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# Section III Asset Management

## Chapter 8 Operators and Management Agents

### 8.1

### Introduction

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9 Production, Chapter 8, Operator and Management Agent Analysis, deals at length with the  
10 necessary qualifications for Operators and Management Agents of newly insured projects, and it  
11 also addresses required elements of the relevant contractual documents. The purpose of this  
12 Chapter is to describe the Office of Residential Care Facilities' (ORCF) ongoing expectations  
13 and monitoring of such Operators and Management Agents ~~and also to describe the procedures  
14 ORCF will follow in approving a change in an Operator or Management Agent of a currently  
15 insured or HUD-held project. The criteria and considerations set forth in Production, Chapter 8  
16 apply with equal force when a Borrower on a currently FHA-insured or HUD-held project is  
17 seeking a change of Operator or Management Agent.~~

18  
19 It is the responsibility of the Borrower to determine how to best organize the project and  
20 establish an effective means to oversee the operation of an insured project. In those instances,  
21 where the Borrower decides to engage an Operator and/or Management Agent, the establishment  
22 of an effective relationship among the Borrower, the Operator and/or Management Agent, and  
23 ORCF, is critical to the success of the project over the life of the mortgage. ORCF's principles  
24 with respect to Borrower/Operator/Management Agent relationships are:

- 25  
26 A. While ORCF will work with Operators and/or Management Agents and monitor their  
27 performance, the Borrower shall remain responsible for a project's compliance with HUD  
28 regulations and requirements. Such responsibility shall apply regardless of whether ORCF  
29 also requires Operators and/or Management Agents to enter into regulatory or other  
30 agreements that place responsibilities on those parties. ORCF expects that Borrowers will  
31 oversee the performance of their Operators and/or Management Agents and take steps to  
32 correct deficiencies as they occur, consistent with the controlling documents.  
33  
34 B. ORCF will not intercede in the relationship between Borrowers and their Operators and/or  
35 Management Agents, except:  
36  
37 1. ~~to~~To review the qualifications of proposed Operator and Management Agent  
38 candidates,  
39  
40 2. ~~to~~To review the proposed contractual agreements between Borrowers and Operators  
41 and/or Management Agents, ~~and~~

42  
43 3. ~~to assure~~To monitor compliance with ~~applicable~~ program requirements.

44  
45 4. When a project exhibits risk.

46  
47 To this end, ORCF requires that detailed Management Agent and Operator documents be  
48 submitted (through the Mortgagee/Servicer) for ORCF approval prior to any proposed material  
49 amendment ~~or termination~~ of a project's Operator and/or Management Agent. For these  
50 purposes, an amendment is deemed material when it would substantially alter the scope of  
51 responsibility of an Operator or Management Agent, whether that change in scope is an increase  
52 or decrease in responsibility. In such circumstances, the Borrower shall submit the request and  
53 supporting information to the Mortgagee/Servicer. The Mortgagee/Servicer must review the  
54 request for completeness, accuracy and eligibility, and submit to ORCF with a recommendation  
55 for approval. In analyzing the request, the Mortgagee/Servicer shall adapt and tailor the  
56 approach and analysis used in recommending an Operator or Agent as part of a firm application  
57 (as set forth in Production, Chapter 8.8,~~).~~ The removal of any entities/participants with  
58 financial or operational control from the Operator or Management Agent requires HUD prior  
59 approval.

60  
61 ~~It is the owner's responsibility to verify that the proposed Operator and/or Management Agent~~  
62 ~~demonstrates the qualifications and experience necessary to assure that the project will be~~  
63 ~~operated in a legal, prudent, efficient, and cost-effective manner prior to submitting a request for~~  
64 ~~approval of such Operator and/or Management Agent. Appropriate qualifications and experience~~  
65 ~~are addressed more fully in Production, Chapter 8, Sections 8.4 and 8.8. If the Borrower~~  
66 ~~determines that the proposed Operator and/or Management Agent satisfies these criteria, the~~  
67 ~~appropriate application shall be submitted to the Mortgagee/Servicer by the Borrower and, upon~~  
68 ~~Mortgagee/Servicer review, ORCF's written approval must be obtained prior to entering into any~~  
69 ~~binding agreements and/or providing services related to the applicable Section 232 project.~~

70  
71 ~~\* Note if an application is to be submitted for a Change of Operator and/or Management Agent,~~  
72 ~~the proposed entity should work with its attorney in the submission of the application.~~

## 8.2

### Ongoing Expectations for Operator Performance

75  
76 All HUD approved Operators (defined at length in Production, Chapter 8.2) shall conduct all  
77 project affairs in a complete and professional manner and comply with the following  
78 requirements:

79  
80 A. ~~Be approved by~~Seek ORCF approval prior to participation.

