

## COMMITTEE ON HEALTHCARE FINANCING



July 2, 2012

Regulations Division, Office of the General Counsel  
Department of Housing and Urban Development  
451 Seventh Street, S.W., Room 10276  
Washington, D.C. 20410

RE - Federal Register Vol. 77, No. 86  
May 3, 2012  
Docket No. FR-5623-N-01 – “Federal Housing Administration (HUD)  
Healthcare Facility Documents - Proposed Revisions and Updates and Notice  
of Information Collection”

To Whom It May Concern -

We are writing on behalf of the **Committee on Healthcare Financing**<sup>1</sup> and the **Mortgage Bankers Association**, along with a coalition of national senior residential and healthcare associations that includes the **American Health Care Association, American Seniors Housing Association, Assisted Living Federation of America, LeadingAge, and National Center for Assisted Living** (the “**Coalition**”), to provide comments to the Department of Housing and Urban Development’s (the “**Department**” or “**HUD**”) on the proposed changes to the Section 232 loan and underwriting documents that were published in the referenced Federal Register notice (the “**Proposed Loan Documents**”). We support the Department’s efforts to update the various closing and underwriting documents, and our comments are intended to provide constructive recommendations to improve the program. We understand that the Proposed Loan Documents, as well as a related notice that was published for comment on changes to the Section 232 regulations (the “**Proposed Loan Regulations**”), represents additional efforts by HUD to further update the program.

We believe that the Section 232 program’s growth over the past few years has been a result of the flexibility HUD has exhibited and its constructive collaboration with various stakeholders, including lenders, borrowers, operators, and accounts receivable lenders. These efforts, which were part of HUD’s larger reorganization resulting in the establishment of the Office of Healthcare Programs and the implementation of the LEAN protocol, have turned the Section 232 program into an attractive, highly-competitive financing vehicle that is now used by borrowers and operators who, a few years ago, would never have considered HUD-insured financing. Because of the enhanced quality of borrowers and operators now utilizing the Section 232 program, HUD has improved the credit risk profile of the GI/SRI Fund. These improvements have contributed significantly to the reasons why the Section 232 program continues to have one of the strongest negative credit subsidy scores among the Department’s loan guarantee programs.

---

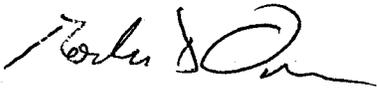
<sup>1</sup> Please know that the Committee on Healthcare Financing is an association of national investment and mortgage bankers and financial advisors who participate in the Department’s Sections 232 and 242 mortgage insurance programs. The Mortgage Bankers Association is a trade association representing originators and servicers of loans insured under the Section 232 program. Other Coalition participants are major national trade associations representing non-profit and proprietary sponsors of senior housing and healthcare services, who are also active in HUD Healthcare Programs.

It is with that background that we have reviewed the Proposed Loan Documents. We agree with HUD that the closing and underwriting documents are in need of updating; however, we do have serious concerns that many provisions being proposed will in fact harm HUD and the Section 232 program and, ultimately, HUD. As stated above, the LEAN program has provided HUD with flexibility and a sound underwriting platform that has allowed tremendous growth in the portfolio with appropriate risk management and needed credit diversification. However, should HUD implement the stringent requirements outlined in the Proposed Regulations and the Proposed Loan Documents, we believe that higher quality borrowers and operators will be discouraged from participating in the Section 232 program, resulting in HUD again becoming the "lender of last resort." The Coalition believes that a dynamic program is what is needed today in order to prepare for and adapt to our changing healthcare delivery system and demographic realities. Therefore, in reviewing our comments, we encourage HUD to focus on how the various changes could in fact harm the Section 232 Program and not assume that increased restrictions actually provide additional protections to the GI/SRI fund. We believe that many of the proposed increased restrictions will not materially expand the protections already implemented in the current Section 232 program, but will increase risk as otherwise quality borrowers and operators avoid the Section 232 program.

