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## **Chapter 11**

# **Lender Underwriting, HUD Review and Closing Matters**

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### **11.1 General**

The MAP program delegates due diligence and underwriting responsibility to MAP approved Lenders and their Underwriters. The MAP approved Underwriter must be completely familiar with the contents of the MAP Guide, have demonstrated experience and mastery of commercial lending practices and real estate finance, and have a working knowledge of HUD regulatory and statutory authority.

HUD retains commitment authority and responsibility for final determination of acceptable risk to the insurance fund, as well as certain technical and compliance responsibilities. However, this in no way relieves the MAP Lender from responsibility for their underwriting and programmatic compliance.

The basic function of a MAP approved Underwriter is to objectively evaluate the following factors in making a credit approval recommendation:

- Character, creditworthiness, competence, and capacity of the borrower and development team members.
- Cash flow sufficient to service the proposed loan.
- Collateral quality, including valuation, physical condition, environmental factors and location.
- Capital structure, including all proposed indebtedness and equity.
- Cash available to close, given the total mortgageable and non-mortgageable costs of the transaction; and
- Compliance with HUD program and processing requirements.

The Underwriter must identify all material risks and weaknesses, with appropriate mitigants including quantitative analysis and stress testing to identify the impact of “worst case” scenarios. If a transaction recommended by a lender is properly underwritten and processed, and is complete and technically compliant, HUD’s role is to review the application and the lender can assume a timely determination.

If the application fails to identify material underwriting risks and mitigants, or has material processing or compliance deficiencies, HUD has the option to reject the application, re-underwrite it and approve with conditions, or return the application to the lender for modifications to address deficiencies.

The responsibilities of MAP lender and HUD underwriters are addressed in Chapter 4 (Processing) and in this chapter.

## **11.2 Lender Underwriting**

- A. The lender is responsible for assigning a MAP approved Underwriter for the Pre-application or Firm Commitment submission. The MAP approved Underwriter is responsible for the selection and performance of the third-party professionals (both the firms and individuals). The Construction Loan Administrator must be approved prior to the Firm Commitment stage if the closing and servicing lender has been identified, or as soon as identified.

The lender's MAP approved Underwriter is responsible for oversight and performance of the following tasks:

1. Data collection:
  - a. Due diligence, including selection and management of their third-party consultants. The MAP Lender is responsible for underwriting the loan. This responsibility necessarily requires the lender's oversight, acceptance and recommendation to HUD for approval of the conclusions and recommendations of the third-party reports, except as modified by the lender, and as explained, and justified in the lender's underwriting.
  - b. Loan Processing.
  - c. Mortgage Credit review.
  - d. Underwriting.
  - e. Obtaining internal loan approval (from the lender's loan committee or other process);
  - f. Submission of the loan application to the appropriate Regional Center or Satellite Office and payment of the application fee.
  - g. Responding to HUD deficiency letters and requests for information.
  - h. Coordinating with the borrower and their counsel, and follow-up to get the loan to closing; and
  - i. Coordination with construction loan administration, cost certification, and servicing.

B. Pre-application. The lender's underwriter must determine that the submission meets the requirements of this Guide and represents an acceptable risk to the insurance fund. The pre-application submission to the field office must include a Standardized Underwriter Narrative together with any additional information and all narrative attachments, which provide:

1. A summary of the relevant data and quantitative analysis.
2. Strengths, weaknesses, risks and mitigants.
3. A summary of programmatic eligibility and technical factors considered.
4. A description of the proposed project and the surrounding market conditions, including demand, extent of competition, vacancy rates, market absorption, details about features of the proposal (e.g., zoning, unusual site conditions, environmental) which may present potential problems, and any other information that would be useful to analyze the proposal.
5. A description of the individual or entity in control of the borrower (plus general contractor and management agent, if known), their qualifications, the identification of principals and a preliminary mortgage credit and creditworthiness review.
6. Explanations for any differences between the underwriting conclusions and the third-party due diligence.
7. A list of proposed in-house and third-party reviewers of the application and their qualifications.

