>
19.	Security Instrument	HUD-94000M & state addendum	O	<i>State-specific provisions and/or addenda may be required.</i>
20.	Regulatory Agreement	HUD-92466M	O	



FHA Insurance Upon Completion Checklist

Project Name and/or Number: \_\_\_\_\_

Item		HUD Form	#	Status and Comment
21.	Lender's Certificate	HUD-92434M	O	<i>With all applicable exhibits and attachments.</i>
22.	Agreement and Certification	HUD-93305M	O	
23.	Lender's Current Payment Letter		O	
24.	Latent Defects Escrow	HUD-92414M	O	
25.	Escrow Agreement for Critical, Non-deferred Repairs	HUD-92476.1M	O	
26.	Other escrow agreements, if applicable		O	<i>List as required, see Closing Guide § 2.8.</i>
27.	Borrower's Oath	HUD-92478M	O	<i>Must be given under oath in accordance with state law requirements for taking an oath, in order to fulfill National Housing Act requirements.</i>
<b>IV. Construction Documents</b>				
28.	Building Permit(s)		C	
29.	Construction Contract and HUD Supplementary Conditions	HUD-92442M HUD-92554M	O	<i>Include all appropriate exhibits.</i>
30.	Applicable Wage Determinations		C	
31.	Certificate of Occupancy		C	
<b>V. Certificates and Other Closing Requirements</b>				
32.	Contractor's Requisition with Contractor's Prevailing Wage Certificate	HUD-92448	O	
33.	Request for Endorsement of Credit Instrument	HUD-92455M	O	
34.	Land Use Restriction Agreement		C	<i>If tax-exempt bond financing or LIHTCs.</i>
35.	Borrower's Attorney Opinion		O	<i>If tax-exempt bond financing or LIHTCs.</i>
<b>VI. Secondary Financing Documents</b> <i>If applicable, as to each.</i>				
36.	Restrictive Covenants/ Use Agreements		C	<i>With HUD rider if applicable.</i>
37.	Secondary Financing Loan Documents		C	
	a. Loan Agreement		C	
	b. Note		C	
	c. Mortgage		C	
	d. Subordination Agreement, or Rider to Note and Mortgage	HUD-92420M	O	<i>If private, non-governmental secondary financing is approved, a Rider to the second mortgage is used (see Closing Guide § 5.1); if public financing, the HUD Subordination Agreement is required.</i>

FHA Insurance Upon Completion Checklist

Project Name and/or Number: \_\_\_\_\_

	Item	HUD Form	#	Status and Comment
38.	Disbursement Agreement		O	
<b>VI. HUD Administrative Documents and Additional Requirements</b>				
39.	Administrative Memo with attached Waivers and HUD-2 forms		O	<i>If applicable.</i>
40.	Document Review Worksheets, if applicable		O	<i>If used by program staff to document compliance with architectural, cost, valuation, or other underwriting requirements.</i>
41.	Previous Participation Certification Clearance	HUD-92530	C	
42.	HUD Representative's Trip Report	HUD-95379	O	
43.	Maximum Insurable Mortgage	HUD-92580	O	
44.	Labor Relations Clearance		C	
45.	Commercial Space Leases (with Tenant Estoppel Certificates)		C	<i>If applicable.</i>
46.	Subordination, Non-Disturbance and Attornment Agreements		C	<i>If applicable. See sample form in Housing Notice 2011-07.</i>
47.	Lender's Byrd Amendment Certificate		O	<i>Unless collected previously by Housing.</i>

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
Sample Workout / Interim Closing Checklist

Project Name \_\_\_\_\_

Checklist Draft Date \_\_\_\_\_

FHA Project Number \_\_\_\_\_

Interim Closing Date \_\_\_\_\_

*As discussed in the Closing Guide, workouts and interim closings are each unique and have project-specific requirements. The following list may not be exhaustive, but includes items that may be helpful to review in preparation for an interim closing.*

Item		Status and Comment
1.	All proposed Settlement/Workout Agreements with or among some or all of the following	
	a. Borrower	
	b. Borrower's Principals	
	c. Existing General Contractor	
	d. Surety	
	e. Subcontractors and material suppliers	
	f. Lender	
	g. Secondary Lenders	
	h. Grant issuers	
i. Tax Credit issuers		
2.	Firm Commitment and necessary amendments	<i>Determine which, if any, conditions that were to be fulfilled during the construction period have not yet been completed, e.g. environmental issues such as asbestos removal. Include extensions, if applicable.</i>
3.	Loan Title Policy	<i>a. All documents and amendments to documents that are intended to be placed of record should be reviewed ahead of time by the HUD Closing Attorney. b. HUD should receive a current date-down endorsement (not a pro forma) covering the period from the cover date of the initial policy through as current a date as possible. Check to ensure that all necessary releases, stipulations, orders for litigation dismissals will be available on closing day and persons designed to have any orders entered in court as needed.</i>
4.	Proposed certification of sources and uses	<i>Must take into consideration the proposed settlement/workout agreements and proposed new financing, if any.</i>
5.	Hub Director should check for the following possible additional costs and, if possible, factor into the reprocess	
	a. New design architect's fees	<i>Existing plans and specs may need revision, and generate additional fees, to accommodate discoveries made during existing construction and change orders already fully agreed to under the construction contract to be terminated.</i>
	b. New architects fees for observation and scope of work	
	c. New Construction Costs	
	d. New payment and performance bonds costs	

