

Chapter 16
Cash Flow Structures,
Deposit Account Control Agreements
(DACAs), and Deposit Account
Instruction Service Agreements (DAISAs)

16.1

Introduction

This chapter sets forth general principles to guide HUD staff review of proposed cash flow structures, Deposit Account Control Agreements (DACAs), Deposit Account Instructions and Service Agreements (DAISAs) and lease cost/debt service payment methods. It is the requesting parties' responsibility to establish structures and submit documents that comply with applicable ORCF Section 232 Program rules and that are acceptable to HUD. Operators of healthcare facilities typically generate accounts receivable that arise from governmental healthcare insurance programs (e.g., Medicaid, Medicare, Veterans' Administration Programs, or other governmental entities) ("Governmental Receivables") as well as from commercial insurers, private payors, or miscellaneous revenue ("Non-Governmental Receivables").

- A. **Governmental Receivables.** Healthcare insurance programs typically require that Government Receivables be paid directly to the healthcare provider and/or electronically deposited into a deposit account subject to the provider's control (as opposed to the Lender's control). These programs typically also limit the ability to directly assign such receivables. HUD expects that Governmental Receivables will be initially deposited into a separate account that will be subject to the control of the provider and governed by a Deposit Account Instructions and Services Agreement (DAISA).
- B. **Non-Governmental Receivables.** HUD expects that Non-Governmental Receivables will be initially deposited into an account that is subject to a Deposit Account Control Agreement (DACA) (sometimes referred to as a "Blocked Account Agreement"). HUD also expects that the DAISA will provide that funds from the DAISA account ([government receivables account](#)) will be periodically (i.e., daily unless otherwise approved by HUD) swept from the DAISA account into the DACA account.
- C. **Cash Flow Structures.** Depending on the structure and nature of a particular transaction, the cash flow chart typically includes the placement and number of DAISA and/or DACA accounts, the type of DACA used, and the manner in which lease costs/HUD mortgage loan

40 debt service are made. Occasionally state law or a particular healthcare program may affect
41 how a particular transaction can be structured. Regardless of the cash flow structure, the
42 deposit accounts must comply with any applicable HUD Program Obligations, including any
43 requirements that such accounts be federally insured (or if balances exceed such insurance
44 limits, be held at an institution subject to any ORCF Section 232 Program regulatory
45 exceptions). This may be of particular concern where commingled accounts, with large daily
46 balances, are proposed (see below, in Section 16.4.GH). Deposit accounts must not be held
47 outside the United States, and must be denominated in U.S. currency.

48
49 [NOTE: ~~Submission~~The use of DACAs/DAISAs is necessary to give the FHA lender a
50 perfected security interest in the Operator's deposit accounts and cash proceeds, which is a
51 requirement of the Operator Security Agreement. Thus, submission and approval of the cash
52 flow chart and the ~~use of at least one~~-DACAs (and DAISA, if there are governmental
53 receivables) ~~is~~are required regardless of whether ~~ARA/R~~ financing is proposed.]

- 54
55 D. **Lockboxes.** A lockbox is a mechanism that allows a financial institution to collect and
56 process account receivables by having an operating entity's payments sent directly to a
57 location accessible by the financial institution. Lockboxes are often used when payments to
58 multiple operating entities are made to the same account.

16.2

Submission and Review

61
62 ORCF will evaluate cash flow structures, DACAs and DAISAs pursuant to the guidance
63 provided in this chapter for the following programs:

- 64
65 A. Section 232 for new construction or substantial rehabilitation,
66 B. Section 232 pursuant to Section ~~232/~~223(f)¹ for purchase or refinance,
67 C. Section 232 pursuant to Section ~~232/~~223(a)(7) or Section 232 pursuant to 223(f) pursuant to
68 223(a)(7) for refinancing,
69 D. Section 241(a) for supplemental loans in connection with a 232 loan under one of the
70 categories described above, and
71 E. Section 223(d) operating loss loans in connection with a 232 loan under one of the categories
72 described.

73
74 Review of cash flow structures, DACAs and DAISAs may take place at various times, such as
75 during the firm application process, post-closing or at a later point in time during the life of the
76 FHA-insured loan.

F. During the Firm Application Process:

- 77
78
79
80 1. **Section 232/223(a)(7) and Section 232/223(f)** – HUD expects review to take place as

¹ Negative working capital (accounts payable exceeding accounts receivable) must not be included as existing indebtedness in proposed Section 232 refinance transactions.

81 part of the review of the application and document submission for closing.

- 82
- 83 2. **Section 232 New Construction** – HUD will generally not require DACAs or
- 84 DAISAs to be put in place until the project reaches 70% completion. The application
- 85 and initial closing submission should still include the cash flow chart and, when
- 86 available, any ARA/R Loan Documents. DACAs and DAISAs must be in place, in
- 87 any event, by the earlier of: i) the date of final closing, or ii) the closing of any
- 88 ARA/R Loan.
- 89
- 90 3. **Section 232 Substantial Rehabilitation** – HUD generally requires the submission of
- 91 cash flow charts, DACAs and DAISAs as part of the application and document
- 92 submission for initial closing.
- 93
- 94 4. **Section 241(a) Supplemental Loans and 223(d)** - Operating Loss Loans in
- 95 connection with 232 loans in any of the above categories– HUD generally requires
- 96 the submission of cash flow charts, DACAs and DAISAs as part of the application
- 97 and document submission for initial closing.
- 98

99 G. **Post-closing.** See Asset Management Chapter 10 for guidance, ~~except for the following:~~

- 100
- 101 ~~1. **Transfers of Physical Assets or change in Operator.** Reviews are required in~~
- 102 ~~connection with a transfer of physical assets (TPA) or change in Operator. The TPA~~
- 103 ~~occurring in conjunction with an FHA insured loan closing should be directed to the~~
- 104 ~~HUD Underwriter assigned to the project.~~
- 105
- 106 ~~2. **After a Cut-Off Time has occurred involving AR Financing.** Once a Cut-Off~~
- 107 ~~Time occurs, FHA Lender can require the establishment of separate deposit accounts~~
- 108 ~~into which payments with respect to Accounts arising after the Cut-Off Time are to be~~
- 109 ~~deposited consistent with the terms of the Intercreditor Agreement. The Lender shall~~
- 110 ~~diligently exercise its rights under the applicable contractual documents so as to best~~
- 111 ~~protect the FHA insured collateral.~~
- 112

113 H. **Portfolios.** In all the above instances, it should be determined if a portfolio acceptance letter

114 applies and whether an overall cash flow chart was approved during portfolio review, so that

115 it can be determined:

- 116
- 117 1. If the proposed structure is consistent therewith, and
- 118
- 119 2. If a DACA and/or DAISA form has been previously approved in conjunction with the
- 120 portfolio approval.
- 121

122 If a project involves accounts receivable financing and is part of a portfolio that requires a

123 portfolio review, review of the proposed cash flow structure will generally take place at the

124 time of the portfolio review and a cash flow chart ~~should~~must be submitted at that time.