Further details on the required content of the Standardized Underwriter's Narrative and the materials to be included in the pre-application can be found in this Guide and appendices.

C. Firm Commitment Application: The lender's MAP Underwriter must review the in-house and third-party reports to ensure the processing of the loan is in accordance with the requirements of HUD program and processing requirements and determine that the loan recommendation represents an acceptable risk and is financially sound. The MAP Underwriter must document any changes made to the technical reports and must submit an updated, signed Standardized Underwriter's Narrative describing all relevant aspects of the mortgage transaction including a full discussion of the following:

1. Characteristics of the proposed mortgage loan that make it financially sound or an acceptable risk, with the reasons the lender recommends the loan.
2. All significant risk factors and risk mitigants.
3. Changes in the project from the pre-application stage including changes in sponsorship, proposed development team and lender reviewers.
4. Evaluation of the mortgage credit and financial capacity of the principals of the borrower and its ability to repay the loan.
5. Evaluation of the financial and technical capacity of the general contractor to build/rehabilitate the project.
6. Property financial analysis including both actual operating history and projected trends.

7. Property physical description.
8. History of borrower's involvement including the borrower's equity investment in the property, and if applicable, any previous engagements to obtain FHA financing for the property.
9. Analysis of market, rents, expenses and estimated rent-up and operating deficit.
10. Adequacy of the proposed Reserve for Replacement.
11. Summary of environmental conditions, including any issues or potential issues and their mitigants.
12. Documentation of any changes the underwriter made to the conclusions of the appraisal/technical reports with justification.
13. Requests for any waivers of HUD program and processing requirements with supporting documentation and justification summary.
14. Certifications from the individual reviewers (see Section 11.2.H).
15. Notify HUD of the rate lock and allow sufficient time to process any required amendment to the Firm Commitment prior to endorsement. If the borrower and the lender choose to rate lock prior to the submission of draft closing documents to HUD, they do so at their own risk. As always, lenders and borrowers assume the risk of having to pay extension fees.

Further details on the required content of the Standardized Underwriter's Narrative and the materials to be included in the Firm Commitment application can be found in this Guide and appendices.

- D. The MAP Underwriter should perform the site visit for new construction properties and for existing properties an on-site lease audit and physical inspection representing a sample of each unit type. Alternatively, an analyst, underwriter trainee, or different MAP approved underwriter of the lender acting under the direction of the MAP Underwriter (i.e., one that does not report to the originator) may perform the site visit and physical inspection of the units. The underwriter or trainee who conducts the inspection must be identified in the narrative. Typically, the leases that are audited will be the same as the units that are inspected, as follows:
1. For projects 50 units or less: Inspect at least 1 of each unit type, to include a representative sample of 10% of the units.
  2. For projects between 51 and 250 units: Inspect at least 1 of each unit type, to include a representative sample of 10 units plus 5% of the total number of units greater than 50.
  3. For projects greater than 250 units: Inspect at least 1 of each unit type, to include a representative sample of 15 units, plus 2% of the total number of units greater than 250, for a maximum of 50 units.
  4. The terms of the leases must be compared to the rent roll, verifying the unit number, resident name, lease commencement date, expiration date, concessions, if any, and monthly rent. The underwriter must confirm that this data is consistent with the assumptions used in the underwriting analysis.

5. Any inconsistencies or conflicts between the leases, rent roll and the underwritten revenue assumptions must be fully investigated and explained. The scope and results of the lease audit review must be discussed in the Underwriter's Narrative. The underwriter is required to retain a copy of the individual leases reviewed in the underwriter's working papers, which may be subject to audit but should not be included in the Firm Commitment application submission. Some lease files, especially for long-term residents, may be extensive. Only the most recent leases from the audit review should be retained. However, if irregularities exist in the leasing history (such as missing lease pages, unexplained modifications to lease terms or parties to the lease, for example), the entire leasing history for the applicable unit should be retained by the lender, and any irregularities must be explained in the lender's Underwriters Narrative that is submitted with the loan application.
6. The MAP Underwriter is responsible for the review and reconciliation of the third-party reports and the results of the mortgage credit review and other due diligence.