Item		Status and Comment
	e. Additional legal fees	
	f. Additional title fees	
	g. Taxes during construction	
	h. Insurance during construction	
	i. Interest during construction	
6.	Proposed amendments to the HUD firm commitment, including financial requirements for interim closing, necessitated by the terms of the various workout and settlements, additional costs, loan increases and other additional loans and/or grants	
7.	Waivers	<i>During the HUD Closing Attorney's participation in the workout process, it is likely a list of needed waivers will be developed. HUD Closing Attorney should obtain 3 copies from Housing for inclusion in dockets.</i>
8.	Borrower's Organization Documents, Good Standing Certificates and Incumbency Certificates	<i>Can be obtained from HUD closing docket.</i>
	a. What, if any, amendments are needed to these items in order to implement the provisions of the workout/settlement agreements	<i>e.g. update the Capital Contributions provisions.</i>
	b. Obtain incumbency certificates covering the day of interim closing	
9.	Previous Participation Certification	<i>Submit original to Housing for processing for new principals; copied for docket.</i>
10.	Additional Byrd Amendment Certifications	<i>If applicable.</i>
11.	Borrower's Resolution	<i>Update the resolution to ensure that Borrower has the authority to accept and be bound under any increased and new loans and new grant documents and that the principal who will be signing the Settlement Agreements and other interim closing documents has the necessary authority to do so.</i>
12.	Owner/Architect Agreement	<i>Amend, supplement or terminate and replace as necessary.</i>
13.	New Certification of Architect and Engineering Fees	<i>See sample language in Closing Guide § 5.1.</i>
14.	Escrow Agreements	<i>As applicable.</i>
15.	Restrictive Covenants / Use Agreements	<i>As applicable, including amendments to existing documents and/or new documents.</i>
16.	Disbursement Agreement	<i>As applicable.</i>

## **Part 5: Sample Language and Certificates**

### **Sample Language**

- 5.1 HUD Secondary Financing Rider
- 5.2 HUD-Required Provisions for Borrower’s Organizational Documents
- 5.3 HUD Rider to Restrictive Covenants
- 5.4 HUD Rider to Security Instrument LIHTC Properties
- 5.5 Rider to Regulatory Agreement for Residual Receipts Requirements
- 5.6 Survey Affidavit of No Change
- 5.7 Amendment for Components Stored Off-Site

### **Certificates**

- 5.8 Certificate of Architectural & Engineering Fees
- 5.9 Building Code Certification
- 5.10 Zoning Certification
- 5.11 Third Party Obligee Certification
- 5.12 Identification and Certification of Eligible Limited Liability Investor Entities  
(also referred to as the “LLCI Certificate” or the “Passive Investor Certification”)

## 5.1 HUD Secondary Financing Rider

*To be used when private, non-governmental sources provide secured, secondary financing.*

This Rider (“Rider”) is attached to and made a part of (i) that certain Promissory Note (herein, the “Junior Note”) dated \_\_\_\_\_, 20\_\_ from \_\_\_\_\_ (the “Borrower”) in favor of \_\_\_\_\_ (herein, the “Junior Lender”) in the principal amount of \$\_\_\_\_\_ evidencing a loan (herein, the “Junior Loan”) from Junior Lender to Borrower and (ii) that certain Mortgage and Security Agreement (herein, the “Junior Mortgage”) dated \_\_\_\_\_, 20\_\_ from Borrower in favor of Junior Lender. The Junior Note and Junior Mortgage and any and all other documents now or hereafter executed and/or delivered in connection with the Junior Loan are hereafter collectively referred to as the “Junior Loan Documents.” The terms and conditions of this Rider supersede all other terms of the Junior Loan Documents, and, should there be any conflict or inconsistency between this Rider and any other provisions of the Junior Loan Documents, the terms and conditions of this Rider shall prevail.

As used herein, “Senior Loan Documents” shall mean (i) that certain Note (herein, the “Senior Note”) dated \_\_\_\_\_, 20\_\_ from \_\_\_\_\_ (the “Borrower”) in favor of \_\_\_\_\_ (herein, the “Senior Lender”) in the principal amount of \$\_\_\_\_\_ evidencing a loan (herein, the “Senior Loan”) from Senior Lender to Borrower and (ii) that certain \_\_\_\_\_ [insert Security Instrument title] (herein, the “Senior Mortgage”) dated \_\_\_\_\_, 20\_\_ from Borrower in favor of Senior Lender, granting a mortgage on the project known as \_\_\_\_\_, FHA Project No. \_\_\_\_\_ (herein, the “Project”); (iii) that certain Regulatory Agreement (herein, the “Regulatory Agreement”) dated \_\_\_\_\_, 20\_\_ by and between Borrower and the Secretary of Housing and Urban Development (herein, “HUD”); and (iv) any and all other documents required by Senior Lender and/or HUD in connection with, evidencing and/or securing the Senior Loan.

The Junior Lender, by acceptance of delivery and recordation of the Junior Mortgage, and the Borrower, by execution of the Junior Mortgage, agree to the following provisions incorporated in said Mortgage to the same extent as if fully rewritten therein:

1. The Junior Loan Documents and all amounts now and/or hereafter advanced thereunder and/or secured thereby are specifically subordinate to the Senior Loan Documents and all amounts now and/or hereafter advanced thereunder and/or secured thereby.
2. The Junior Note may not mature, and may not bear a maturity date, prior to the date on which the Senior Note matures. The term of the Junior Loan may be extended if the Junior Note matures, there are no surplus cash funds available for repayment and the Senior Loan has not been retired in full or HUD grants a deferment of amortization or forbearance that results in an extended maturity of the Senior Loan.
3. The Junior Loan may be assumed when a sale or transfer of the physical assets occurs under the following conditions:
  - a. Not more than the excess, if any, of (i) 75 percent of the net proceeds of the sale or transfer is applied to the reduction of the Junior Loan over (ii) the amount paid on

account of any other loans with respect to the Project which are junior to the Senior Loan but senior to the Junior Loan; provided, however, that if there are other loans which have the same priority as the Junior Loan, the foregoing amount shall be allocated *pari passu* among such loans based upon the total outstanding indebtedness of each.

