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M E M O R A N D U M

TO: Office of General Counsel, U.S. Department of Housing and Urban Development

FROM: Christine Waldmann Carmody, Esq.
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DATE: July 2, 2012

Re: Comments to 24 CFR parts 5, 200, 207 and 232 New Loan Documents

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Below are our comments concerning the new loan documents that were released as part of the Federal Housing Administration (FHA): Section 232 Healthcare Facility Insurance Program-Strengthening Accountability and Regulatory Revisions Update dated May 3, 2012.

New LEAN Document Comments

Management and Owner's or Operator's Certification
- While this document is very close to the multi-family 9839 form, the biggest deviation is the addition of a hard cap on emergency work payments. Given that these certifications last for as long as the management agent/operator serving in their respective capacities, we recommend removing this hardcap (the manager already promises to keep all expenses reasonable and necessary).

Master Lease SNDA
- This permits only 3 days to give notice of an Operating Deficiency, which is a very short time frame.
- Requires hiring a consultant within 10 days if a Deficiency occurs – unlike the Operator Regulatory Agreement, this at least establishes a "bright line" requirement for when a consultant must be hired. This is a better method than the ambiguity created in the Operator Regulatory Agreement.
- During cure period, Borrower is permitted to pay off the loan and release the property from any master lease. This is beneficial for large portfolios with deep pockets, but does not help smaller borrowers.

Mortgage
- Includes licenses and accounts receivable in the definition of Mortgaged Property even if held by the Operator. This is problematic as HUD cannot require the operator (especially third party operators) to offer the license in the operator's name as collateral for the borrower's mortgage. In addition, if a facility's operator has Account Receivable financing, HUD will not have the first priority on that collateral.

Intercreditor Agreement & Rider
- If HUD feels they need a new Intercreditor form, it is imperative for HUD to work with AR Lenders to create the new form.
- The preamble no longer acknowledges the AR Lender's loan to the Operator, it should acknowledge both the HUD loan to the Borrower and the AR loan to the Operator in the preamble.
- Cut Off Time ends the AR Lender's collateral upon delivery of the notice – no AR Lender will accept this as they will simply stop sending funds and the facility will not be able to maintain the costs of operations
- Funds received after the Cut Off Time from the Operator can only go to pay down pre-Cut Off Time advances, again AR Lender's will simply stop lending to FHA-insured facilities if this arrangement is required
- Unnecessarily limits how an Operator can use its AR funds, an Operator's use of the AR funds should be determined by the AR Lender and the Operator. So long as the Operator does not default on the rent payments for the facility the Operator's use should not be limited.
- There is no purpose to having the Rider when it simply restates the body of the Intercreditor Agreement
- The Intercreditor no longer permits cross-defaults between FHA and non-FHA lines of credit, this will discourage large portfolio owners from utilizing FHA-Insured financing as we frequently find AR Lenders are willing to allow FHA and non-FHA facilities to be segregated as collateral but are requiring them to be cross-defaulted as permitted under the current H08-09 Notice.

Owner Regulatory Agreement
- Debt service reserve requirement are vague.
- Tries to prevent "waste" by requiring goods and services to be purchased at reasonable and necessary levels, anything over $10,000 requires written estimates and a survey of costs in the area – these must be available to HUD for review. How is this enforced? Why not insert this provision in the new 9839 instead of setting up a regulatory violation? How does it work if an operator purchases items across multiple facilities and cost allocates to the appropriate facilities?
- 48 hours to provide notices, surveys more severe than a "g" level finding, and reports to HUD and Lender. We are told by Operators that complying with this requirement is extremely difficult as many times the local facility sends such notices to a central headquarter system which handles all communications with HUD and Lender. Granting another day or two would be a welcome change for the Operators.

Operator Regulatory Agreement
- Same 48 hour notice period as borrower for notices and surveys. We are told by Operators that complying with this requirement is extremely difficult as many times the local facility sends such

notices to a central headquarter system which handles all communications with HUD and Lender. Granting another day or two would be a welcome change for the Operators.
- If HUD determines it is necessary because Operator's performance "may be placing the operational and/or financial viability of healthcare facility at risk" the operator must hire a consultant within 10 days – can happen even without a default! This can be very expensive and 3rd party operators are not going to want to be forced to hire a consultant without a "bright-line" trigger for this requirement.
- Operator must create a Risk Management Program – this can be a very expensive endeavor for small single run facilities with little benefit to HUD that is not covered by Notice 04-15.

DACA
- Why is there a required HUD form? Most depository banks have their own forms and will not accept the HUD form
- We recommend that these forms be used as guidance. If HUD has certain items that absolutely must be included, insert those requirements in the LEAN closing guide.

DAISA
- Why is there a required HUD form? Most depository banks have their own forms and will not accept the HUD form
- We recommend that these forms be used as guidance. If HUD has certain items that absolutely must be included, insert those requirements in the LEAN closing guide.
- No FHA Lender indemnity, which benefits Lenders and HUD