E. Lender Due Diligence Certification: With each Firm Commitment package, the lender must submit a letter signed by the MAP approved Underwriter which certifies that:

1. The lender has reviewed all in-house and third-party forms/reports/reviews.
2. The preparer of the forms/reports/reviews is qualified as required by this Guide and has all required insurance coverage(s).
3. The forms/reports/reviews were prepared in the manner required by the Guide and are complete and accurate.
4. The lender has identified all staff and third-party contractors who contributed to the underwriting presentation and their role; and
5. The proposed loan represents an acceptable risk to the Department and is financially sound, based upon the lender's review and analysis, and that the application complies with all HUD program and processing requirements.

The letter must include the following certification and language:

I am an authorized agent of the lender and employed full time by the MAP Lender. I have no side deals, agreements, or other financial considerations in connection with this transaction and will not enter into such arrangement in connection with this transaction

G. Third-party report Certifications. The following Certification must be included in the lender's third-party reports:

I understand that my (appraisal, market study or architectural, cost, environmental, or other specialized report) will be used by \_\_\_\_\_ (name of MAP Lender) to document to the U.S. Department of Housing and Urban Development that the MAP Lender's application for FHA

multifamily mortgage insurance was prepared and reviewed in accordance with HUD requirements. This report has been made, presented, and delivered for the purpose of influencing an official action of the FHA, and of the Commissioner, and may be relied upon by the Commissioner as a true statement of the facts contained therein. I certify that my review was in compliance with HUD program and processing requirements applicable on the date of my review and that I have no financial interest or family relationship with the officers, directors, shareholders, members or partners of the lender or affiliated entities, Borrower or affiliated entities, the general contractor, any subcontractors, the buyer or seller of the proposed property and that I have not engaged in any business that might present a conflict of interest.

- H. Both the MAP Underwriter and third-party certifications must contain the following warning language:

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I hereby certify under penalty of perjury that all of the information I have provided on this form and in any accompanying documentation is true and accurate. I acknowledge that if I knowingly have made any false, fictitious, or fraudulent statement, representation, or certification on this form or on any accompanying documents, I may be subject to criminal, civil, and/or administrative sanctions, including fines, penalties, and/or imprisonment under applicable federal law, including but not limited to 12 U.S.C. §§ 1708 and 1735f-14, and 1833a; 18 U.S.C. §§1001, 1006, 1010, 1012, and 1014; and 31 U.S.C. §§3729 and 3802.

- I. HUD Forms Submission. The lender must submit a Standardized Underwriting Narrative, d and HUD-92013-C, LIHTC Summary Report required only for applications with LIHTCs, . The HUD-92264 and HUD-92264-A forms are still required to be submitted and signed by the lender and third parties preparing the documents. The lender must certify that all parties preparing forms, reports or reviews are qualified as required by the HUD program and processing requirements.

### **11.3 HUD Regional Center or Satellite Office Underwriting Review**

- A. Under the direction of the MF Regional Center Director or other appropriate managers, the HUD underwriter is responsible for coordinating with technical support and other HUD staff, and the oversight and performance of the following tasks:
1. Conduct of Concept meetings and follow-up communication.
  2. Review of proposed MAP Lender and Underwriters and reporting to Asset Management and Counterparty Oversight Division of any concerns.
  3. Working with the Workload Distribution Lead for the Regional Center and/or Satellite Office and other appropriate officials in managing workload assignments for new applications.