Finally, we have worked with the HUD Practice Committee of the Forum on Affordable Housing & Community Development Law of the American Bar Association (the "ABA") in reviewing and commenting upon the Proposed Loan Documents. We support the comments the ABA has separately submitted. However, we have several significant comments to the Proposed Loan Documents and have attached those comments as Exhibit A to this letter.

We thank you for the opportunity to participate in this process and look forward to an opportunity to discuss directly with HUD our specific comments. In the meantime, please do not hesitate to call Rod Owens at Krooth & Altman LLP at 202-293-8200 if you have any questions.

Very truly yours,



Roderick D. Owens  
Krooth & Altman LLP  
Counsel to the  
Committee on Healthcare Financing



Anthony Luzzi  
Sims Mortgage Funding, Inc.  
Chair, Section 232 Working Group  
Mortgage Bankers Association

**On behalf of the Coalition of:**

**American Health Care Association  
American Seniors Housing Association  
Assisted Living Federation of America  
LeadingAge  
National Center for Assisted Living**

**Exhibit A**  
**Comments to the Proposed Loan Documents**

**A. General Comments**

- When the final regulations and loan documents are in fact published, we respectfully request that HUD make them effective no earlier than 180 days after publication and, more importantly, apply them to loans that we submitted for firm application after that 180 day effective date. There is a significant lead time required to put together a Section 232 application and the lenders and borrowers must make decisions based on the rules and documents in effect at the time they are putting together the application. Therefore, if HUD makes the documents effective relatively soon after publication (e.g. 60 or 90 days), the Department will be changing the rules on many borrowers and lenders in the middle or near the end of the application preparation process. We believe this is not in the best interest of the Section 232 program and HUD's efforts to attract more credit worthy borrowers and operators.
- The proposed documents are designated as "HUD-####-OHP." The use of "OHP" may imply that these documents also apply to the Section 242 program. Therefore, we suggest changing "OHP" to "ORCF."
- We are concerned that some of the requirements are vague and subject to various interpretation/application by lenders. This will create an issue if lenders compete on what HUD requirements they will apply. We do not believe lenders should compete on interpreting HUD requirements. Therefore, we ask that HUD be clear as to when a particular requirement applies. For example, determining when a PCNA reports is needed for a Section 232/223a(7) loan should not be discretionary. HUD needs to state clear rules that all lenders must follow.
- Prior to final publication of the documents, we ask that HUD publish a draft Section 232 handbook and republish the loan documents. Without the handbook, the public is unable to fully evaluate the proposed loan documents and regulatory changes. Also, in order to be able to have a productive discussion on the draft 232 handbook, HUD will need to republish the loan documents and proposed regulations so that HUD personnel and the public can communicate about these items in compliance with the Administrative Procedures Act.

**B. Healthcare Regulatory Agreement – Borrower** – Attached please find a black-lined version of this document with our comments and commentary contained therein.

**C. Healthcare Regulatory Agreement – Operator** – Attached please find a black-lined version of this document with our comments and commentary contained therein.

**D. Healthcare Regulatory Agreement – Master Tenant** – Attached please find a black-lined version of this document with our comments and commentary contained therein.

- E. Deposit Account Control Agreement (“DACA”)** – Attached please find a black-lined version of this document with our comments and commentary contained therein.

While we support HUD’s requirement that borrowers and operators provide lenders with DACA’s, we strongly oppose a HUD mandated form of DACA. First of all, DACAs are common documents in the banking industry. In fact the Business Law Section of the American Bar Association issued a suggested form of DACA in 2006, and most major banks have drafted their own forms.

We do not believe that the proposed HUD form of DACA is unique in any way such that it protects HUD and the GI/SRI fund any better than various DACA forms that HUD has permitted over the last few years. Moreover, on the practical side, in the course of closing many 232 loans, we note that one of the most time-consuming and expensive aspects of the closing process has been negotiating a DACA when the HUD closing attorney insisted on using HUD’s sample form of DACA. As noted above, many banks have their own form of DACA and refuse to use another party’s form. In many cases, the requirement to use HUD’s DACA has resulted in a borrower severing a long-standing banking relationship in order to open an account with a bank willing to issue HUD’s prescribed form.