125 Review of the associated documents, including DACAs, DAISAs, Intercreditor Agreement

(for ARA/R Financed Projects), etc. may take place when the projects are assigned to an ORCF Underwriter.

- I. ~~In all~~ **Replacement** of the above instances, if A/R Lender. If an existing ARA/R Lender is being replaced, the parties must make arrangements acceptable to HUD for termination of any existing DAISAs or DACAs in favor of such ARA/R Lender.
- J. **Exceptions.** ORCF understands that in the case of Section 232/223(a)(7) applications, there may be justification for ORCF to waive strict adherence to its current policies with regard to executing DACAs.
1. Waivers may be considered for a DACA on a Section 232/223(a)(7) application if the subject ~~facility~~ Healthcare Facility seeking refinance pursuant to 223(a)(7) is operated by a non-IOI Operator and was finally endorsed prior to the issuance of HUD Housing Notice 2008-09.
 2. FHA Lenders, at the time of the Section 232/223(a)(7) transaction, must obtain a DACA (if not already in place) on the Operator's receivable bank account. Otherwise, the Lender must request a waiver. ORCF may grant the waiver subject to the following conditions (these provisions will be added to the Healthcare Regulatory Agreement – Borrower (Form HUD-92466-ORCF) (Borrower's Regulatory Agreement) and Healthcare Regulatory Agreement – Operator (Form HUD-92466A-ORCF)):
 - a. A special condition will be added to the firm commitment requiring a mortgage debt service reserve (amount to be determined by ORCF) to be in place until a DACA can be placed on the Operator's receivable bank account,
 - b. At lease renegotiation (excluding renewals that only involve an extension of the term) or termination, a DACA will be required of the Operator,
 - c. If accounts receivable financing is utilized in the future, a DACA will be required on the Operator's receivable bank account.

16.3

Cash Flow Charts

HUD recognizes that ~~healthcare facility~~ Healthcare Facility Operators, particularly when master leases, accounts receivable financing, and portfolios are involved, employ a variety of cash management systems and cash flow structures. On all Section 232 transactions, the Operator must submit to HUD a cash flow chart that depicts the flow of funds arising from operation of the ~~project~~ Project, from receipt through payment of ~~project~~ Project/lease costs and FHA-insured loan debt service. Once the cash flow chart is approved by HUD and the FHA Lender, it is

165 attached to the Operator Security Agreement (Form HUD-92323-ORCF) as an exhibit.
166 (Borrowers that are also Operators are required to sign the Operator Security Agreement.)
167

168 The Appendices to this Chapter include sample cash flow charts showing the completion of
169 Section 232 project cash ~~flow charts~~flows. HUD expects a cash flow chart to be submitted
170 pursuant to Section 232 to address and depict the following:
171

- 172 A. All of the accounts through which ~~project~~Project funds flow, or which are related to the
173 ~~project, Project~~ (including investment accounts, if any) must be shown. The account into
174 which Government Receivables are initially deposited and the account into which Non-
175 Government Receivables are initially deposited must be identified. All Zero Balance
176 Accounts (ZBAs) must be identified.
177
- 178 B. The depository bank name, account number and all parties named on each account must be
179 depicted. If anyone other than the Operator is named on the account, the parties must explain
180 who such person is and ~~itsthe~~ relationship to the Operator. If the DAISA account is not in
181 the name of the Operator, the parties must further demonstrate that such arrangement is
182 permitted by the applicable governmental healthcare programs.
183
- 184 C. Which accounts will be subject to DAISAs or DACAs, the parties to each, and the nature of
185 each DACA (immediate control versus future notification) must be depicted (see below, in
186 Section 16.6, for an explanation of the distinction between these two types).
187
- 188 D. If ARA/R financing is involved, the flow of ARA/R loan disbursements and repayments
189 must be shown. The cash flow chart must also show whether or not funds will go through
190 any ARA/R Lender account (e.g., for daily pay-downs) and the account into which ARA/R
191 loan draws (and any remittances of excess funds not necessary for pay-down) will be
192 deposited.
193
- 194 E. How lease costs/FHA loan debt service will be paid, must be addressed and any tenant or
195 master rent accounts that are proposed ~~should,~~ must be depicted. A “tenant rent account” is
196 an account established solely for the purpose of funding lease costs, through ARA/R loan
197 draws or otherwise.
198
- 199 F. If there is ARA/R financing involving multiple projects, the cash flow chart must depict the
200 above as to all projects within the ARA/R line.
201
- 202 G. If a master lease is involved, the chart must depict the Master Tenant’s position in the cash
203 flow process (including any Master Tenant accounts and any deposit account agreements
204 proposed to govern such accounts). ~~Alternatively, the cash flow chart must demonstrate and~~
205 ~~the Intercreditor Agreement must address in a manner acceptable to HUD how the rent will~~
206 ~~be paid, and the Borrower(s) and Master Tenant must agree to the arrangement as evidenced~~
207 ~~by their signature on the ICA.-.~~
208
209
210

211
212

16.4

Cash Flow Structures

213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255

A. **Definitions.** In cash flow structures, there are two categories of deposit accounts discussed: “upstream” accounts and “downstream” accounts.

1. An “**upstream**” account is any account through which funds flow prior to reaching a particular account.
2. A “**downstream**” account is any account through which funds flow after leaving a particular account.