4. Screening applications for completeness, and fiscal controls for new application submissions.
5. Conducting an “Early Warning System” screening to determine what level of underwriter and technical specialist review is required given the complexity and risk factors associated with the transaction, and specific risk issues in the transaction.
6. After screening or during the underwriting and technical review, the Regional Center or Satellite Office will advise the lender of deficiencies in the application, and the lender will have 5 business days to correct the defects or deficiencies. If the defects/deficiencies cannot be corrected within the 5 business days, or such other time frame as the Regional Center Director determines as appropriate, HUD will reject the application.
7. Acknowledging receipt of the application, management of the queue and estimating processing target dates.
8. Advising the lender if there are deficiencies or additional information is needed.
9. Performing technical reviews based on lender underwriting and third-party reports or arranging for technical specialist reviews for higher risk or complex transactions or functions that need specific technical analysis given the features of a particular transaction.
10. Recommending transactions for loan approval (or rejection) decisions.
11. Preparing and issuing Pre-application Invitation letters and Firm Commitments.
12. Assisting the closing coordinator as needed in coordinating the closing process with OGC, the lender, and borrower’s team.
13. Coordinating with Asset Management in turnover of files, briefing about conditions of the Firm Commitment, and providing information necessary for Asset Management’s risk rating of the transaction; and
14. Coordinating with Asset Management and/or HUD’s Departmental Enforcement Center (DEC) to ensure that any open DEC referrals with respect to the borrower or the proposed managing agent are resolved.

B. Pre-application and Firm Commitment Processing.

The HUD underwriter will conduct or arrange for the Pre-application or Firm Commitment review, including any required technical specialist reviews. The HUD underwriter will coordinate the technical reviews, resolve any inconsistencies and make a recommendation as to whether an application should be approved, modified or rejected. The HUD underwriter must document and justify any recommendation to approve a loan or to require conditions with which one or more technical reviewers does not concur.

If a HUD technical review does not concur with the conclusions approved by the Regional Center or Satellite Office Director, the technical reviewer may document the non-concurrence separately in the file. The HUD underwriter should address the non-concurrence and document how the issues were addressed in the loan approval decision.

Upon completion of the technical reviews and the environmental assessment, the HUD Underwriter must prepare a memorandum to the Regional Center or Satellite Office Director summarizing the individual reviews of the specialists, any proposed waivers of Guide requirements and the Team Leader's overall recommendation.

C. Underwriting Recommendation.

The memorandum recommending loan approval will be in the standard loan committee report or alternative format, and specifically address:

1. The adequacy of the initial operating deficit for any new construction or substantial rehabilitation loans.
2. The adequacy of the working capital escrow and construction contingency for any new construction or substantial rehabilitation loans.
3. The adequacy of the initial deposit and ongoing payments to the reserve for replacement.
4. A description of any non-critical repairs to be performed after closing for Section 223(f) loans.
5. In a tax credit transaction, the schedule of the equity contribution at closing and remainder during various stages of the construction period.
6. The architectural drawings and specifications; and
7. Any environmental conditions or other concerns.

Back-up documentation necessary to prepare and issue the Firm Commitment must be attached or available, including Previous Participation Certification from APPS, the technical staff reviews, the lender narrative summary, the lender's technical reviews, Forms HUD-92264 and HUD-92264-A signed by the HUD reviewers and Team Leader. Where the HUD underwriter has rejected a conclusion by a technical reviewer or has modified any technical recommendation by the lender or HUD reviewer, documentation and justification must be included in the memorandum.

HUD's review appraisers have the option to modify appraisal conclusions internally or to return the application to the lender for revision of the appraisal. Should the HUD review appraiser choose to modify the appraised value, rent or expense conclusions internally, as per USPAP Standard 3, this opinion becomes its own appraisal whether it concurs with the opinion of value in the work under review or differs from the opinion of value.

D. Firm Commitment Issuance, Amendments, Reissuance, and Extensions.

1. Upon issuance of a Firm Commitment, the HUD Underwriter must provide such support as needed and requested to the closing coordinator to prepare for closing, and provide files, data, and information as needed by the Account Executive to facilitate Asset

Management's rating and servicing of the loan.