Therefore, we believe that by requiring the use of a HUD form of DACA, HUD will be increasing the costs and burdens of closing a loan transaction without any appreciable benefit to HUD. HUD can obtain the same protection in many different forms of DACAs. Rather than focusing on a specific form of DACA, we suggest that HUD should develop a set of provisions that cannot or must be included in a DACA. This guidance could be included in the Section 232 handbook so that HUD can more easily adjust it as control agreements and this lending industry evolve over the next generation. We believe the development of a focused set of requirements would help make Section 232 transactions more efficient for the parties involved, without increasing risk to HUD.

- F. Deposit Account Instructions and Service Agreement** - Attached please find a black-lined version of this document with our comments and commentary contained therein.

- G. Intercreditor Agreement** – Attached please find a black-lined version of this document with our comments and commentary contained therein. We request that HUD provide flexibility throughout this document in order to induce accounts receivable lenders’ (A/R Lender) greater participation in the Section 232 program. The narrowing of the A/R Lender collateral definition, plus other changes made to the detriment of the A/R Lenders will discourage participation by A/R Lenders and leave HUD with a portfolio unable to access quality accounts receivable financing. When a healthcare facility is in financial distress, HUD will want A/R Lenders assistance in delaying any potential default, so HUD should develop a set of A/R Lender documents that will be accepted by A/R

Lenders. HUD should not assume that A/R Lenders desire to participate in the HUD program and thus will be willing to accept what HUD mandates. The A/R Lenders do not need HUD and, as many indicated directly to HUD at the May 31, 2012, forum, will completely pull out of the HUD program.

- H. Rider to the Intercreditor Agreement** - We have attached a black-line showing our comments directly in this Agreement. As you can see from our comments, the Rider is unnecessary and should be deleted as a closing document. Most of the Rider's provisions are already included in the Intercreditor Agreement. Those provisions that are not included in the Intercreditor Agreement should be included. We do not see a reason why HUD should promulgate a form of Intercreditor Agreement and still need a form of Rider to attach to that Intercreditor Agreement. It makes more sense to have all necessary provisions in one Intercreditor Agreement. Further, doing so will help HUD better comply with the Federal Paperwork Reduction Act.
- I. Blocked Account Agreement** - Attached please find a black-lined version of this document with our comments and commentary contained therein.
- J. Operator Security Agreement** - Attached please find a black-lined version of this document with our comments and commentary contained therein.

We note that HUD did not publish a form of security agreement for the borrower to sign. We do not feel that the provisions in the Security Instrument are sufficient protection for the types of collateral involved in a Section 232 loan. This is particularly the case if the borrower is also the operator. Therefore, we have modified the operator security agreement to be used by a borrower if the borrower is also the operator. However, we request that HUD develop and publish for comment a borrower security agreement to be used when the borrower is not the operator. We feel the borrower security agreement needs to be a standard form. Otherwise, lenders may compete on security agreement requirements and we do not feel it is in the best interest of the program for lenders to compete on interpreting HUD requirements. The requirements of the Section 232 program should be clear to all participants.

- K. Master Lease Addendum** - Attached please find a black-lined version of this document with our comments and commentary contained therein.
- L. Estoppel Certificate Section 232** - Attached please find a black-lined version of this document with our comments and commentary contained therein.
- M. Master Tenant Estoppel Certificate Section 232** - Attached please find a black-lined version of this document with our comments and commentary contained therein.
- N. Addendum to Operating Lease** - Attached please find a black-lined version of this document with our comments and commentary contained therein.