B. **General provisions.** ~~In many instances, HUD requires only a single DAISA account, and a single DACA account~~DACA on each of the primary operating accounts, provided that ~~such~~those DACA account(s) represents the account(s) into which ~~all of the non-Government Receivables are initially deposited and into which the DAISA funds are swept.~~;

1. ~~Typically, accounts which are “downstream” of an account subject to a DACA in favor of FHA Lender do not require a DACA in favor of the FHA Lender. In other words, if the cash flow chart shows that all of the funds being deposited into an account have already passed through a DACA account, then a separate DACA on such other account(s) is usually not required. There may be exceptions to this depending on the nature of the cash flow structure. For example, a DACA is not required on “downstream” payroll accounts that are funded solely with funds that have first gone through an account subject to a DACA to which FHA Lender is a secured party.~~
2. ~~A DACA would not be required on accounts into which funds that belong solely to residents, as opposed to the Healthcare Facility/Operator, are deposited (provided that any portion of any resident funds that are deposited into such accounts and to which the facility or Operator becomes entitled shall be promptly deposited into a DACA account to which FHA Lender is a party at the earliest point permitted by applicable law and the facility’s contracts with residents).~~

C. ~~Exceptions.~~ HUD may determine that a DACA is required on additional accounts:

1. ~~For underwriting reasons,~~
2. ~~If a Tenant Rent Account is used,~~
3. ~~For a Master Tenant account (the account into which the lease payments from the individual facility Operators are made),~~
4. ~~On an operating account, if a DACA upstream of the AR Lender account is used; such an upstream DACA typically calls for a daily sweep of funds into AR Lender’s account. Such an upstream DACA may have an alternative instruction as to where to sweep the funds at such time as AR Lender no longer is entitled to exercise control of the account under the Intercreditor Agreement (usually to the operating account).~~

256 Further, due to the daily sweep of such upstream account, the bulk of funds will
257 generally be in the downstream operating account;

258 1. On all of the non-Government Receivables are initially deposited,

259
260 2. AR lender (if applicable) deposits funds into, and/or

261
262 3. the Government Receivables account funds are swept, and/or

263
264 5.4. multiple project funds are commingled (i.e. Borrower Representative Account
265 (described below), Accounts), if any.

266 ~~6. If the AR Lender is also the depository, additional DACA's may be required to~~
267 ~~evidence such bank's agreement that it will waive or limit any rights of set-off,~~
268 ~~recoupment, banker's lien or contractual security interest in such other accounts (with~~
269 ~~the exceptions set forth below, in Section 16.6); and~~

270 ~~In such other instances that may be appropriate~~

271 C. If an operator has accounts receivable financing, HUD also requires that HUD be a secured
272 party to any DACA that the Accounts Receivable lender requires.

273
274 D. HUD may require a DACA on other accounts given the structure of the unique characteristics
275 of a particular transaction.

276
277 **E. Types of Cash Flow Structures:**

278
279 1. If the ~~project~~Project is a single "stand-alone" ~~project~~Project, involving just one FHA
280 mortgage loan and one Operator, the cash flow chart will typically be as set forth on
281 Appendix 16.1.

282
283 2. There are different types of ARA/R financing, and the flow chart must make clear
284 which type is contemplated. In one type, the ARA/R loan borrower (typically, the
285 Operator) simply draws on the ARA/R loan when needed and pays it down as
286 necessary to stay within its loan limits. The funds do not flow through an account
287 held in the name of the ARA/R Lender. ARA/R Lender might also be the depository
288 bank, but the accounts are held in the Operator's name. ARA/R Lender, in its
289 capacity as secured party, can access such funds only on a default (through
290 enforcement of its DACA or set-off rights). These type arrangements are often seen
291 where an Operator does not need a steady stream of loan availability in order to
292 maintain its liquidity but rather is using the line as needed to protect against more
293 minor cash flow shortfalls. A sample flow chart showing this can be found at
294 Appendix 16.1.

295
296 3. In another type of ARA/R Loan, the project's revenues flow through an ARA/R
297 Lender account, where they are applied by ARA/R Lender to the outstanding balance
298 of the ARA/R loan on an ongoing basis. In this type of arrangement, it is usually
299 contemplated that the Operator will be routinely making draws and that ARA/R loan

draws will be funding most, if not all, operating expenses. A sample flow chart showing this can be found at Appendix 16.2.

F. **Cash Flow Structures & Governmental Receivables.** Regardless of type, Governmental Receivables must flow through an Operator account subject to a DAISA account before going through the ARA/R Lender's account. -See Appendix 16.2 for an example of this scenario.

~~1. For the cash flow structure type outlined above, in Section 16.4.D.3, funds may also go through a project specific, or commingled "upstream" DACA account prior to reaching the AR Lender account. See Appendix 16.3 for a specific example of this scenario.~~

~~2. An upstream DACA account must not be the project operating account. Rather, the project operating account may be an account that is downstream of the AR Lender. Thus, if such an upstream DACA is used, it may call for a periodic (often daily) sweep of funds into the AR Lender account until such time as AR Lender is no longer entitled to give a Control Notice (i.e. until such time as the right to give the Control Notice shifts to FHA Lender). The sweep of funds to AR Lender must not be permitted once FHA Lender is entitled to give the Control Notice. The parties must plan in advance how funds will flow into the downstream operating account once the AR Lender is no longer in the picture.~~

~~3. In any instance where there is no upstream DACA, there must be a downstream DACA at the first account which funds go through after leaving the AR Lender's account.~~

~~4. If the AR Lender requires a DACA on a downstream account, the FHA Lender should generally also be a party. See Appendix 16.2 for a specific example of this scenario.~~

G. In the rare case where a project receives no Governmental Receivables (i.e., 100% private pay), the cash flow structure will only have a DACA.

H. **Commingled Accounts:** If it is proposed that funds from more than one project will flow into an account (a "commingled account," as shown in Appendix 16.3 and 16.4), the parties must demonstrate that comply with the following requirement:

1. Systems must be in place which will permit the identification of funds belonging to each project at all times. Under the Operator's Regulatory Agreement if HUD determines that deposits cannot be reliably and readily traced by facilitythe Healthcare Facility, HUD may direct Operator to deposit such funds in a segregated account.