81  
82 B. Comply with all regulatory and program requirements, including without limitation:

- 84 1. ~~execution~~Execution of a Healthcare Regulatory Agreement-Operator (Form HUD-  
85 92466A-ORCF);  
86
- 87 2. ~~execution~~Execution of a lease or other contractual agreement that is acceptable to  
88 ORCF; and  
89
- 90 3. ~~execution~~Execution of other documents in a format as required by HUD, and as may  
91 be determined by the nature of the transaction and the structure of the organization.  
92
- 93 C. Respond timely to any requests from HUD for project operating data.  
94
- 95 D. Provide evidence of insurance coverage in accordance with HUD requirements.  
96
- 97 1. Professional Liability Insurance coverage must be consistent with Production,  
98 Chapter 14, Insurance Requirements.  
99
- 100 2. ~~Property~~Any additional property insurance ~~as required~~ and as agreed in by the lease or  
101 other operating agreement.  
102
- 103 E. Satisfy HUD requirements regarding financial accounting and reporting, including without  
104 limitation:  
105
- 106 1. ~~properly~~Properly maintaining books and accounts in accordance with Program  
107 Requirements and as to allow for audit of the project;  
108
- 109 2. ~~maintaining~~Maintaining the HUD-required operating account;  
110
- 111 3. ~~submitting~~Submitting to Mortgagee/Servicer (and also to ORCF directly if requested)  
112 quarterly and year-to-date certified financial reports, consistent with Program  
113 Requirements and as addressed in Asset Management, Chapter 4;  
114
- 115 4. ~~providing~~Providing answers to specific questions posed by ORCF, and  
116
- 117 5. ~~adhering~~Adhering to all other financial guidelines of HUD.  
118
- 119 F. In accordance with Program Requirements, including without limitation the Operator  
120 Regulatory Agreement and Asset Management, Chapter 3 of this Handbook, electronically  
121 notify the Mortgagee/Servicer and ORCF of survey or other matters placing the project's  
122 licensure or funding at risk. Please see Servicer's Notification to HUD of Risks to Healthcare  
123 Project, form HUD-93334-ORCF and Operator's and/or Borrower's Notification to HUD of  
124 Threats to Permits and Approvals, form HUD-93335-ORCF.  
125
- 126 G. Maintain the project in accordance with the lease (or other Borrower-Operator contractual  
127 agreement, as applicable) and program requirements.  
128
- 129 H. Comply with all applicable fair housing and civil rights laws and requirements.

- 130  
131 I. Maintain in full force and effect at all times, each of the permits and approvals of the  
132 healthcare project, including the state-issued operating license and any other authorizations,  
133 consents, approvals, permits, actions, filings and/or certifications necessary to operate the  
134 project. ~~(Refer to Healthcare Regulatory Agreement-Operator)~~ Please see Servicer's  
135 Notification to HUD of Risks to Healthcare Project, form HUD-93334-ORCF and Operator's  
136 and/or Borrower's Notification to HUD of Threats to Permits and Approvals, form HUD-  
137 93335-ORCF.  
138  
139 J. Engage the services of an independent consultant, if required by ORCF, at its expense, to  
140 alleviate project operating deficiencies that have been identified by ORCF. All such  
141 consultants must be approved by ORCF prior to such engagement.  
142  
143 K. Implement and maintain a risk management program meeting ORCF requirements, in  
144 accordance with Program Obligations. (See Production, Chapter 2)  
145  
146 L. ~~Maintain~~ Through the Lender, maintain regular communications with the assigned ORCF  
147 representative Asset Management and provide prompt notification for all urgent financial,  
148 operational and/or regulatory compliance issues. Please see Servicer's Notification to HUD  
149 of Risks to Healthcare Project, form HUD-93334-ORCF and Operator's and/or Borrower's  
150 Notification to HUD of Threats to Permits and Approvals, form HUD-93335-ORCF.  
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### 8.3