- O. Master Lease Subordination, Non-Disturbance and Attornment Agreement -** Attached please find a black-lined version of this document with our comments and commentary contained therein.
- P. Subordination, Non-Disturbance and Attornment Agreement of Operating Lease-** Attached please find a black-lined version of this document with our comments and commentary contained therein.
- Q. Subordination Agreement - Operating Lease -** Attached please find a black-lined version of this document with our comments and commentary contained therein.
- R. Master Tenant Security Agreement -** Attached please find a black-lined version of this document with our comments and commentary contained therein.
- S. Subtenants Cross Guarantee –** We suggest that HUD add a provision that automatically terminates the Guaranty as to the specific guarantor once that Loan associated with the Guarantor’s Operating Lease is paid off.
- T. Lender’s Certification -** The Coalition has a strong objections to Section 40. We understand that objections were made during the course of the development of the multi-family loan documents and HUD rejected those comments with regard to Section 40. However, we believe that for the Section 232 program, HUD should reconsider its position. The assets supporting loans in the multifamily program are mainly real estate and very little collateral is personal property. In the Section 232 program, a great portion of the collateral is personalty that is covered by the Uniform Commercial Code. While that may seem to support HUD’s inclusion of Section 40, we do not understand why HUD would seek such assurance from the lender. First, Lenders are not allowed to engage in the practice of law. However, the certification being requested by HUD in Section 40 is in fact an opinion of law. Therefore, HUD is requiring lenders to engage in activities prohibited by HUD’s lender qualification requirements.

Secondly, asking for a perfection opinion is something that HUD will not be able to obtain from law firms. In fact, HUD has not required such an opinion in the past. Perfection is a factual matter. If certain steps are taken, then HUD’s own lawyers should be able to confirm that the security interest is in fact perfected. This is no different than HUD relying on its own lawyers to confirm that that HUD-insured mortgage is properly insured by a title policy. Therefore, rather than asking a lender to make a legal opinion on perfection that lawyers are unable to give, we suggest that HUD require the lender to confirm that each of the steps required to perfect a security interest have in fact occurred. That is a more appropriate certification. And, more importantly, certifying as to the specific steps will better enable HUD’s closing attorneys to determine that the closing documents are all in proper order. Further, this can be supplemented by an opinion of borrower’s counsel that states the steps necessary to perfect a security interest in the personalty have been taken.

**U. Consolidated Certifications – Mortgagor**

- Part XV - Audit Firm - Audit Firm Name that prepared loss on 242(a) project should be changed to reference 223(d).
- Part XVI – In the statement that states the “Mortgagor’s organizational chart, in such detail as approved by HUD, is attached hereto,” please delete “in such detail as approved by HUD.” The Mortgagor cannot know if HUD has approved the organizational chart when the chart and certification are being initially submitted to HUD.

**V. Consolidated Certifications – Principal of Mortgagor**

- Part IX Certification begins, “Mortgagor hereby certifies that neither Mortgagor nor any of its principals or affiliates have.” We suggest that read “Principal of” Mortgagor.

**W. Consolidated Certifications – Operator**

- Part III – The title, “Form - Health Care Facility Summary Appraisal Report and/or form - Supplement to Project Analysis” should be amended to delete “Form - Health Care Facility Summary Appraisal Report and/or.”
- Part IX– In the statement that states the “Operator’s organizational chart, in such detail as approved by HUD, is attached hereto,” please delete “in such detail as approved by HUD.” The Mortgagor cannot know if HUD has approved the organizational chart when the chart and certification are being initially submitted to HUD.
- Part IX Previous Participation should be renumbered to be “Part XV.”
- Attachment One to Principal of Mortgagor Consolidated Certifications – Comment - Should “Operator” replace “Principal of Mortgagor”?

**X. Consolidated Certifications – Parent of Operator**

- Part IX Previous Participation should be renumbered to be “Part X.”
- Part IX Previous Participation – The certification that begins, “Operator hereby certifies that neither Operator nor any of its principals or affiliates have ever been” should read “Parent of Operator.”

**Y. Consolidated Certifications – Management Agent**

- Part IX Previous Participation should be renumbered to be “Part XV.”
- Part IX Previous Participation – The certification that begins, “Mortgagor further certifies that” should read “Management Agent.”

- Attachment One to Principal of Mortgagor Consolidated Certifications should be amended to reference the “Principal of Management Agent” and not “Principal of Mortgagor.”