- b. As used herein, net proceeds are the funds available to the Borrower after:
  - i. Correcting any monetary or covenant default under any of the Senior Loan Documents, and
  - ii. Making required contributions to any reserve funds and needed improvements to the Project as evidenced by HUD's annual inspection reports.
4. If HUD approves a sale of the project pursuant to HUD guidelines for transfers of physical assets, then Junior Lender will agree to such transfer of ownership of the project.
5. The Junior Note, Junior Mortgage and all other Junior Loan Documents automatically terminate if HUD acquires title to the project by foreclosure or a deed in lieu of foreclosure.
6. All work performed with the proceeds of the Junior Mortgage must be cost certified and conformed to Davis-Bacon requirements, if applicable in accordance with Program Obligations.
7. The Junior Mortgage is subject to and subordinate to the Senior Mortgage, the Regulatory Agreement and that certain Building Loan Agreement between the Borrower and Senior Lender.
8. Proceeds of the Junior Loan may only be used to cover allowable project costs or any anticipated operating shortfall.
9. As long as HUD or its successors or assigns is the insurer or holder of the Senior Mortgage, any payments due under the Junior Loan Documents shall be payable only from 75 percent of available "surplus cash" (or "residual receipts") as that term is defined in the Regulatory Agreement and subject to the availability of such surplus cash (or residual receipts) in accordance with the provision of said Regulatory Agreement. The restriction on payment imposed by this paragraph shall not excuse any default caused by failure of the Borrower to pay the indebtedness evidenced by the Junior Note.
10. Borrower has obtained the prior written consent of the Senior Lender to the existence of the Junior Loan.
11. To the extent that the Junior Note provides for payments of principal and interest, such principal and interest shall be due and payable on or after the maturity date of the Senior Loan, provided that if the Senior Loan is prepaid in full, to the extent otherwise provided in the Junior Loan Documents, the holder of the Junior Note, at its option upon 30-days notice, may declare the whole principal sum or any balance thereof, together with interest thereon, immediately due and payable. Interest due pursuant to the terms of the Junior Note that is not paid in accordance therewith shall not create any default in the terms of the Junior Note, but shall accrue and be payable in full at or after the date of maturity of the Senior Loan.

12. The Junior Note is non-negotiable and may not be sold, transferred, assigned, or pledged by the Junior Lender except with the prior written approval of HUD.
13. The Junior Lender certifies that the Junior Loan Documents represent a bona fide transaction and that it fully understands all of HUD's requirements for such secondary financing [add for nonprofit borrowers: “and that no prepayment of principal or interest shall be accepted without evidence that HUD has authorized such prepayment. If an unauthorized prepayment is accepted, the funds shall be held by the Junior Lender in trust for the Project”].
14. In the event of any conflict between (i) any of the Junior Loan Documents, and (ii) any of the Senior Loan Documents, the Section of the National Housing Act under which HUD insures the Senior Mortgage, and/or any applicable HUD rule, regulation or requirement (collectively, the “HUD Documents and Requirements”), the HUD Documents and Requirements shall be controlling in all respects.

JUNIOR LENDER:

\_\_\_\_\_

a \_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:

BORROWER:

\_\_\_\_\_

a \_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:



## 5.2 HUD-Required Provisions for Borrower's Organizational Documents

The Borrower entity's organizational governing document (partnership agreement, operating agreement, or by-laws, as applicable) must provide that the Borrower will be in existence at least as long as the term of the insured loan and must include provisions stating as follows, which provisions may automatically terminate when the loan no longer is insured or held by HUD:

Notwithstanding any clause of provision in the [*identify both the formation document(s) and the governing document(s)*] to the contrary and so long as the United States Department of Housing and Urban Development ("HUD") or a successor or assign of HUD is the insurer or holder of a loan to [*Borrower*] ("the HUD-insured Loan") secured by the mortgage on [*insert project's name and FHA project number*] in [*insert city, county and state*] (the "Project") the following provisions shall apply:

1. If any of the provisions of the organizational documents conflict with the terms of the HUD-insured Note, Security Instrument, or HUD Regulatory Agreement ("HUD Loan Documents"), the provisions of the HUD Loan Documents shall control.
2. No provision required by HUD to be inserted into the organizational documents may be amended without HUD's prior written approval. Additionally, if there is a conflict between any HUD-required provisions inserted into this Agreement and any other provision of this Agreement, the terms of the HUD-required provisions will govern; and if there is a conflict between any of the provisions in the [*insert appropriate document, i.e., Articles of Organization*] and any HUD-required provisions of this Agreement, the HUD-required provisions will govern.
3. Unless otherwise approved in writing by HUD, the Borrower entity's business and purpose shall consist solely of the acquisition, ownership, operation and maintenance of the Project and activities incidental thereto. Borrower shall not engage in any other business or activity. The Project shall be the sole asset of the Borrower entity, which shall not own any other real estate other than the aforesaid Project.
4. None of the following will have any force or effect without the prior written consent of HUD:
  - a. Any amendment that modifies the term of Borrower's existence;
  - b. Any amendment that triggers application of the HUD previous participation certification requirements (as set forth in Form HUD-2530, Previous Participation Certification, or 24 CFR § 200.210, et seq.);
  - c. Any amendment that in any way affects the HUD Loan Documents;
  - d. Any amendment that would authorize any member, partner, owner, officer or director, other than the one previously authorized by HUD, to bind the Borrower entity for all matters concerning the Project which require HUD's consent or approval;
  - e. A change that is subject to the HUD TPA requirements contained in Chapter 13 of HUD Handbook 4350.1 REV-1; or
  - f. Any change in a guarantor of any obligation to HUD (including those obligations

arising from violations of the Regulatory Agreement).