2. Firm Commitments will be issued for a term of 60 calendar days. The lender has the option of requesting an extension of the Commitment to prepare for the Initial Endorsement submission. The Regional Center Director may grant one or more extensions, for up to a total of 120 calendar days from the original expiration date. An additional 60-day extension for good cause may be approved by the Director of Multifamily Production in HUD Headquarters, after which a reopening fee will be required.

When the Regional Center Director determines that extenuating circumstances justify a limited extension of an outstanding Firm Commitment, the lender must certify and Regional Center Director must concur that the documentation provided by the lender demonstrates that granting the extension will not likely change the underwriting data and assumptions on which the Firm Commitment was issued or undermine the feasibility of the project. Such factors include but are not limited to a change in the borrower's or development team's configuration or financial capacity, market, inflation or other factors impacting cost. A change in the interest rate or other terms or conditions of the Firm Commitment may require reprocessing and amendment of the Firm Commitment.

If a Firm Commitment has been extended beyond 120 calendar days from its original date, the lender must provide an updated appraisal/market study, cost and mortgage credit, or other information as required by the Regional Center or Satellite Office for review prior to loan closing.

3. Only the Regional Director, Production Division Director, and other officials formally designated to act in these capacities are authorized to sign Firm Commitments and/or endorse Insured Mortgage Notes.
4. The Department has limited flexibility to permit the resubmission of rejected applications. In accordance with the procedures contained in HUD Handbook 4410.1 Rev-2, Project Fiscal Procedures will apply.
5. Amended Commitments. An amended commitment bears the same date as the original commitment, followed by the date of the amendment, although the applicable regulations are those in effect on the original commitment issuance date. Most underwriting changes, such as changes in mortgage amount and/or interest rate, will be incorporated in letter amendments to the commitment.
6. Additional Conditions. Additional Conditions are part of the Firm Commitment. Changes to the specific terms of such conditions or allowing closings to proceed when conditions are not yet met, must be documented with a letter amendment to the Firm Commitment.

- E. Reissued Commitments. A reissued commitment will have its own date which will control what regulations apply and how long the commitment will remain in effect and will substitute for the originally issued commitment. A lender which accepts a reissued commitment will no longer have rights granted under the original, or a previously amended, commitment. A reissued commitment is required for:
1. Requests for reconsideration of an expired or terminated commitment.
  2. Changes in project location.
  3. Major changes in plans and specifications; and
  4. Reprocessing to reflect changes in the MIP.
- F. Waivers.
1. Statutory requirements shall not be waived under any circumstance. Regulations may only be waived by an Assistant Secretary (usually the FHA Commissioner for MAP loan issues other than environmental regulatory waivers).
  2. Requested waivers of this Guide must be submitted for Regional Counsel review to ensure there is no conflict with a statute or regulation. The Regional Center Director may waive requirements of this Guide that are not statutory or regulatory except for the following matters which must be approved in HQ:
    - a. Debt coverage ratios for all programs.
    - b. Loan to value ratios for Section 223(f) loans.
    - c. Loan to cost ratios for the 221(d) and 220 programs.
    - d. Traditional Application Processing for MAP eligible transactions.
    - e. Substantive modifications to the Ground Lease addendum form (HUD-92070M).
    - f. The requirement for a Single Asset Borrower Entity (see 24 CFR 200.5).
    - g. The prohibition on a lender advancing fees for payment of discounts on behalf of the Borrower.
    - h. Payment of broker or referral fees to any party with an identity of interest with the borrower or its affiliates.
    - i. Extensions of Firm Commitments beyond 180 days of issuance (original term of 60 days plus up to a 120-day extension);
    - j. Approval of applications in which the Regional Environmental Officer recommends disapproval of an FHA mortgage insurance application; and
    - k. Waivers of Chapter 19 (Closing Guide) as well as any waiver of, or revision to, closing documents must be processed pursuant to the procedures in Section 19.2.01.