**Z. Consolidated Certifications – Contractor**

- Part IX Previous Participation should be renumbered to be “Part X.”
- Attachment One to Principal of Mortgagor Consolidated Certifications – Please insert “Contractor” in place of “Principal of Mortgagor.”

**AA. Firm Application Checklist - Section 232 New Construction - Single Stage**

- The time needed to collect, review, and report the data in this form will take several weeks, not one hour.
- 1-3 - insert “be” between ‘should in.’ Also add the recent 2264A supplement to the list.
- 1-4 - We note the following:
  - Footnote #3 is the same thing as ‘submit electronic version as a Word document’;
  - Please clarify if the Exhibit A, B, and C stamps are required for each page as well; and
  - Should Exhibit C also include a list of Minor Movables?
- 3-7 - Equity Support Documents – We suggest that this should be a new exhibit just in case the parties that are providing the equity are not a principal. Also, please clarify what tab this would this go in.
- Section 4 - Lenders should be able to copy and paste this section, since it’s a requirement to complete for each principal. Currently, we cannot copy and paste.
- 4-7 - Change Item B to “Income and Expense Statement” and create a new Item C that will be the Financial Statement Certification.
- 5-6 - C and D - this appears to be requirements for a corporation. Basically credit reports are to be pulled on any Principal of the Operator. Maybe just list C. Principals of the Operator with a footnote. If we are pulling credit reports, where are the credit authorizations going? Is there going to be a new certification?
- 5-8 - The numbers are from 8-14, but should be 1-7.
- 5-12 - HUD should consider adding a section for the Master Lease as a new Section 5-12.
- 8-1 - Under B, we suggest changing “a.” to “1”
- 13-10 - letter B should be #7; letter C and D, should be B and C
- Section 14 - Please change “15” to “14-12.”
- Footnote #13 should reference 8-2B not 10-2B.

**BB. Firm Application Checklist - Section 232 New Construction - Two Stage - Initial Submission**

- 1-3 - HUD should consider adding the recent 2264A supplement to the list.
- 1-4 - We note the following:
  - Footnote #3 is the same thing as ‘submit electronic version as a Word document’;
  - Please clarify if the Exhibit A, B, and C are stamps required for each page as well.
- 3-7 - Equity Support Documents – We suggest that this should be a new exhibit just in case the parties that are providing the equity is not a principal. Also, please clarify what tab this would this go in.
- Section 4 - lenders should be able to copy and paste this section, since it’s a requirement to complete for each principal. Currently, lenders cannot copy and paste.
- 4-7 - Change Item B to “Income and Expense Statement” and create a new Item C that will be the Financial Statement Certification.
- 5-3 - 5-6 - C and D - this appears to be requirements for a corporation. Basically credit reports are to be pulled on any Principal of the Operator. Maybe just list C. Principals of the Operator with a footnote. If we are pulling credit reports, where are the credit authorizations going? Is there going to be a new certification.
- 5-6 - C and D - This appears to be requirements for a corporation. Basically credit reports are to be pulled on any Principal of the Operator. Maybe just list C. Principals of the Operator with a footnote. If lenders are pulling credit reports, HUD should clarify where are the credit authorizations must go. Will HUD develop a new a new certification?
- 5-8 - numbers are from 8-14, should be 1-7
- 5-12 - HUD should consider adding a section for the Master Lease as a new Section 5-12.
- 8-1 - Under B, we suggest changing “a.” to “1”
- 8-10 - Item D – We suggest changing this item to read “Identification marks of past or estimated flood levels on all structures, **if any exist.**”
- Section 14 - Please change “15” to “14-12.”
- Footnote #13 should reference 8-2B not 10-2B.
- Footnote #15 is listed even though the entire PLI section is omitted for this stage.