2. ~~Operator~~The Operator's compliance with the financial reporting ~~required~~requirements under 24 CFR 5.801 ~~will~~also necessitate that the Operator(s) maintain

346 accounts in a manner that will allow HUD and the FHA Lender to discern the funds
347 attributable to each ~~facility~~Healthcare Facility.

- 348
- 349 3. Generally, HUD does not permit Governmental Receivables from different
350 ~~projects~~Projects to be initially deposited into a commingled account. Any proposal to
351 commingle Governmental Receivables from different ~~projects~~Projects, in addition to
352 meeting the above standards, must demonstrate that such commingling is permitted or
353 required by the applicable healthcare program payor rules.
- 354
- 355 4. The use of commingled accounts is subject to HUD’s written approval and must be
356 identified on the cash flow chart, which must show all the ~~facilities~~Healthcare
357 Facilities whose funds are proposed to flow through such account. ~~An~~
358 ~~approved~~ORCF generally does require DACAs on commingled ~~account would be~~
359 ~~subject~~accounts or borrower representative accounts due to the
360 ~~provisions~~concentration of a-project funds in a single account. Commingled accounts
361 still require individual project accounting, so if there are multiple FHA lenders on the
362 same account, it may be appropriate for the DACA in accordance to specify that each
363 FHA lender may only issue a control notice with Section 16.6 respect to their
364 projects’ funds. Alternatively, one FHA lender may agree to act as the secured party
365 agent for the other FHA lenders. The Operators involved must be affiliated.
366 Generally, accounts that commingle FHA-insured ~~facilities~~Healthcare Facilities with
367 non-FHA insured facilities will not be permitted. Generally, the use of commingled
368 accounts in connection with a master lease structure may be acceptable. ~~The~~Also, the
369 Operator Security Agreement and A/R Financing Certification (Form HUD-90020-
370 ORCF) require that the account into which Governmental Receivables are initially
371 deposited be separate from the account into which Non-Governmental Receivables
372 are initially deposited. ~~So this sort of commingling, so combining the DAISA and~~
373 ~~DACA accounts into a single account~~ is rarely permitted.

374

375 H. **Borrower Representatives on ARA/R Line:** Occasionally ARA/R Loan Documents (or
376 documents for a centralized deposit account held by one of the Operators or an affiliate) may
377 call for a single person or entity (usually called the “Borrower Representative”) to be the sole
378 party authorized to make draws on behalf of multiple Operators; and may also call for such
379 draws to all be initially deposited into a commingled account in the name of the Borrower
380 Representative and/or for such draws to be deposited into separate project accounts as
381 directed by Borrower Representative. Generally, this is encountered where an ARA/R Loan
382 includes many Operators (or will include, if it anticipates adding additional FHA facilities in
383 the portfolio). Sometimes the Borrower Representative is proposed to be one of the
384 Operators, and sometimes it is proposed to be a separate entity that is affiliated with the
385 Operators. The cash flow chart must always depict any such proposed arrangement and any
386 Borrower Representative accounts. Such arrangements raise a number of considerations and
387 must be acceptable to HUD.

388

389 All documents evidencing the relationship between the Borrower Representative (in its
390 capacity as such) and the Operators must be submitted for HUD’s consideration. The
391 Borrower Representative must not be a creditor of the Operators; i.e., the documents

392 ~~should~~shall establish that the Borrower Representative is making such draws as agent for the
393 other Operators and is not borrowing funds in in its own capacity then “re-lending” such
394 funds to other Operators. The Borrower Representative must be obligated to make and
395 disburse draws to the respective facilities in a manner consistent with HUD Program
396 Obligations, applicable HUD Regulatory Agreements (Borrower’s Regulatory Agreement,
397 Operator’s Regulatory Agreement or Healthcare Regulatory Agreement – Master Tenant
398 (Form HUD-92337-ORCF), and the Intercreditor Agreement with respect to each Healthcare
399 Facility. Additionally, the Borrower Representative will be required to sign a certification to
400 disclose the named entity on the accounts managed or controlled by the Borrower
401 Representative.
402
403

16.5

Lease Cost/Debt Service Payment Methods

404
405 The cash flow chart must show how “Current Impositions” (i.e., the rent, taxes and insurance,
406 and deposits to escrows or reserves required under the Lease or other Borrower-Operator
407 Agreement) will be paid. If the FHA Borrower is also the Operator, there are no lease payments
408 so the chart will show only payment of debt service and deposits to escrows and reserves
409 required by the FHA ~~insured loan documents. — The method detailed in Mortgage Insurance~~
410 Documents. If there is Accounts Receivable financing, the cash flow chart must be consistent
411 with ~~and match~~ the flow of funds description in the Intercreditor Agreement. The Operator’s,
412 Borrower’s (and where applicable, Master Tenant’s) execution of the Intercreditor Agreement
413 evidences their agreement to the lease cost payment method, and also evidences the ARA/R loan
414 borrower’s authorization to the ARA/R Lender to direct the proceeds of lease cost draws as
415 provided therein. If there is no A/R financing, the parties' agreement to the lease cost payment
416 method must be outlined in the Operator Lease and Master Lease.
417

418 A. **Acceptable Payment Methods.** Generally, the following methods are acceptable and
419 consistent with the Intercreditor Agreement:
420

- 421 1. **Direct from ARA/R Lender to FHA Lender.** The Operator directs ARA/R Lender
422 to disburse ARA/R loan advances to pay Current Impositions or the current loan costs
423 directly into an account in the name of the FHA Lender.
- 424 2. **Disbursement into Operator Designated Account.** If the proceeds of such an
425 advance are not being paid directly to the FHA Lender, the FHA Lender must be able
426 to receive by automatic debit or otherwise have the right to withdraw from an
427 Operator account amounts at least equal to the Current Impositions or the current
428 mortgage loan costs. If the FHA Lender is only receiving only current mortgage loan
429 costs, the Operator ~~should~~will be required to pay excess Current Impositions to the
430 Borrower.
 - 431 a. **Disbursement into Tenant Rent Account.** The Operator may establish a
432 “Tenant Rent Account” whose sole purpose is ~~for~~ payment of Current
433 Impositions and which is funded directly by ARA/R loan draws (or by the
434 Operator). The Operator must be obligated to timely cause to be deposited
435 sufficient funds each month to pay such costs. ~~AR Lender should disclaim~~
436 ~~any interest in such an account, and it will be subject to a DACA solely in~~