### Ongoing Expectations for Management Agent Performance

153  
154 “Management Agent” is a term defined in Production, Chapter 8.3. A Management Certification  
155 – Residential Care Facility (Form HUD-9839-ORCF) shall be required for any entity that is  
156 ~~directing the day-to-day functions of a healthcare project~~ servicing in that capacity with respect to a  
157 management agreement, and is not required to execute the Operator Regulatory Agreement  
158 under the criteria of Production, ~~Chapter 8~~ Chapter 8.2. If, however, that entity *is* required to  
159 execute the Healthcare Regulatory Agreement-Operator), pursuant to any of the criteria in  
160 Production, Chapter 8.2, then the Management Agreement that entity executes must incorporate  
161 subordination language approved by HUD. The requirements and responsibilities of  
162 Management Agents are described in detail in the ~~Management Certification—Residential Care~~  
163 ~~Facility. The typical duties of Management Agents, which shall be described in detail in the~~  
164 ~~management agreement, may include, but are not limited to the following:~~ Production Section II,  
165 Chapter 8.

- 166 ● ~~Personnel Administration~~
- 167 ● ~~Resident Admissions~~
- 168 ● ~~Supervision of resident care/patient services~~
- 169 ● ~~Marketing~~
- 170 ● ~~Direction of project operations and maintenance services~~
- 171 ● ~~Administration of contracts and commercial leases~~
- 172 ● ~~Billing~~

- ~~• Collections~~
- ~~• Accounting services~~
- ~~• Enforcement of employment policies and internal financial controls~~
- ~~• Food services~~
- ~~• Banking services~~
- ~~• Maintenance of business licenses, permits, and other certifications from governmental authorities~~
- ~~• Coordination of State licensure functions~~
- ~~• Coordination of HUD Real Estate Assessment Center (REAC) inspections, if applicable~~
- ~~• Representation of the project at official meetings~~
- ~~• Performance of any other activities necessary for the function and management of the health care project as further described in the management agreement.~~

The Management Certification is applicable to the Borrower (or Operator, depending on the particular contractual structure) and Management Agent. The separate parties together certify that they will comply with HUD requirements and contract obligations, execute an acceptable Management Agent agreement, and ~~further~~ that no payments have been made to the owner in return for awarding the management contract to the Management Agent and ~~that~~ such payments will not be made in the future. Management Agents must also comply with all applicable fair housing and civil rights laws and requirements.

## 8.4

### Expectations for Consultant and Contractor Performance

Borrowers, Operators and/or Management Agents may, without ORCF's consent, (but as limited by Program Obligations, the operating lease and the management agreement, as applicable), engage consultants or contractors to provide assistance and/or guidance in specialized areas. Certain engagements of consultant services, such as the hiring of legal counsel, are for services clearly beyond the traditional scope of managerial expertise. Other such engagements may be for consultants that offer a highly specialized skill in a narrow area of project operations, such as pharmacy, psychiatry, rehabilitation management and case coding, and are generally advisory in scope and for a negotiated fee over a limited period of time.

Consultants are distinguished from Management Agents as follows:

1. Consultants make recommendations and have no contractual or other authority to commit or exact resolutions of their own
2. Consultants advise on matters within specific areas of expertise for a specific time frame.
3. Consultants do not have overall responsibility for resident care and for the operations that support that care, as outlined in Production Chapter 8.5.

215 An entity that is providing back-office support but does not meet the definition of a HUD  
216 Management Agent would fall into a Contractor role and may be paid a reasonable fee from  
217 project funds.

218  
219 If an entity, ~~which was presented by the Borrower or Operator to be a consultant,~~ is found by  
220 HUD to have project ~~commitment~~ authorities or are to be providing a wide scope of managerial  
221 or operational resident care services ~~over an extended time period,~~ ORCF may deem the  
222 consultant to be a Management Agent and may require that the entity be reviewed and approved  
223 as a Management Agent.