**CC. Firm Application - Section 232 New Construction - Two Stage - Final Submission**

- 1-1 - Re-submitting the Check Transmittal Letter, which is done at the initial stage, is redundant and we believe this item should be removed. Then the letters should be redone so you have A and B as Intentionally Omitted, C. is the checklist, and D is the Electronic Submittal Document. There should not be an E.
- 1-3 - insert “be” between ‘should in.’ Also add the recent 2264A supplement to the list.
- 1-4 - We note the following:
  - Footnote #3 is the same thing as ‘submit electronic version as a Word document’;

- Please clarify if the Exhibit A, B, and C are stamps required for each page as well; and
- Should Exhibit C also include a list of Minor Movables?
- 2-1 and 2-2 - Is a new appraisal and market study required if they are not within 120 days? Or are new ones required in general? The Phase I was omitted for the second stage.
- 3-7 - Equity Support Documents – We suggest that this should be a new exhibit just in case the parties that are providing the equity are not a principal. Also, please clarify what tab this would go in.
- Section 4 - Lenders should be able to copy and paste this section, since it's a requirement to complete for each principal. Currently, we cannot copy and paste.
- 4-7 - Change Item B to "Income and Expense Statement" and create a new Item C that will be the Financial Statement Certification.
- 5-6 - C and D - This appears to be requirements for a corporation. Basically credit reports are to be pulled on any Principal of the Operator. Maybe just list C. Principals of the Operator with a footnote. If lenders are pulling credit reports, HUD should clarify where are the credit authorizations must go. Will HUD develop a new a new certification?
- 5-8 - The numbers are from 8-14, but should be 1-7.
- 5-12 - HUD should consider adding a section for the Master Lease as a new Section 5-12.
- 8-5 - no longer required, since this is now required at the initial submission
- 8-6 - no longer required, since this is now required at the initial submission
- 13-10 - letter B should be #7; letter C and D, should be B and C
- Section 14 - Please change "15" to "14-12."
- Footnote#8 needs a dash after it.
- Footnote #13 should reference 8-2B not 10-2B

**DD. Firm Application Checklist Section 232 – Substantial Rehabilitation Two Stage – Final Submission**

- Item 8-1 – Change "Intentionally Omitted" to "Purchase Amendments or extensions since initial firm submission."
- Item 14-9 – Change B-181 to B-108

**EE. Firm Application Checklist Section 232 – Substantial Rehabilitation – Single Stage**

- Item 14-9 – Change B-181 to B-108

**FF. Firm Application Checklist Section 232/223(f)**

- Page 1 - Portfolios - For portfolios being submitted and reviewed in underwriting by HUD at relatively the same time, we believe that the portions of Section 1 should be added to the list of items that may be submitted in one (or more) Master Mortgage

Credit submissions. A portion of the original underwriting can also be consistent across the portfolio (i.e. portions of the underwriting narrative, the Lender's consolidated certification, the Contact List, copies of email guidance from HUD, copies of the HUD 2 and a copy of the portfolio letters.)

- Items 5-6.C. and D. – Shareholders should be expanded to include members of a limited liability company and limited partners of a limited partnership
- Items 7, 9, and 10 may possibly add requirements that go beyond the otherwise required submissions. Generally, all documents for entities not otherwise required to be reviewed are not necessary. Only organizational type documents for the signature entities.
- Item 8-4 – Please add “if required” after “Owner’s Certification” because it will only be required if using an old survey.
- Item 10-4 – The first three bullets should have the same \$10,000 threshold applied as in the 4<sup>th</sup> bullet.

**GG. Firm Application Checklist - Section 232/223(a)(7)**

- Item 9 – We believe this should be removed from the checklist and be covered in the narrative only. Having the site visit handled in two different documents creates the concern of inconsistent requirements or variations on the same requests that will lead to confusing and possibly conflicting requirements/requests/information. The items listed in Section 9 are vague and need clarity if they remain. For example -
  - Item 9.C. Lender Representative Qualifications - What qualification are required? This question is not in narrative.
  - Item 9.D. Describe property general condition – What is HUD looking for specifically.
  - Item 9.F. - confirm REAC deficiencies have been addressed. The lender may not have access to REAC report. Also, lenders not qualified to make this determination.
  - Item 9.H. - General photographs are welcome (Optional) – The proposed narrative indicates photos are required, not optional.
- Item 16 – Please clarify if items B, C, and D copies of what currently is in place or drafts, if necessary, of the items to be recorded at closing?
- End Note iv should be reflected in the narrative.
- Supplemental Checklist C - Parent of Operator. No discussion of parent is found in narrative. Therefore, this item should be removed from the checklist.
- Supplemental Checklist D - Management Agent. Item D-3 is applicable based on a reference to a footnote. There are no applicable footnotes.