437 favor of FHA Lender. ~~An example of this scenario can be found in Appendix~~
438 ~~16.2.~~

439 ~~[NOTE: In this scenario, it is acceptable to use an immediate control DACA~~
440 ~~(as defined below) which permits the bank, after FHA Lender's debit for debt~~
441 ~~service, to remit any excess to the FHA Borrower's account. FHA Lender~~
442 ~~should be able to revoke such permission.]~~

- 443 b. **Disbursement into Operating Account.** Alternatively, draws for Current
444 Impositions sometimes will be disbursed directly into the ~~project's~~Project's
445 general operating account. This alternative is generally acceptable for stand-
446 alone or smaller transactions (so long as the FHA Lender has the ability to
447 debit this account for Current Impositions) and may be less acceptable for
448 more complex transactions. ~~An example of this scenario can be found in~~
449 ~~Appendix 16.1.~~

- 450
451 3. **Disbursement into Master Tenant Account.** If a master lease structure is used,
452 such advance may be made directly from ARA/R Lender into the Master Tenant's
453 account. An example of this scenario can be found in Appendix 16.3.

454 ~~In this scenario, it may be appropriate to use an immediate control DACA in favor of~~
455 ~~FHA Lender which permits Master Tenant, after FHA Lender's debit for debt service,~~
456 ~~to remit any excess to the respective FHA Borrowers. FHA Lender should be able to~~
457 ~~revoke such permission.~~

458
459 Sometimes Current Imposition payments are proposed not to be made to the Master
460 Tenant directly but are rather debited by the FHA Lender(s) directly from an Operator
461 designated account. The Master Lease requires that rents be paid to the Master
462 Tenant, who in turn pays the FHA Borrowers. Accordingly, if HUD approves such a
463 proposal:
464

- 465 a. If ARA/R Financing is involved, the Intercreditor Agreement must evidence
466 approval by Master Tenant and Borrowers of such method of payment, ~~by~~
467 describing the payment structure in Section 3.4.
468 b. If ARA/R financing is not involved ~~and HUD approves a structure under~~
469 ~~which funds do not flow through Master Tenant~~, Master Tenant's and
470 Borrower's agreement to such method of payment ~~should~~must be
471 documented.
472

473 FHA Lender agrees to apply amounts received on account of Current Impositions
474 toward payment of the FHA Borrower's monthly debt service obligation under the
475 FHA Loan and to fund applicable escrow and reserve requirements, with the balance
476 remaining of the payment so collected, if any, to be remitted by FHA Lender to the
477 FHA Borrower (or such excess may be remitted to the FHA Borrower by the DACA
478 Bank or Master Tenant after the FHA Lender debit if permitted by the DACA or by
479 such other remittance method as may be approved by HUD).
480
481

16.6

Deposit Account Control Agreements (DACAs)

482
483 A Deposit Account Control Agreement (DACA) is an agreement between a debtor/account
484 owner, a secured party, and the bank maintaining the account that the bank will comply with
485 instructions from the secured party directing the disposition of funds in the deposit account
486 without further consent by the debtor/account owner. A DACA must be used on the accounts
487 listed above in Chapter 16.4.

488
489 A. **General Parameters.** Under the Uniform Commercial Code (UCC), a Lender must have a
490 DACA with the depository bank to perfect its security interest in such deposit account as
491 original collateral. There is an exception if the Lender is also the institution where the
492 account is held (i.e., the Lender has possession of the account). However, even if FHA
493 Lender is the depository bank, HUD ~~generally~~ still requires (unless a HUD-2 waiver is
494 granted) a DACA that clearly describes the priority of the liens.

495
496 AR~~If the A/R Lender is the depository bank, the A/R~~ Lender must also agree to limit its
497 ability to assert other security interests, set-off, recoupment, or banker's liens in project
498 accounts held by it as the depository (see Section 16.43).

499
500 In the event it becomes appropriate to do so, the FHA Lender shall "spring" any DACAs in a
501 timely manner. In the event that the FHA Lender ultimately assigns the loan to HUD, it shall
502 also assign the DACA to HUD.

503
504 B. **Types of Deposit Account Control Agreements.** There are two primary types of
505 ~~DACA's~~DACAs: future notification, or "springing," ~~DACA's~~DACAs, and immediate
506 control ~~DACA's~~DACAs.

507
508 1. **Future Notification DACAs.** In a future notification, or "springing," DACA, the
509 Operator is permitted to use the account as it normally does and to make withdrawals.
510 The bank follows the Operator's instructions as to the account until such time as the
511 secured party notifies the depository bank that it is exercising exclusive control (such
512 a notice is referred to herein as a "**Control Notice**"). Once the Control Notice is
513 given, the bank must follow only the secured party's instructions as to the disposition
514 of funds in the account. Typically, the secured party can only give such a Control
515 Notice and "spring" the DACA (and any associated lockbox) once an event of default
516 occurs under its loan documents.

517 a. ~~The~~ FHA Lender ~~DACA is~~DACAs are typically a "future notification"
518 ~~DACA~~DACAs.

519 b. The Operator Security Agreement contemplates that, unless otherwise
520 approved by HUD, ~~the~~ FHA Lender ~~DACA~~DACAs will be a future
521 notification type ~~DACA~~DACAs that can be triggered only on default.

522
523 2. **Immediate Control DACAs.** In an immediate control DACA, the secured party
524 exercises control immediately, and the bank is obligated from the date of the
525 agreement's execution to comply with the instructions of the secured party, and/or the

526 Operator/account holder is precluded from making withdrawals. (Sometimes a
527 DACA will be labeled “future notification²²”, but the Lender gives the Control Notice
528 at closing or within the document; these are, in effect, immediate control DACAs).)