5. The Borrower entity is authorized to execute a Note and Security Instrument in order to secure a loan to be insured by HUD and to execute the Regulatory Agreement and other documents required by the Secretary in connection with the HUD-insured loan.
6. Any incoming member/partner/owner of Borrower must as a condition of receiving an interest in the Borrower entity agree to be bound by the HUD Loan Documents and all other documents required in connection with the HUD-insured loan to the same extent and on the same terms as the other members/partners/owners.
7. Upon any dissolution, no title or right to possession and control of the Project, and no right to collect the rents from the Project, shall pass to any person or entity that is not bound by the Regulatory Agreement in a manner satisfactory to HUD.
8. The key principals of the Borrower identified in the Regulatory Agreement are liable in their individual capacities to HUD to the extent set forth in the Regulatory Agreement.
9. The approved Borrower entity shall not voluntarily be dissolved or converted to another form of entity without the prior written approval of HUD.
10. The Borrower entity has designated \_\_\_\_\_ [insert name] as its official representative for all matters concerning the Project that require HUD consent or approval. The signature of this representative will bind the Borrower entity in all such matters. The Borrower entity may from time to time appoint a new representative to perform this function, but within three business days of doing so, will provide HUD with written notification of the name, address, and telephone number of its new representative. When a person other than the person identified above has full or partial authority with respect to management of the Project, the Borrower entity will promptly provide HUD with the name of that person and the nature of that person's management authority.
11. Notwithstanding any provision in this [Operating Agreement / Partnership Agreement / Bylaws] to the contrary, any obligation of the [Corporation / Partnership / Limited Liability Company] to provide indemnification under this [Operating Agreement / Partnership Agreement / Bylaws] shall be limited to (i) amounts mandated by state law, if any, (ii) coverage afforded under any liability insurance carried by the [Company / Partnership] and (iii) available "surplus cash" of the Borrower as defined in the Regulatory Agreement. Until funds from a permitted source for payment of indemnification costs are available for payment, the [Corporation / Partnership / Limited Liability Company] shall not (a) pay funds to any members, partners, officers and directors, or (b) pay the deductible on an indemnification policy for any members, partners, officers and directors.

### 5.3 HUD [Rider / Amendment] To Restrictive Covenants

✱ Use as a Rider if the Restrictive Covenants are being entered into at closing; use as an Amendment if the Restrictive Covenants have already been entered into.

This [RIDER] [AMENDMENT] TO RESTRICTIVE COVENANTS is made as of [\_\_\_\_\_, 20\_\_], by \_\_\_\_\_ (“Borrower”) and \_\_\_\_\_ (“Agency”).

WHEREAS, Borrower has obtained financing from \_\_\_\_\_ (“Lender”) for the benefit of the project known as \_\_\_\_\_ (“Project”), which loan is secured by a [name of security instrument] (“Security Instrument”) dated as of \_\_\_\_\_, and recorded in the [Recorder’s Office or other land records office] of \_\_\_\_\_ County, \_\_\_\_\_ (“Records”) on \_\_\_\_\_ as Document Number \_\_\_\_\_, and is insured by the United States Department of Housing and Urban Development (“HUD”);

WHEREAS, Borrower has received [a loan] [an allocation of Low Income Housing Tax Credits] [HOME funds] [tax-exempt bond financing] [other- describe] from the Agency, which Agency [is requiring] [has required] certain restrictions be recorded against the Project; and

[Use if the Restrictive Covenants have already been entered into: WHEREAS, Borrower entered into that certain [\_\_\_\_\_] *Insert name of restrictive covenants document* ] (“Restrictive Covenants”) with respect to the Project, as more particularly described in Exhibit A attached hereto, dated as of [\_\_\_\_\_] and recorded in the Records;]

WHEREAS, HUD requires as a condition of its insuring Lender’s financing to the Project, that the lien and covenants of the Restrictive Covenants be subordinated to the lien, covenants, and enforcement of the Security Instrument; and

WHEREAS, the Agency has agreed to subordinate the Restrictive Covenants to the lien of the Mortgage Loan in accordance with the terms of this [Rider] [Amendment].

NOW, THEREFORE, in consideration of the foregoing and for other consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

(a) In the event of any conflict between any provision contained elsewhere in the Restrictive Covenants and any provision contained in this [Rider] [Amendment], the provision contained in this [Rider] [Amendment] shall govern and be controlling in all respects as set forth more fully herein.

(b) The following terms shall have the following definitions:

"Code" means the Internal Revenue Code of 1986, as amended.

"HUD" means the United States Department of Housing and Urban Development.

"HUD Regulatory Agreement" means the Regulatory Agreement between Borrower and HUD with respect to the Project, as the same may be supplemented, amended or modified from time to time.

“Lender” means \_\_\_\_\_, its successors and assigns.

“Mortgage Loan” means the mortgage loan made by Lender to the Borrower pursuant to the Mortgage Loan Documents with respect to the Project.

“Mortgage Loan Documents” means the Security Instrument, the HUD Regulatory Agreement and all other documents required by HUD or Lender in connection with the Mortgage Loan.

“National Housing Act” means the National Housing Act of 1934, as amended.

“Program Obligations” has the meaning set forth in the Security Instrument.

“Residual Receipts” has the meaning specified in the HUD Regulatory Agreement.

“Security Instrument” means the mortgage or deed of trust from Borrower in favor of Lender, as the same may be supplemented, amended or modified.

“Surplus Cash” has the meaning specified in the HUD Regulatory Agreement.