- Supplemental Checklists, Footnotes. Cross references need to be clarified and consistent. Right now, there are at least two different numerical systems used.

#### **HH. General Comments on Lender Narratives –**

- The narrative now requires the lender to certify that it does not know, or have any reason to believe, that any of the assertions in the other Consolidated Certifications submitted are inaccurate or incomplete. We believe Congress has already provided HUD protection in this regard by enacting 18 USC Sections 1001 and 1010, and therefore this provision should be deleted from all the Narratives.
- The narratives indicate that HUD requires the Management Agreement to permit HUD to terminate the Agreement without cause. If the Management Agent is performing, we think allowing HUD to terminate such agreement without cause in an unjust extension of Federal power. Therefore, we request that those requirements be amended to state that HUD may terminate with cause.

#### **II. Lender Narrative - Section 232/223(f) Refinance**

- Hypothetical Conditions and Extraordinary Assumptions –Underwriting has always been about projecting future income while understanding the relationship between historical operations, current and future market conditions and projected operations. An As Stabilized value may be more appropriate than ‘as is’ for many reasons including insurance repairs, change of use, etc. Removing underwriting judgment is not appropriate. In addition, if underwriting is required to be followed strictly to stabilized (existing) operations, there should never be a need for a debt service reserve fund.
- Lender’s Underwriter – HUD is now proposing that the inspecting underwriter be underwriter of record that is assigned to the project. This standard is extremely high and is inconsistent with other lending programs and HUD practices, and conflicts with the requirements stated below this section in the “Inspecting Underwriter” section. HUD has previously allowed other qualified underwriters to visit these properties. Of course, no employee should be able to sign as the inspecting underwriter if they earn a commission on the loan, but a qualified underwriter, servicing and asset management professional or construction cost analyst should be acceptable in this regard to make a visit to the property. Consistent with the ‘Inspecting Underwriter’ section, the inspecting underwriter should also sign the narrative.
- Credit History - The comment about the numerical credit score is confusing. The FICO scale is a standardized scale used throughout the credit industry. Why would an underwriter be required each time to identify what a particular score means? Shouldn’t the reviewer understand that meaning? This comment applies throughout where this requirement is stated.

**JJ. Lender Narrative – Section 232/223(a)7 Refinance**

- In general, there is a lot of redundant information being provided. These redundancies should be eliminated to the extent reasonable.
- NOI Analysis indicates that “If either a decrease in reimbursement rate or an increased net operating income are projected, a more detailed analysis of the net operating income should be provided.” HUD should provide a specified format they want the information presented in to allow for “standardized” review and approval of information presented.
- Compliance. This section should be deleted in its entirety. The lender may or may not have access to any or all of this information. It is more appropriately added to the Mortgagor’s Consolidated Certification. They are in the best position to make these statements and have access to the required information.
- Professional Liability Coverage. Key question 2 has been eliminated. What is the applicable loss history required?
- Transaction Repayment Period – this section does not appear to add value. If this is related to a new policy regarding an acceptable repayment period, the policy should be articulated and discussed through the normal process.
- PCNA Addendum, Key Question 1.a. The repair escrow is 110% on a 223(a)(7), not 120%.
- Environmental Addendum. The information in this addendum is already contained in the 4128. This addendum should be eliminated entirely.
- On Page 7, under Lender’s Site Visit, HUD asks “Do the number of beds and their use match what the facility license states?” This would seem to require the lender to enter each unit and make a complete bed count. This is probably not possible for every type of facility and is appears an unreasonable request. Therefore, we ask that this be deleted.