3. The Regional Center Director will submit to the Director of the Office of Multifamily Housing Production all waiver requests requiring HQ approval as early as possible. Requests for regulatory waivers will take longer to process since they require review and concurrence from the Office of General Counsel and the Deputy Assistant Secretary for Multifamily Housing, as well as the approval of the FHA Commissioner. HQ will not consider waiver requests submitted directly by MAP Lenders.
4. Any waiver granted in connection with the proposed transaction must be documented in the field office docket and HQ docket, along with the lender's request and field office request using Form HUD-2, as further set forth in Section 1.4.E. Waivers granted by the Regional Center, along with supporting documentation, must be submitted to the Office of Multifamily Housing Production to determine if changes to this Guide or the regulations are necessary.

#### G. Interest Rate Lock.

The lender must notify HUD of interest rate lock (e.g. Ginnie Mae investor trade agreement) to allow sufficient time to process any amendments to the Firm Commitment. While the lender may elect to lock rate after receipt of a commitment to insure, lenders and borrowers assume all risk of fees due (e.g. investor extension or delivery fees) associated with the timing of transaction closing and mortgage-backed security pooling or issuance.

## **11.4 Program Closing Provisions**

Chapter 19 (Closing Guide) addresses various program closing provisions and procedures that the lender must be aware of to prepare for initial closing, final closing and initial/final closing events. The HUD underwriter's responsibilities (or Closing Coordinator, as applicable) include:

- A. Ensuring all Special Conditions to the Commitment have been individually addressed and satisfied, including the resolution of any open DEC referrals, prior to or in tandem with closing.
- B. Reprocessing and amending Firm Commitments as necessary and appropriate [Cross references: FHA Closing Guide Section 19.1.02 and Regulations 24 CFR 200.46 for Commitment Issuance & 200.47 for Firm Commitment].
- C. Extending or Re-issuing Firm Commitments [Note: The Reopening fee for an expired firm commitment is \$0.50 per thousand (Regulations 24 CFR 200.40(g)); Cross references: 24 CFR 200.46 and 200.47];
- D. Coordinating with Asset Management staff to ensure the orderly transition from Production to Servicing; and
- E. Coordinating the closing schedule with OGC, the lender, and borrower.

## 11.5 Loan Fees

- A. Loan Fees. Lenders may charge loan origination and placement fees, both of which are mortgageable, and the combination of which cannot exceed 3.5% of the mortgage amount (or 5.5% for tax-exempt bond financing) for Section 223(f) refinancing transactions and new construction or substantial rehabilitation transactions. The maximum fees for Section 223(a)(7) loans is 2% for loans greater than \$2 million, and up to \$40,000 for loan amounts less than \$2 million. In addition to loan origination and placement fees, lenders may realize trade profit (also known as marketing gain) on the sale of Ginnie Mae or other mortgage backed securities.

Lenders are required to report loan fees earned that exceed five percent (5%) of the insured loan amount on each FHA-insured loan over \$2,000,000 endorsed during the lender's fiscal year period covered in its audited financial statements. Loan fees include: (a) origination and placement fees as permitted by this Guide, plus (b) trade profit, trade premium or marketing gain earned on the sale of the Ginnie Mae security at a value above par, even if the security sale is delayed until after endorsement, minus (c) loan fees applied by the lender to its legal expenses incurred in connection with loan closing. This reporting is confidential and is not subject to release under the Freedom of Information Act but will be examined by HUD in evaluating counterparty risk as part of the lender monitoring responsibility.

The loan fees on a particular transaction that exceed 5% must be reported by both the originating lender and closing lender when the loan is assigned for closing and fees are split between the two entities. Trade profit fees used to pay prepayment penalties on behalf of a borrower in a Section 223(a)(7) transaction are not net out of the loan fees in calculating whether or not the loan fees exceeded 5%.