## 8.5

### **Procedure for Change of Operator and/or Management Agent**

226  
227 ~~The Borrower shall be independently responsible for the initial screening and selection of an~~  
228 ~~Operator and/or Management Agent for the project; however, as described in this Chapter, such~~  
229 ~~selection shall be subject to Mortgagee/Servicer review and to final review and approval of~~  
230 ~~ORCF.~~

231  
232 ~~All requests for the approval of an Operator and/or Management Agent shall be initiated by the~~  
233 ~~Borrower. Such request shall be submitted to the Mortgagee/Servicer at least sixty (60) days~~  
234 ~~prior to the date such Operator and/or Management Agent is proposed to commence its duties~~  
235 ~~under the operating lease or management agreement, and shall include the required~~  
236 ~~documentation described in detail in the appropriate change request Checklist (available on the~~  
237 ~~Section 232 Program website) for proposed Operators and/or Management Agents. Submissions~~  
238 ~~should be sent electronically.~~

239  
240 ~~In certain limited circumstances, it may prove necessary for the Borrower (or Master Tenant or~~  
241 ~~Operator, if applicable) to approve an emergency replacement Operator or Management Agent.~~  
242 ~~In such circumstances, the Borrower shall be required to immediately notify ORCF and the~~  
243 ~~Mortgagee/Servicer of such exigent circumstances, and within five (5) business days of such~~  
244 ~~emergency replacement, shall submit all the documents required by this Chapter for the review~~  
245 ~~and approval of the new Operator and/or Management Agent as set forth herein.~~

246  
247 ~~3.1. When a change of Operator or Management Agent is requested, evidence of an~~  
248 ~~Operator's (or Management Agent's) experience, as delineated in Production,~~  
249 ~~Chapter 8.4, shall be provided in a format that includes specific examples,~~  
250 ~~including the applicable healthcare project's name, type of care, location, and unit~~  
251 ~~and bed count. For projects that added units to a market, evidence shall also include~~  
252 ~~the year the project opened, key operating metrics (fill pace, occupancy, net operating~~  
253 ~~income margins, etc.), and the specific responsibilities required for the management~~  
254 ~~and operation of such health care project. The requirements of this Section are~~  
255 ~~intended to better ensure that HUD will approve Operators and Management Agents~~  
256 ~~that are committed to the long-term success of the project and have the requisite~~  
257 ~~experience to operate and manage the project.~~

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~~An application for the change of an Operator or Management Agent must be assembled, reviewed for completeness, accuracy and eligibility, and submitted by the Mortgagee/Servicer to ORCF with a recommendation for approval. A checklist of the required application exhibits as well as the instructions for submitting the application is posted on the Section 232 Program website. Factors for the Mortgagee/Servicer's analysis and recommendation are set forth in Production, Chapter 8.8~~

~~Operating Lease requirements and Management Agreement requirements are detailed in Production, Chapter 8, Sections 8.6 and 8.7, respectively, of the Production portion of this Handbook.~~

~~The AE shall review the request, and the Mortgagee/Servicer's analysis and recommendation of that request, consistent with Production, Chapter 8.9.~~

~~The Management Agent may begin performing their duties and or responsibilities upon receipt of a written final approval from ORCF, in addition to the executed Management Agent Certification. There is no preliminary approval for a Management Agent.~~

~~It is ORCF's practice that if upon examination of the application and the attached instruments by the appropriate HUD staff and OGC, the submission is found to be in order, then a preliminary approval may be given to a proposed Operator. The Operator may be authorized to assume responsibilities once preliminary approval is granted. Preliminary approval may be based on conditions of documents in need of correction and or revision as well as a preliminary approval pending ORCF's receipt of all recorded documents. If the terms of the preliminary approval are not met within 45 working days from the date of the issuance of the preliminary approval, (unless further time is granted by the Commissioner in writing), the preliminary approval shall be terminated.~~

~~Until ORCF gives a preliminary and or final approval of an Operator and or Management Agent in writing, the transaction may not take place. HUD will prosecute to the fullest extent possible, any unapproved unauthorized transactions.~~