529 ~~a. If a Tenant Rent Account is used for the lease cost payment method, it may be~~
530 ~~appropriate to use an immediate control DACA in favor of FHA Lender on~~
531 ~~the Tenant Rent Account. Likewise, if a Master Lease is involved and lease~~
532 ~~payments are being made into a Master Tenant Account, it may be appropriate~~
533 ~~to use an immediate control DACA in favor of FHA Lender on such Master~~
534 ~~Tenant account.~~

535 Where

536 ~~b. When~~ there is a DACA in place upstream of an ARA/R Lender account, such
537 DACA may call for daily sweeps into the AR Lender’s A/R Lender account
538 and ~~not prohibit~~ withdrawals by the Operator.

539 ~~i. Typically, if the FHA Lender is party to this DACA, FHA Lender’s~~
540 ~~ability to exercise control will still be linked to its future notification if~~
541 ~~the parties intend that this account serve as a general operating account~~
542 ~~once AR Lender control terminates.~~

543 ~~In this scenario, it may be appropriate to require a DACA on the downstream project~~
544 ~~operating account. these cases, the AR lender may use an Immediate Control DACA~~
545 ~~with respect to itself but a Future Notification DACA with respect to the FHA Lender~~
546 ~~(upon issuance of a Control Notice).~~

547
548 C. **Key elements of DACA.** HUD does not have a required form of DACA, though one or
549 more sample forms are posted as unofficial guidance. These sample forms are only
550 examples, and the responsible parties may use a different form, at their discretion, provided
551 the form used addresses the key elements and is consistent with HUD Program Obligations.

552
553 Key elements for ~~DACA’s~~ DACAs include those set forth below. Elements that include
554 “must” are expected to be included in all forms. The remaining elements should be included,
555 but HUD has discretion to permit deviations (and additional provisions) that do not
556 materially affect HUD’s interests.

557
558 1. **Parties to DACA:**

559 a. Where no ARA/R Loan is involved, the FHA Lender must be the only secured
560 party named in the DACA. Parties will generally be the Bank, FHA Lender,
561 and the Operator (or named account holder). The depository bank must be an
562 organization engaged in the business of banking.

563 b. Where an ARA/R Loan is involved, both the ARA/R Lender and FHA Lender
564 can be named as secured parties in a single DACA, or a First Lien DACA (in
565 favor of ARA/R Lender) and a Second Lien DACA (in favor of FHA Lender)
566 may be used.

567 c. HUD must not be a party to a DACA ~~(unless the loan is held by HUD).~~

568 d. If a party other than the Operator is named on, or has an interest in, a deposit
569 account in the flow of funds, such arrangement must be acceptable and
570 comply with any restrictions in the FHA ~~insured loan documents.~~ Mortgage
571 Insurance Documents. If required by FHA Lender and/or HUD, such third

572 party must execute such joinders, security agreements, ~~DACA's~~DACAs or
573 other documents to bind such party's interest.

574
575 2. **Notification of Security Interests.** The DACA must include a provision notifying
576 the Depository that the FHA Lender has a security interest in the deposit account and
577 all checks, funds, monies or other items now or hereafter deposited therein and any
578 lockboxes associated therewith.

579
580 3. **No Other DACAs.** The DACA should include representations to the effect that
581 there are no other control agreements affecting the account and that none will be
582 placed on the account (other than the DACA(s) approved as part of the transaction).

583
584 In any instance where a First Lien DACA and Second Lien DACA are used, the First
585 Lien DACA must refer to and permit the Second Lien DACA (and vice versa).

586
587 4. **Accounts Covered.** The DACA must identify the account (or accounts) that are
588 subject to the DACA. The account number(s) must match the cash flow chart (and
589 the DAISA must be checked to ensure that it is sweeping funds into an account
590 identified in the DACA). If the DACA covers more than one account, it should
591 provide that FHA Lender can give a Control Notice as to any or all accounts.

592
593 5. **UCC Control Language and Execution.** To establish "control" within the meaning
594 of the Uniform Commercial Code, the DACA must always provide that (either
595 immediately or upon issuance of a Control Notice) Depository Bank will comply with
596 FHA Lender's instructions as to disposition of funds without further consent of the
597 debtor (typically the Operator). This language is referred to as "UCC Control
598 Language". The DACA must be authenticated; i.e., it must be fully executed by all
599 ~~of the~~ parties. Notarization is not required, unless required by state law. Provisions
600 in the DACA allowing Depository Bank to file an interpleader action should not
601 include disputes between depositor and FHA Lender/HUD.

602
603 6. **When Each Secured Party Is Entitled to Give Control Notice.** If both ARA/R
604 Lender and FHA Lender are parties to the same DACA, the DACA must clearly set
605 forth when the Depository is obligated to follow the FHA Lender's (as opposed to
606 ARA/R Lender's) instructions, which must be consistent with the "change in control"
607 or termination of DACA provisions in the Intercreditor Agreement.

608
609 In any instance where a First Lien DACA and Second Lien DACA are used, the First
610 Lien DACA must terminate or provide for a change in control over to the Second
611 Lien DACA consistently with the "change in control" and termination provisions in
612 the Intercreditor Agreement.

613
614 7. **Giving and Implementing Control Notices:**

- 615 a. The DACA must clearly set forth the manner for sending a Control Notice and
616 ~~should~~must identify when it is deemed given or received. The manner of
617 giving a Control Notice must include expeditious means (i.e., it ~~should~~must

618 not be limited to delivery by mail, but also include personal delivery or other
619 prompt means).

- 620 b. The depository bank ~~should~~must agree to implement the notice as soon as is
621 reasonably practicable. The key is to be able to identify when the block
622 begins, which must not be subject to significant delay. Implementation
623 periods of longer than three business days after notice will not be acceptable.
- 624 c. Once a Control Notice goes into effect, depository bank must agree to (a)
625 disregard further instructions delivered by the Operator/account holder and
626 block Operator's/account holder's access to the account (except for the
627 purpose of making and accepting deposits) and (b) rely solely on instructions
628 of the Secured Party giving the Control Notice.

630 **8. Set-Off, Recoupment, Bank Liens and Security Interests.** The depository bank, in
631 its capacity as Depository Bank, must agree to limit any rights of set-off, recoupment,
632 banker's lien, or contractual security interest in the account and Account Collateral.

- 633 Generally, these should be limited to:
- 634 a. If depository bank is also the ARA/R Lender the obligations secured by the
635 ARA/R loan/security agreement, provided any such setoff must be subject to
636 the Intercreditor Agreement;
 - 637 b. Its customary and usual fees in its capacity as depository bank related to the
638 DACA account; and
 - 639 c. Returned items, customary collecting bank, or similar items related to the
640 DACA account.