- B. Loan fees are earned as follows:
1. 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.
  2. Permanent loan fees and permanent loan extension fees, to the extent a separate permanent loan is anticipated, are earned at final closing.
  3. 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.
- C. Deferred Fee Collection. Section 8.15.D.4 sets forth provisions for the deferred collection of fees in connection with tax-exempt bond financing.

D. Broker's Fees.

1. Fees to mortgage brokers are allowed so long as they are disclosed in the Underwriting Narrative and form HUD-92434M (or HUD-92455M, as appropriate), there is no identity of interest between the mortgage broker or its affiliates, or the lender and its affiliates, and the borrower or its affiliates, and the broker is actively engaged in the business of mortgage loan origination.

Referral fees to other parties, such as consultants, management agents, or entities or individuals with any identity of interest with the borrower or its affiliates are prohibited.

2. Lender or affiliates of lenders 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 the Director of Multifamily Production in HUD Headquarters. See 24 CFR 202.5(l). Refer also to Section 2.4 of the MAP Guide.

## 11.6 Title Matters

- A. As noted in the Application Checklist, a preliminary title commitment or report should be reviewed as part of the Firm Commitment processing. It is used to validate existing indebtedness, ensure correct legal description of the parcel(s) to be mortgaged, and the adequacy of title with respect to matters such as liens, easements, restrictions and other exceptions. Please see Chapter 19 (Closing Guide) for additional requirements related to title and survey matters.

B. Air Rights and Other Shared Interest Projects.

1. A three-dimensional air rights map for air rights projects 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.
2. 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 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 air rights project common facilities. The agreement must grant rights to the HUD project site and its residents to use the common facilities. If the HUD project is subject to property/homeowner association documents such as with a cooperative, these documents may provide for maintenance, access and cost sharing, which must be determined acceptable to HUD prior to or as a condition of the Firm Commitment.
3. If the air rights parcel is on a leasehold, it must include the Ground Lease addendum form (HUD-92070M) with minimal modifications to reflect an air rights lease.

4. The Regional Center or Satellite Office Director must:
  - a. Assure 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 residents the right to use the common facilities.

## **11.7 Borrower Entity's Organizational Documents**

### **A. Borrower Entity's Organizational Documents**

1. General. Draft (or final) organizational documents should be reviewed as part of the creditworthiness analysis during Firm Commitment underwriting. Organizational documents for the borrower entity must be submitted at closing. The specific documents required for each type of borrower entity are set forth in Chapter 19 (Closing Guide). These requirements apply to all types of closings including initial, initial/final, and final endorsements.
2. Terms. The documents must include the required language found in Chapter 19 (Closing Guide).

## **11.8 Note**

- A. Term. The term must be the same as specified in the Firm Commitment, which must be within the maximum terms allowed by the program and not less than 10 years.
  1. Generally, for most new construction or substantial rehabilitation rental projects, the term, calculated from the date of completion of construction, may not exceed the lesser of 40 years or 75% of the project's remaining economic life.
  2. For existing projects (insured under Section 207 pursuant to Section 223(f)), the term must be not less than 10 years, and may not exceed the lesser of:
    - a. 35 years, or
    - b. 75% of the estimated remaining economic life of the physical improvements.
  3. For 223(a)(7) projects, the term of the mortgage is statutorily limited to 12 years beyond the remaining term of the existing mortgage (excluding any previous Section 223(a)(7) loan) so long as the PCNA and underwriting determine that the loan term is no more than 75% of the remaining useful life of the property.
- B. Prepayment Provisions. Generally, prepayment lockout and/or penalty structures that are commercially reasonable and consistent with industry practice, that expire after 10 years and are no more than 10% during any of the first 10 years, and no more than 1% thereafter are acceptable, so long as the interest rate is commercially reasonable at the time of the rate lock.