(c) Notwithstanding anything in the Restrictive Covenants to the contrary, [*use for tax credit transactions only*: except the requirements in 26 U.S.C. 42(h)(6)(E)(ii), to the extent applicable,] the provisions hereof are expressly subordinate to (i) the Mortgage Loan Documents, including without limitation, the Security Instrument, and (ii) Program Obligations (the Mortgage Loan Documents and Program Obligations are collectively referred to herein as the “HUD Requirements”). Borrower covenants that it will not take or permit any action that would result in a violation of the Code, HUD Requirements or Restrictive Covenants. In the event of any conflict between the provisions of the Restrictive Covenants and the provisions of the HUD Requirements, HUD shall be and remains entitled to enforce the HUD Requirements. Notwithstanding the foregoing, nothing herein limits the Agency’s ability to enforce the terms of the Restrictive Covenants, provided such terms do not conflict with statutory provisions of the National Housing Act or the regulations related thereto. The Borrower represents and warrants that to the best of Borrower’s knowledge the Restrictive Covenants impose no terms or requirements that conflict with the National Housing Act and related regulations.

(d) [*Use for tax credit transactions only*: In accordance with 26 U.S.C. 42(h)(6)(E)(i)(1), in] In the event of foreclosure (or deed in lieu of foreclosure), the Restrictive Covenants (including without limitation, any and all land use covenants and/or restrictions contained herein) shall automatically terminate, [*use for tax credit transactions only*: with the exception of the requirements of 26 U.S.C. 42(h)(6)(E)(ii) above, to the extent applicable, or as otherwise approved by HUD.]

(e) Borrower and the Agency acknowledge that Borrower’s failure to comply with the covenants provided in the Restrictive Covenants does not and shall not serve as a basis for default under the HUD Requirements, unless a default also arises under the HUD Requirements.

(f) [Except for the Agency’s reporting requirement,] in enforcing the Restrictive Covenants the Agency will not file any claim against the Project, the Mortgage Loan proceeds,

any reserve or deposit required by HUD in connection with the Security Instrument or HUD Regulatory Agreement, or the rents or other income from the property other than a claim against:

- i. Available surplus cash, if the Borrower is a for-profit entity;
- ii. Available distributions of surplus cash and residual receipts authorized for release by HUD, if the Borrower is a limited distribution entity; or
- iii. Available residual receipts authorized by HUD, if the Borrower is a non-profit entity. [or
- iv. [A HUD-approved collateral assignment of any HAP contract.]

(g) For so long as the Mortgage Loan is outstanding, Borrower and Agency shall not further amend the Restrictive Covenants, with the exception of clerical errors or administrative correction of non-substantive matters, without HUD's prior written consent.

(h) Subject to the HUD Regulatory Agreement, the Agency may require the Borrower to indemnify and hold the Agency harmless from all loss, cost, damage and expense arising from any claim or proceeding instituted against Agency relating to the subordination and covenants set forth in the Restrictive Covenants, provided, however, that Borrower's obligation to indemnify and hold the Agency harmless shall be limited to available surplus cash and/or residual receipts of the Borrower.

(i) **[Use only with Low-Income Housing Tax Credits:** Notwithstanding anything to the contrary contained herein, it is not the intent of any of the parties hereto to cause a recapture of the Low Income Housing Tax Credits or any portion thereof related to any potential conflicts between the HUD Requirements and the Restrictive Covenants. Borrower represents and warrants that to the best of Borrower's knowledge the HUD Requirements impose no requirements which may be inconsistent with full compliance with the Restrictive Covenants. The acknowledged purpose of the HUD Requirements is to articulate requirements imposed by HUD, consistent with its governing statutes, and the acknowledged purpose of the Restrictive Covenants is to articulate requirements imposed by Section 42 of the Code. In the event an apparent conflict between the HUD Requirements and the Restrictive Covenant arises, the parties and HUD will work in good faith to determine which federally imposed requirement is controlling. It is the primary responsibility of the Borrower, with advice of counsel, to determine that it will be able to comply with the HUD Requirements and its obligations under the Restrictive Covenants. **[Use only with tax-exempt bonds:** No action shall be taken in accordance with the rights granted herein to preserve the tax exemption of the interest on the notes or bonds, or prohibiting the owner from taking any action that might jeopardize the tax-exemption, except in strict accord with Program Obligations.]

BORROWER:

AGENCY:

By:

By:

\_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
Name:  
Title:

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

I, the undersigned, a Notary Public in and for the county and State aforesaid, do hereby certify that on this \_\_\_\_\_, \_\_\_\_\_, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that (s)he signed and delivered the said instrument as his/her free and voluntary act and the free and voluntary act of \_\_\_\_\_ for the purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[seal]

\_\_\_\_\_  
Notary Public

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

I, the undersigned, a Notary Public in and for the county and State aforesaid, do hereby certify that on this \_\_\_\_\_, \_\_\_\_\_, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that (s)he signed and delivered the said instrument as his/her free and voluntary act and the free and voluntary act of \_\_\_\_\_ for the purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[seal]

\_\_\_\_\_  
Notary Public

[Attach Exhibit A – Legal Description]

## 5.4 RIDER TO SECURITY INSTRUMENT - LIHTC PROPERTIES

This Rider (“Rider”) is attached to and amends the Security Instrument entered into between [**Borrower**] and [**Lender**], dated as of [**Date**] (“Security Instrument”).

To the extent any provisions of this Rider conflict with any provisions in the body of the Security Instrument, the provisions of this Rider shall prevail. Any terms in the body of the Security Instrument not in conflict with the provisions of this Rider remain in full force and effect.

Notwithstanding anything else in the Security Instrument to which this Rider is attached:

1. Definitions. The following terms shall be added to Section 1 (Definitions) of the Security Instrument:

- (a) Any capitalized terms not defined in this Rider shall have the meaning given in the body of the Security Instrument.
- (b) “**Equity Investor**” means \_\_\_\_\_.
- (c) “**Borrower’s GP/MM**” means \_\_\_\_\_.