**KK. Lender Narrative – New Construction Section 232– Single Stage**

- On page 6, under the Independent Units” section, we suggest making the following change - “There will be unlicensed/independent ~~units~~ **beds** at the subject; however, the total does not exceed 25%.”
- On page 6, under Program Guidance, we suggest the following changes - “Waivers to exceed the 25% limit will be considered on a case by case basis for good

- cause. Please note that OHP to date has not provided a waiver if the percentage of Independent Living ~~units~~ **beds** exceeds **30%** of the total project ~~units~~ **beds.**”
- At the end of the section titled “Pro Forma Appraiser’s Conclusions,” we suggest adding the following new bullet point - “Lender Modifications of Value - If the lender disagrees with the appraiser’s value conclusion, discuss here. If not, state ‘None.’”
  - Under the “Net Income Analysis” section on page 41, the term “Net Income” is not defined. The asterisk does not have a footnote associated with it.
  - Under “interest rate” section on page 63, add “float days,” after “the base rate.”

#### **LL. General Comments for all HUD Commitments**

- There is a tremendous concern that by publishing the forms of the HUD Commitments, that HUD will be restricted in its ability to modify provisions to reflect the actual facts of the loan being insured. Therefore, we request that HUD provide authority in the commitments for HUD staff to adjust the Commitments as necessary to reflect the facts of the case or changes in the relevant HUD requirements. For example, the Commitments include the mortgage insurance premiums applicable to the specific programs. However, if those MIP rates are changed, HUD staff will need the flexibility to modify the Commitments as appropriate without the need/burden of going through a regulatory process to amend a document.
- In order to be consistent with the new loan/production documents, that HUD should replace "Mortgagee" with "Lender," "Mortgagor" with "Borrower," and "Mortgage" should be replaced with "Security Instrument.”
- We support the ABA’s comment that the Commitments should reflect that the Identity of Interest operator of the Project must provide a security agreement, UCC-1 financing statements and deposit account control agreements, while the Borrower, if not the operator of the Project, must provide UCC-1 financing statements.
- PCNA Reports - We suggest that HUD require the first PCNA report to be completed on or before the 10 year anniversary date of initial or initial/final endorsement of the HUD-insured Note. That date is much more easily identifiable by future HUD and Lender personnel as opposed to the date of the initial PCNA, which may have been updated or revised during the period between submission of the application and closing of the loan.
- Debt Service Coverage Ratios. In order to allow HUD staff to appropriately structure transactions to their underwriting decisions, and to decrease the need for future revisions to the form documents, we request that the published form of Commitments omit a specific debt service coverage ratio and a specific time period. In fact, any parameters as to these requirements should be included in a handbook that can be adjusted as the industry and HUD’s needs/preferences changes over the years to

come. Leaving the debt service coverage ratio and time period blank in the form Commitments allows the required debt service coverage ratio to be increased or decreased and time period changed as warranted by Program Obligations or transaction specific underwriting decisions. Furthermore, there is a lack of uniformity among the draft Commitments in the language relating to debt service coverage requirements. The language should be identical across the Commitments with the exception of the Commitment for Insurance of Advances – Supplemental Loan Section 232 Pursuant to Section 241(a), which appropriately ties the beginning date for operating deficits to the date of substantial completion, rather than receipt of a certificate of occupancy or occupancy of beds/units by residents.

- Forms 92442A, 92329, 92447, and 92438 are no longer required and references should be deleted.
- For construction loans with a split rate, there is no programmatic requirement which specifies when the change in rate must occur. Therefore, rather than specifically tying the rate change to the construction period, we believe the language of the existing Commitment form is preferable, as it provides flexibility for the parties to negotiate, subject to HUD review and approval, when the rate will change from the construction loan rate to the permanent loan rate.
- We suggest leaving the term of the loan and amortization period blank to allow for adjusts below the maximum permitted by Section 232.

**MM. Commitment for Insurance of Advances 2 Stage, Final (Amended and Restated) Submittal Section 232**

- Paragraph 2(b) – We suggest changing “15%” to “[15% or 25%, as applicable].”