The following additional conditions and terms apply:

1. Market rate properties.
    - a. Prepayment must be permitted in whole or in part so long as 30 days advance written notice is given to lender of intent to prepay, except for Section 223(f) loans (subject to statutory five year prepayment lockout), which must meet certain conditions and receive HUD approval if the property will be converted to a use other than rental housing, in order to prepay within the five year prepayment lockout.
    - b. Prepayments must be permitted for up to 15% of the original principal amount in any one calendar year without a prepayment charge. Prepayments exceeding 15% may be subject to a reasonable charge agreed to by borrower and lender and included in the Mortgage.
    - c. Notwithstanding the borrower's right to prepay, a HUD 9807 must be processed in order for HUD to release the recorded Regulatory Agreement.
  2. Affordable or subsidized properties.
    - a. FHA insured projects which are, or formerly were, affordable or subsidized and are subject to a Use Agreement, Regulatory Agreement, or similar restrictive covenants require prior written consent of HUD to prepay the mortgage debt.
    - b. HUD may approve partial prepayments to reduce succeeding monthly payments over the remaining portion of the original mortgage term or may also approve partial prepayments made after 30 days written notice. Prepayments exceeding 15% of the original principal amount may be subject to a reasonable charge on such excess as agreed to by borrower and lender and included in the Mortgage.
  3. Prepayment of bond financed or Ginnie Mae securitized mortgages. Where the mortgage is given to secure Ginnie Mae mortgage-backed securities or a loan made by a lender that has obtained the funds for the loan by the issuance and sale of bonds or bond anticipation notes, or both, the mortgage may contain a prepayment restriction and prepayment penalty charge acceptable to the Commissioner as to term, amount, and conditions.
- C. Conditions for Including Lockouts and/or Penalties. Compliance with the following conditions is required when prepayment lockouts and/or penalties are permitted.
1. Lender's Certificate and Request for Endorsement. The Lender's Certificate, Form HUD-92434M and the Request for Endorsement, Form HUD-92455M, requires the lender to certify that in the event of a default during the term of the prepayment lockout and/or penalty (i.e., prior to the date on which prepayment may be made with a penalty of one percent or less), it will comply with Program Obligations. The Lender, in order to comply, must:
    - a. Request a 90-day extension of the deadline prescribed by 24 C.F.R. Section 207.258(a) (2) for filing a notice of its intention to file an insurance claim and its election to assign the mortgage.
    - b. Assist the Borrower to arrange refinancing to cure the default and avert an insurance claim if HUD grants the requested (or shorter) extension of the notice filing deadline.

- c. Report to HUD at least monthly on any progress in arranging a refinancing.
  - d. Otherwise cooperate with HUD in taking reasonable steps to avoid an insurance claim.
  - e. Require any successors or assigns to certify in writing that they agree to be bound by these conditions for the remainder of the term of the prepayment lockout and/or penalty period; and
  - f. Notify HUD of the delinquency where a payment is not received by the 16th day of the month in which it is due.
- D. Late Charge Provisions. 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. 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. Where obligations pursuant to tax-exempt bond financing or Ginnie Mae involvement do not impose restrictions independent of the lender's restrictions, HUD may consider exercising an override of prepayment lockout and/or premium provisions imposed by the lender if:
- 1. Borrower has defaulted on the insured loan and HUD has received notice as required by the regulations.
  - 2. HUD determines that the project has been experiencing a net income deficiency, which has not been caused solely by management inadequacy or lack of owner interest, and which is of such a magnitude that the borrower is currently unable to make required debt service payments on the insured loan, pay all project operating expenses and fund all required HUD reserves;
  - 3. HUD finds there is a reasonable likelihood that the Borrower can arrange to refinance the defaulted loan at a lower interest rate or otherwise reduce the debt service payments through partial prepayment; and
  - 4. HUD determines that refinancing the defaulted loan at a lower rate or partial prepayment is necessary to restore the project to a financially viable condition and to avoid a full insurance claim.