



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING
FEDERAL HOUSING COMMISSIONER

September 6, 2013

Notice H-2013-26

Special Attention of: Section 232 Operators
Section 232 Mortgagees
Section 232 Mortgagees
Section 232 Departmental Staff
Office of General Counsel Field Counsel

SUBJECT: Rider to HUD-92323-ORCF, Operator Security Agreement

EXPIRATION: This Notice remains in effect until amended, superseded or rescinded.

This Notice announces the availability of a Rider to Operator Security Agreement (“Rider”), attached hereto. The Rider pertains to HUD-92323-ORCF (“Operator Security Agreement”), the publication of which was announced in the Federal Register on March 14, 2013 (Volume 78, No. 50, pp. 16279-16286).

FHA has received a number of comments expressing concern that the Operator Security Agreement may place unaffiliated, third-party operators in an unfair position. Industry stakeholders have commented that the Operator Security Agreement may expose such operators to unfair financial risk in circumstances where borrowers cause regulatory violations to which fully compliant, fully performing operators do not contribute and over which violations such operators have no control. In response to such concerns, FHA will allow borrower and lender to attach the Rider to Operator Security Agreements in transactions where operators are *not* affiliated with borrowers, subject to the certification in the Rider.

Questions concerning this Rider should be directed to: Kelly Haines, Director, Office of Residential Care Facilities, Kelly.M.Haines@hud.gov, (314) 418-5240.

Carol J. Galante
Assistant Secretary for Housing—Federal Housing Commissioner

Attachment - Rider to Operator Security Agreement

RIDER TO OPERATOR SECURITY AGREEMENT
(Rider)

[Include this Rider for non-affiliated Borrowers and Operators]

- A. Notwithstanding any provision in the Operator Security Agreement to the contrary, upon the occurrence of an Event of Default under the Loan Documents, provided the Operator is not in violation of the Operator Regulatory Agreement, for so long as (i) Operator's lease payments continue to be made (whether directly or indirectly, pursuant to any escrow agreements or other agreements among the parties) to the satisfaction of the Lender; (ii) Operator is not in violation of any provision of the Borrower-Operator Agreement, and (iii) there is no Material Risk of Termination (a "Non-Operator Default Circumstance"), the Lender, on behalf of itself, its successors and assigns, agrees that it will not exercise any remedies available to it under Section 9 of the Operator Security Agreement against Operator or the Collateral.
- B. Should the Lender, its successors or assigns, whether through judicial or non-judicial foreclosure, public or private sale, deed or assignment in lieu of foreclosure, or otherwise, take title to the Land, Improvements and/or other assets of the Borrower (including the Borrower's rights as landlord under the Borrower-Operator Agreement), provided the Healthcare Facility remains in operation and the Operator is not in violation of the Operator's Regulatory Agreement, the Lender and its successors and assigns agree that the term "Obligations" in the Operator Security Agreement shall be limited to the definitions set forth in subsections 1(b)(2), (3) and (4).
- C. Furthermore, Lender agrees that so long as the Operator is not in violation of the Operator Regulatory Agreement, to the extent Operator has funded Escrowed Funds, tax and/or insurance impounds, Lender, on behalf of itself, its successors or assigns, will permit withdrawals by, or utilization of such funds by or on behalf of Operator for their intended purpose. The provisions of this Paragraph C shall supersede any set-off or lien rights of the Lender under Section 1(c) of the Operator Security Agreement.
- D. Upon indefeasible payment in full of the Loan, as determined by Lender, in its sole discretion, and written request by the Operator to do so, Lender agrees to promptly release its lien on the Collateral.
- E. To the extent there is an inconsistency between the provisions of this Rider and the provisions of the Operator Security Agreement, the provisions of this Rider shall be controlling.
- F. Operator certifies that no individual with a financial interest in Operator (direct or indirect, including without limitation any individual with an interest in an entity that has a direct or indirect financial interest in Operator) has, a financial interest in Borrower (direct or indirect, including without limitation any individual with an interest in an entity that has a direct or indirect financial interest in Borrower), except as specifically identified to and approved in writing by HUD for the specific purpose of using this Rider. Operator shall

remake such certification at any time Operator seeks to enforce its rights under this Rider and if Operator cannot make such certification at such time, or HUD otherwise determines in its sole discretion, that such certification is false or inaccurate, this Rider shall be of no force or effect.