2. Removal of Borrower’s GP/MM.

*[Include this section 2 only if pre-approval of a special limited partner entity as an interim replacement general partner/managing member has been requested and approved. Use in accordance with separately provided guidance on the pre-approval process.]*

Equity Investor may remove the Borrower’s GP/MM in accordance with the terms of the Borrower’s organizational documents, subject to the following conditions:

- (a) Lender and HUD shall receive prior written notice of any such removal and replacement.
- (b) HUD and Lender have approved such organizational documents, including any and all amendments thereto, but only to the extent HUD approval of the Borrower’s organizational documents is required by Program Obligations.
- (c) HUD and Lender have approved the replacement of the Borrower’s GP/MM in accordance with Program Obligations. At Borrower’s request, HUD and Lender have approved [**SPECIAL LIMITED PARTNER ENTITY**] (“Interim Replacement GP/MM”) to act as a temporary replacement general partner/managing member of Borrower, in the event Equity Investor removes Borrower’s GP/MM for cause in accordance with Borrower’s organizational documents. Approval of such Interim Replacement GP/MM is expressly limited to a period of only 90 days that commences on the date of such removal, provided that HUD in its sole discretion may extend such 90-day period by an additional 30 days.
- (d) HUD and/or Lender may at any time by written notice to Equity Investor revoke the approvals given in this Section 2 if HUD or Lender becomes aware of any conditions or circumstances that would disqualify or compromise the ability of Interim Replacement GP/MM from acting as an interim general partner/managing member pursuant to Program Obligations.
- (e) After such interim period, any proposed permanent replacement for the Borrower’s GP/MM is subject to HUD’s consent pursuant to Program Obligations, including any applicable procedure for the transfer of physical assets.

3. Transfer of Equity Investor.

Equity Investor may transfer all or part of its interests in Borrower upon the following conditions:

- (a) HUD approves any transferee in accordance with Program Obligations, provided that if such transferee is a limited liability investor, as such term is defined in Program Obligations, HUD shall receive the same certifications and organizational charts required by Program Obligations for the admission of a limited liability investor at a transaction's closing.
- (b) HUD and Lender receive prior written notice of such transfer.
- (c) HUD and Lender receive executed copies of (and, to the extent, if at all, required by Program Obligations, have previously approved drafts of), any and all documents necessary to effect such transfer, including any and all amendments to Borrower's organizational documents.

4. Notice.

- (a) Lender agrees that, as long as Equity Investor is a member or partner of Borrower, Lender shall endeavor as a courtesy to Equity Investor to deliver to Equity Investor a copy of any notice of default that is delivered to Borrower. Equity Investor's address for such notice purposes is:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Equity Investor may change the address to which notices intended for it are to be directed by means of written notice given to Lender.

- (b) Any cure of any default by Borrower offered by Equity Investor shall be treated the same as if offered by Borrower.

**BORROWER**

**LENDER**

by: \_\_\_\_\_

by: \_\_\_\_\_



## 5.5 Rider to Regulatory Agreement for Residual Receipts Requirements

*\*This sample Rider is set up assuming residual receipts requirements are established through a HAP contract. In the event residual receipts requirements are established through another program or documents, such as the Section 202 program, revise this rider as necessary to reflect deal specifics. This Rider is not intended to alter those specific program requirements.*

This Rider (“Rider”) is attached to and amends the Regulatory Agreement entered into between [**Borrower**] and the United States Department of Housing and Urban Development, acting by and through the Secretary, his or her successors, assigns or designates (HUD), dated as of [**Date**] (“Regulatory Agreement”).

To the extent any provisions of this Rider conflict with any provisions in the Regulatory Agreement, the provisions of this Rider shall prevail. Any terms in the body of the Regulatory Agreement not in conflict with the provisions of this Rider remain in full force and effect.

Notwithstanding anything else in the Regulatory Agreement to which this Rider is attached:

1. Any capitalized term used herein and not defined has the meaning given to it in the Regulatory Agreement.
2. Borrower has entered into a [*Housing Assistance Payment Contract (HAP Contract) identified by HAP Contract # [HAP Contract #], as amended, renewed and/or assigned from time to time*].
3. While the Regulatory Agreement would otherwise allow Borrower to make Distributions of Surplus Cash in accordance with the provisions of the Regulatory Agreement, the HAP Contract further limits such Distributions and requires Borrower to maintain a Residual Receipts account, as Residual Receipts is defined in the HAP Contract.
4. Borrower shall establish and/or maintain a Residual Receipts account, and make required deposits into said Residual Receipts account, in accordance with the HAP Contract.
5. Notwithstanding any provision of the HAP Contract, the Residual Receipts account shall be subject to the control of Lender and shall be maintained in accordance with any applicable requirements of the Government National Mortgage Association, and withdrawals may be made only with the prior written approval of HUD. These funds shall be held in an interest-bearing account, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America, or in such other investment as may be allowed by HUD, which shall be insured or guaranteed by a federal agency and in accordance with Program Obligations.

6. Funds deposited in the Residual Receipts account shall be held in trust for the Project and shall continue to be held in trust for the benefit of the Project upon any sale or transfer of the Project, pursuant to the HAP Contract. Upon termination of the requirement to maintain a Residual Receipts account, any funds held in the Residual Receipts account shall be subject to HUD's direction.
7. In the event that the HAP Contract is terminated or is otherwise no longer of any force or effect with respect to the Project, this Rider shall terminate and be of no further force or effect.