641
642 Because DAISA funds are swept daily and may be subject to legal restrictions that
643 limit the bank's ability to debit from such account, the foregoing (b) and (c) may
644 include fees, returned items, etc. related to the DAISA account as well.

645
646 **9. Termination of DACA:**

- 647 a. By Operator: Operator (debtor) ~~should~~must not be able to terminate the
648 DACA (unless via a joint instruction with the Secured Party or Parties).
- 649 b. By depository bank: The depository bank must be obligated to give notice to
650 FHA Lender prior to its voluntary termination. A notice period of at least 30
651 days is expected (unless for breach or fraudulent or illegal activity, when a
652 shorter period may be acceptable). ~~Longer notice periods are favored.~~).
- 653 c. By secured parties: Either secured party can terminate ~~their~~its interest under
654 the DACA by notice. The provisions on when ARA/R Lender must terminate
655 are controlled by the Intercreditor Agreement and do not need to be addressed
656 in the DACA, but the DACA must be consistent with the Intercreditor
657 Agreement. A termination by ARA/R Lender must not terminate FHA
658 Lender's interest under the DACA (or if a First Lien/Second Lien DACA are
659 used, the Second Lien DACA); nor result in disposition of funds out of the
660 account.
- 661 d. Disposition of Funds on Termination: Generally, if the DACA is being
662 terminated by the Operator or the bank, the DACA should direct the bank to
663 direct the funds in the account on termination to an account designated by the

664 Secured Party or Parties. This would typically be a replacement account set
665 up by the Operator.

666
667 10. **Other Key Elements.** See Section 16.8 for additional key elements that apply to
668 both DACAs and DAISAs.

669
670

16.7

Deposit Account Instructions and Service Agreements (DAISAs)

671 A Deposit Account Instructions and Service Agreement (DAISA) refers to the instructions
672 provided to the bank by the account holder that details how the bank is to dispose of
673 governmental healthcare funds in the deposit account. A DAISA must be used with respect to
674 the deposit account(s) into which Government Receivables will be initially deposited. It is the
675 parties' responsibility to assure that the DAISA comports with applicable healthcare program
676 restrictions.
677

678
679 A. **Key elements of a DAISA.** Currently HUD does not have a required form of DAISA,
680 though it may post one or more sample forms as unofficial guidance. The sample forms are
681 only examples, and the responsible parties may use a different form provided it addresses the
682 key elements and is not inconsistent with HUD Program Obligations.

683
684 Key elements for ~~DAISA's~~ DAISAs include those set forth below. Elements that include
685 "must" are expected to be included in all forms. The remaining elements should be included,
686 but HUD has discretion to permit deviations (and additional provisions) that do not
687 materially affect HUD interests.
688

- 689 1. **Parties to DAISA.** If no ~~ARA/R~~ Lender is involved, parties are typically the
690 depository bank and Operator, and FHA Lender. If an ~~ARA/R~~ Lender is involved,
691 parties typically include the depository bank, Operator, FHA Lender and ~~ARA/R~~
692 Lender. HUD must not be a party. If a party other than the Operator is named on or
693 has an interest in the account, such arrangement must be acceptable to HUD and the
694 parties must demonstrate this is permitted or required by the applicable government
695 healthcare program. If required by FHA Lender and/or HUD, such third party must
696 execute such ~~DAISA's~~ DAISAs, joinders, security agreements, or other documents to
697 bind such party's interest.
698
- 699 2. **Notification of Security Interests.** ~~The HUD requires that the~~ DAISA ~~should~~ include
700 a provision notifying the Depository that the FHA Lender has a security interest in the
701 deposit account and all checks, funds, monies or other items now or hereafter
702 deposited therein and any lockboxes associated therewith (especially if FHA Lender
703 is not a party). Note that this provision is intended to serve notice of the security
704 interest and does not constitute perfection of the security interest.
705

- 706 3. **No ~~DACAs~~DAISAs.** The DAISA should include representations to the effect that
707 there are no other control agreements affecting the account and that none will be
708 placed on the account ~~(other than those approved for the transaction).~~
709
- 710 4. **Accounts Covered.** The DAISA must identify the account(s) that are subject to the
711 DAISA, which must match the cash flow chart, and any lockboxes associated with
712 the account.
713
- 714 5. **Sweep Instructions.** The account holder (*not* the secured party) must instruct the
715 depository bank to initiate a funds transfer (“daily sweep”) of available funds each
716 business day (or, if expressly approved by FHA Lender and HUD when the DACA is
717 approved, the account holder instruction may be for less frequent sweeping of the
718 funds, but typically not more than 48 hours) into another account that is identified in
719 the DAISA (typically, this will be the DACA account, unless HUD has approved a
720 direct sweep into an ARA/R Lender account). The account holder (not the Secured
721 Party) should also instruct the bank not to permit the account holder to make
722 withdrawals from the account.
- 723 a. ~~The~~To comply with Medicaid and Medicare requirements, the DAISA must
724 not grant either Lender the right to direct disbursement from or to give
725 instructions regarding the account. It is not a control agreement and must not
726 include the UCC Control Language or provisions allowing Lenders to give
727 control notices.
- 728 b. Generally, Operator’s sweep instructions should be revocable, and the DAISA
729 should be terminable by the Operator (account holder) in order to comply with
730 governmental healthcare program restrictions.
- 731 i. Restrictions on the account holder’s revocation or termination rights
732 that are tantamount to FHA Lender control over the account should be
733 avoided. For example, the DAISA should not condition the account
734 holder’s right to revoke its instructions on FHA ~~Lender~~Lender’s
735 consent ~~under the DAISA~~. However, such a revocation or termination
736 remains a default under the Operator Security Agreement if FHA
737 Lender’s consent is not obtained under such security agreement.
- 738 ii. Provisions which delay implementation of a changed instruction
739 and/or which require prior notice to FHA Lender are encouraged,
740 though lengthy periods may be inconsistent with healthcare program
741 restrictions and should generally be avoided. Exculpatory clauses
742 restricting bank’s liability for failing to give such a notice are
743 acceptable.
744
- 745 6. **The Bank must agree to limit rights of setoff, recoupment or any security**
746 **interest or banker’s lien.** Limited exceptions (such as for their reasonable and
747 customary fees, returned items, posting errors, etc.) may be acceptable but should be
748 limited to items and fees related to this account only. No exceptions should be made
749 for contractual security interests. ~~ARA/R~~ Lender must waive its right to set off its
750 loan against the DAISA account to the extent required by applicable law or
751 governmental healthcare insurance program rules.