**BORROWER**

*(insert signature block)*

**U.S. DEPARTMENT OF HOUSING  
AND URBAN DEVELOPMENT**

*(insert signature block)*

## 5.6 Survey Affidavit of No Change

State of \_\_\_\_\_  
County of \_\_\_\_\_

The undersigned ("Affiant") being first duly sworn on oath does hereby depose, represent and say to the U.S. Department of Housing and Urban Development ("HUD"): as follows:

Affiant is the \_\_\_\_\_ of \_\_\_\_\_ ("Borrower") and is fully and well acquainted and knowledgeable concerning the physical characteristics and condition of the real estate legally described on Exhibit A attached hereto and made a part hereof and the buildings, structures and improvements (collectively the "Improvements" ) located thereon;

Said real estate and Improvements are part of the HUD Project named \_\_\_\_\_ and designated HUD Project Number \_\_\_\_\_;

On \_\_\_\_\_, \_\_\_\_\_ ("Surveyor") surveyed said real estate and Improvements and produced a written survey dated \_\_\_\_\_ and identified as job, survey or order number \_\_\_\_\_ of the surveying firm of \_\_\_\_\_ whose address is \_\_\_\_\_

("Survey"). On \_\_\_\_\_ an original of said Survey was delivered to HUD;

On \_\_\_\_\_, the Affiant reviewed said Survey and physically inspected said real estate and Improvements including, without limitation, the perimeter boundaries of said real estate;

The Survey accurately and fully depicts the observable physical conditions of said real estate and the location and condition of all Improvements and any above ground physical indicia of any easements, licenses, roadways, paths or other physical usage located on said real estate as of \_\_\_\_\_ [the date of Affiant's said inspection] including, without limitation, all encroachments thereof on or into easements and set back lines and by Improvements primarily located on adjoining real estate onto the real estate described on **Exhibit A** hereto; EXCEPT [if none, state "NONE"] \_\_\_\_\_.

Affiant hereby certifies that the statements and representations contained in this instrument and all supporting documentation thereto are true, accurate, and complete. This instrument has been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring a multifamily loan, and may be relied upon by HUD as a true statement of the facts contained therein.

AFFIANT:

By:

\_\_\_\_\_

Name:

Title:

Date:

Warning: Any person who knowingly presents a false, fictitious or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions, including but not limited to: (i) fines and imprisonment under 18 U.S.C. §§ 287, 1001, 1010, and 1012; (ii) civil penalties and damages under 31 U.S.C. § 3729; and (iii) administrative sanctions, claims and penalties under 24 CFR parts 24, 28, and 30.

I, the undersigned, a Notary Public in and for the county and State aforesaid, do hereby certify that \_\_\_\_\_, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that (s)he signed and delivered the said instrument as his/her free and voluntary act and purposes therein set forth.

GIVEN under my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public  
(SEAL)

## 5.7 Amendment to the Construction Contract for Payment for Components Stored Offsite

- A. The undersigned as Contractor and as Owner will abide by the following conditions to induce HUD to release mortgage loan proceeds for the payment of components stored offsite.
1. The components stored offsite that will be recognized for payment under Article 3.B(3) of the contract are those listed and approved by HUD as an appendix to the Contractor's and/or Mortgagor's Cost Breakdown, Form HUD-2328, attached to the Contract as Exhibit "A". The appendix must provide an inventory of the "stored components" and a breakdown of the line item of which the stored components are a part. The breakdown must state:
    - a. Cost of Components (Invoice Value),
    - b. Cost of transportation from offsite storage location to the construction site,
    - c. Cost of Installation, and
    - d. Costs of any other items included in the line item.
  2. The Contractor is responsible for:
    - a. All direct and indirect costs associated with the storage and transportation of components stored offsite.
    - b. Obtaining a risk of loss insurance policy which covers the components during storage, in transit and until installed at the project site. The policy must name the Owner, Lender and the HUD as their interest may appear. Evidence of the existence of this insurance must be submitted to HUD prior to the approval of any advance for components stored offsite.
    - c. Assuring to the satisfaction of HUD proper identification and segregation of components while in storage and protection of components while in storage and transportation.
    - d. Securing from the Owner or Lender all necessary security agreements, copies of financing statements, and documentation pertaining to first lien warranties, and submitting them with the request for payment.
    - e. Providing corporate surety bonds for on-site improvements on forms HUD-92452A-MHUD-92452M for payment and performance bonds, respectively, each equaling 100 percent of the HUD estimate of construction or rehabilitation cost.
  3. All requests for payment for components stored offsite must be submitted by the Contractor on Form HUD-92448, *Contractor's Requisition*, accompanied by the following:
    - a. A statement from the Architect certifying that:
      - i. He/she has visited the storage site and has inspected the components for which payment has been requested.
      - ii. The components are in good condition and they comply with the contract requirement,

- iii. The components are properly stored and protected,
  - iv. The components are segregated in an easily identified manner from other materials stored at the same site and are marked for identification.
- b. A bill of sale accompanied by an itemized invoice transferring title of the components to the Owner.
  - c. A copy of the security agreement provided to the Lender by the Owner.
  - d. A copy of the financing statement filed by the Lender in accordance with the Uniform Commercial Code.
  - e. A warranty from the Lender that the security instruments requested a first lien on the building components.
  - f. An opinion from the Lender's attorney that he/she has reviewed the security agreement and associated documents relative to the components for which advance are sought and that the security agreement creates a valid security interest in the collateral and that when the financing statement is duly filed, the secured party will have the first lien.
4. Restrictions
- a. Payments for components stored offsite shall be limited to the cost of components (Invoice Value) identified in the HUD approved appendix to the Contractor's and/or Mortgagor's Cost Breakdown, Form HUD-2238, attached to the Contract as Exhibit "A," and shall be subject to a 10 percent holdback.
  - b. In no case shall a payment be approved for components stored offsite to a contractor whose performance, in the judgment of the HUD Field Office Manager, is marked by serious deviations from the contract documents.
  - c. At no time may the outstanding amount of insured advances for components stored offsite exceed 50 percent of the total estimated construction costs as specified in the construction contract.
  - d. The minimum amount for any single advance is \$10,000.

OWNER

By: \_\_\_\_\_

Name:

Title:

Date:

CONTRACTOR

By: \_\_\_\_\_

Name:

Title:

Date:

**5.8 Certification of Architectural/Engineering Fees**

TO: Assistant Secretary of Housing-Federal Housing Commissioner

C/O: \_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_:

The undersigned hereby certifies that all architectural, engineering, drafting, land surveyor, testing, laboratory and related services fees and fee balances for the analysis of the property, preparation of reports, and for the project design and preparation of plans and specifications have been fully paid, except as listed below. The undersigned further certifies that there are no other disputed or undisputed claims for such services.

FIRM \_\_\_\_\_  
SERVICE \_\_\_\_\_  
FEE \_\_\_\_\_  
BALANCE \_\_\_\_\_

FIRM \_\_\_\_\_  
SERVICE \_\_\_\_\_  
FEE \_\_\_\_\_  
BALANCE \_\_\_\_\_

FIRM \_\_\_\_\_  
SERVICE \_\_\_\_\_  
FEE \_\_\_\_\_  
BALANCE \_\_\_\_\_

**5.9 Building Code Verification**

This will confirm that an apartment project known as \_\_\_\_\_, located at \_\_\_\_\_, built in \_\_\_\_\_, and consisting of \_\_\_\_\_ units, which are housed in \_\_\_\_\_ buildings and situated on \_\_\_\_\_ acres (square feet), was built in accordance with the applicable codes at the time of construction and has no code violations on record, except for: [Specify violation, remedy, and status (open/closed). If none, write "None."]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**GOVERNING AUTHORITY:**

By: \_\_\_\_\_  
Name:  
Title:  
Date:  
Phone: ( )

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This letter should be signed by an individual with supervisory responsibility, such as the Chief Planner, *etc.*

An inspection of the project is not required.

The intent of this certification is to notify HUD that the project, as it stands today, is not under the scrutiny of the governing authority and does not have any violations recorded against it which jeopardize the project's existence. If any violations have existed or do exist, the governing authority should specify the violation and the remedial action taken or required.

Your assistance in this matter is greatly appreciated.



### 5.10 Zoning Letter

*\*This letter may be provided in lieu of a zoning endorsement in accordance with Section 3.2.C above.*

This will confirm that an apartment project known as \_\_\_\_\_, located at \_\_\_\_\_, built in \_\_\_\_\_, and consisting of \_\_\_\_\_ units, which are housed in \_\_\_\_\_ buildings and situated on \_\_\_\_\_ acres ( \_\_\_\_\_ square feet), was adequately zoned as a multifamily project at the time of occupancy and that there are no zoning violations on record, except for: [Specify violation, remedy, and status (open/closed). If none, write "None."]

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GOVERNING AUTHORITY:

By: \_\_\_\_\_  
Name:  
Title:  
Date:  
Phone: (    )

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This letter should be signed by an individual with supervisory responsibility, such as the Chief Planner, *etc.*

An inspection of the project is not required.

The intent of this certification is to notify HUD that the project, as it stands today, is not under the scrutiny of the governing authority and does not have any violations recorded against it which jeopardize the project's existence. If any violations have or do exist, the governing authority should specify the violation and the remedial action taken or required.

Your assistance in this matter is greatly appreciated.

## 5.11 Third Party Obligee Certification

[Address to Hub Director]

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dear \_\_\_\_\_:

The undersigned hereby certifies that, under an agreement dated \_\_\_\_\_ between the undersigned and \_\_\_\_\_, a discount or other financing charge of \$ \_\_\_\_\_ in addition to the initial service charge will be paid by \_\_\_\_\_. The undersigned does not now have and will not later assert any claim against the Borrower, Mortgaged Property, mortgage loan proceeds, any reserve or deposit made with the undersigned or another required by HUD in connection with the mortgage transaction, or against the rents or other income from the Mortgaged Property for payment of any part of such discount.

LENDER:

By: \_\_\_\_\_  
Name:  
Title:  
Date:

The undersigned does not now have and will not later assert any claim against the Borrower, Mortgaged Property, mortgage loan proceeds, any reserve or deposit made with the undersigned or another required by HUD in connection with the mortgage transaction, or against the rents or other income from the Mortgaged Property for payment of any part of such discount.

THIRD PARTY:

By: \_\_\_\_\_  
Name:  
Title:  
Date:

## 5.12 Identification and Certification of Eligible Limited Liability Investor Entities

\* Also referred to as the "LLCI Certificate" or the "Passive Investor Certification"

The Field Office will request from each entity which claims to be a limited liability investor entity the following certification:

I, **[name of authorized signer]**, am authorized to certify on behalf of **[name of investor entity]** to each and every item stated below.

I certify that **[name of investor entity]** is:

- a. An eligible limited liability investor subject to the Preservation Approval Process Improvement Act of 2007 and as set forth herein;
- b. Investing in **[name of owner/mortgagor entity]**, which anticipates receiving Low-Income Housing Tax Credits pursuant to Section 42 of the Internal Revenue Code;
- c. A limited liability company, an investor corporation, an investor limited partnership, an investor limited liability limited partnership; or other similarly eligible entity; and
- d. An investor with limited or no control over routine property operations or HUD regulatory and/or contract compliance, unless it should take control of the ownership entity or assume the operating responsibilities in the event of the default of the operating partner or upon specific events as set forth in the **[name of owner/mortgagor entity]**'s *[operating agreement / partnership agreement / organizational documents]*.

I further certify that should any of the facts or circumstances that support the certifications above change or the entity for which this certification is made withdraws from participation in the owner/mortgagor, I will notify HUD immediately in writing providing full disclosure and explanation of the change(s).

Signed: \_\_\_\_\_ Date: \_\_\_\_\_  
[Name of authorized signer]  
[Title]

Approved: \_\_\_\_\_ Date: \_\_\_\_\_  
(Field Office Hub/Program Center Director)