752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782

7. **Termination of DAISA:**

- a. By Operator: Operator (debtor) shall be able to terminate the DAISA in order to comply with Medicaid and Medicare anti-assignment requirements. However, failure to procure the FHA Lender’s prior written consent to such termination may result in a default under the Operator Security Agreement.
- b. By depository bank: The depository bank must be obligated to give notice to FHA Lender prior to its voluntary termination of the DAISA. A notice period of at least 30 days is expected (unless for breach or fraudulent or illegal activity, when a shorter period may be acceptable). ~~Longer notice periods are favored.~~
- c. By secured parties: The DAISA account is subject to the control of the healthcare provider, not the Lenders. Generally, the Lender is a party solely for the purpose of notifying the depository bank of its interest. Accordingly, the secured party has very few rights under a DAISA (for example, it may have the right to be provided bank statements and on-line access to monitor account activity, and/or to be notified of certain key events, like revocation of a sweep instruction on the account). The DAISA may provide for notification by the secured party to the bank when it no longer has any interest. However, ~~such~~ a notification by the A/R Lender should not have the effect of terminating the DAISA, as FHA Lender is continuing to rely on the sweep instruction. There may be exceptions (for example, if there is a separate DAISA to which FHA Lender is a party that remains in place and/or a new DAISA entered into concurrently).
- d. When ARA/R Lender is the depository bank: the DAISA should refer to the ARA/R Lender in its capacity as depository bank where appropriate.

8. **Other Key Elements.** See Section 16.8 for additional key elements that apply to both DACAs and DAISAs.

16.8 Key Elements for Both DACAs and DAISAs

783
784
785
786
787
788
789
790
791
792
793
794
795
796

- A. As referenced above, there are some elements that HUD expects to see in both DACAs and DAISAs. Those elements are as follows:
 - 1. **Access to Account.** For the DACA, and for any DAISA to which FHA Lender is a party, the depository bank must agree (if practicable) to provide FHA Lender upon FHA Lender’s request ~~(which need only be made once and not on a recurring basis)~~ access to daily activity in the account and copies of periodic account statements delivered to Operator.
 - 2. **Account Maintenance Requirements.** If the depository bank is also the ARA/R Lender, and it requires that Operator maintain its deposit accounts with it, then the DACA/DAISA must provide language to the effect that if the depository bank terminates the DACA/DAISA for reasons other than breach thereof, the Operator

797 must be able to move its relationship notwithstanding any restriction to the contrary
798 in its other agreements (or this can be addressed by ARA/R Lender in its loan
799 documents).

- 801 3. **Minimum Balance Requirements.** Occasionally, the parties may wish to include a
802 minimum balance requirement in the DACA-~~or~~/DAISA:
- 803 a. To provide a source of payment for bank permitted debits, such as its fees,
 - 804 b. To provide a source of funds for overpayment reconciliation for a government
805 healthcare program, or
 - 806 c. For other reasons.

807
808 Such an arrangement must be brought to ORCF's attention during underwriting, be
809 reasonable in amount, and be acceptable to FHA Lender and HUD.

810
811 4. **Conflicts:**

- 812 a. The DACA and DAISA must provide that in the event of a conflict between
813 the DACA and the bank's deposit agreement(s), the terms of the DACA and
814 DAISA control.
- 815 b. CertainAs a reminder, certain future events may be permitted by a DAISA or
816 DACA but will still be defaults under the HUD Loan Documents. For
817 example, to comply with government healthcare program rules, the DAISA
818 normally permits the Operator to revoke its sweep instructions and/or to
819 terminate the DAISA. These acts ~~remain defaults, however, constitute a~~
820 default under the FHA Loan Documents Operator Security Agreement. The
821 execution of such DAISA or DACA by FHA Lender, and HUD's approval of
822 same, shall not be deemed any waiver thereof or consent thereto. ~~The DAISA~~
823 ~~or DACA should contain language to make this clear. But regardless of~~
824 ~~whether such language is included, such a waiver shall not be implied.~~

- 825
826 5. **Bank Fees.** These should be limited to usual, customary and reasonable fees in the
827 normal course of business of the bank.

- 828
829 6. **Indemnification obligations.** These should typically be limited to the Operator
830 (debtor) and, if required by the depository bank, a guarantor(s).

831
832 Indemnities binding FHA Lender are not encouraged. However, if FHA Lender
833 agrees to such obligations, they should typically be limited to third party claims
834 arising from compliance by Bank with FHA Lender's written instructions after a
835 Control Notice is given and reimbursement of returned items to the extent FHA
836 Lender received the proceeds thereof. The Operator should be primarily responsible
837 for indemnities. HUD must be expressly excluded from all such indemnification
838 obligations.

839
840 Any indemnification provided by the FHA Lender (and preferably, by Operator) to
841 the Depository Bank should exclude indemnification for indirect damages, lost
842 profits, or special, punitive or consequential damages, and at a minimum, bank's

843 gross negligence or intentional misconduct. If ARA/R Lender is also the depository,
844 it should be clear ~~the indemnity is geared towards~~that it may only be indemnified in
845 its capacity as depository and not as secured party.

846
847 7. **Boilerplate.** Should include standard provisions dealing with governing law,
848 execution of counterparts, execution by facsimile (or other electronic) signature, etc.
849 Provisions which would not permit venue in a federal district court are not permitted.

850
851 8. **Assignment:** The DACA and DAISA must permit assignment of the DACA/DAISA
852 by the FHA Lender. The assignment provisions must not be materially inconsistent
853 with, or unduly burden, HUD assignment of claims procedures. For example, an
854 assignment clause which requires the assignee to execute an assumption shall not
855 apply to an assignment to HUD.

DRAFT