Section II
Production

Chapter 13
Master Lease

13.1 Introduction

HUD has worked diligently to ensure its insurance fund remains stable by addressing the concentration of credit with any single operator. In 2001, HUD issued new processing procedures for multiple-facility applications. Although each facility is still evaluated individually, borrowers face increased scrutiny when they seek financing for multiple facilities ~~within an 18 month time frame~~.

HUD ~~will now require~~requires a master lease for three or more properties and/or $15 million or more in aggregate loans to projects under the same ownership.

The HUD master lease structure ties together the operating leases from each healthcare facility that makes up a portfolio into one master lease. The HUD master lease requires each facility operator to allow available funds from its project to be used for any other project in the master lease portfolio that is unable to generate adequate cash flow to make required lease payments to supplement any liquidity shortfalls. This includes portfolios that may have more than one master lease due to the use of minority partners or multiple lenders. Master leases are an important tool used to lessen the financial risk posed by a portfolio and provides assurance that all portfolio project resources are available to financially support troubled projects. Master leases, along with portfolio corporate credit reviews (see Production, Chapter 17) are the primary tools the Office of Residential Care Facilities (ORCF) uses to identify and mitigate concentration risk associated with portfolio projects.

13.2 Terms and Concepts

Portfolio: Two or more borrower entities that are under common ownership and/or common control.

Common Control: Is exhibited by any individual(s) or entity(ies) that controls the Borrower and/or operator regardless of the percentage of ownership interest, so long as the individual(s) or entity(ies) comprise each Borrower and/or operator. Affiliated residential care facilities and/or healthcare operating entities will be grouped into a portfolio if they share common control as defined here. The type of corporate credit review will depend in part on the size of the combined mortgage amount of the portfolio

Single Asset Entity: For each individual project, the mortgaged property shall be the only asset of the Borrower and Operator (please see Production, Chapter 2.5.B and 2.5.C for SAE requirements).

Affiliates/Affiliated: Any person or business concern that directly or indirectly controls the policy of a principal or has the power to do so.

13.3 Policies and Guidance

A. **Purpose of Master Lease**

FHA approves mortgages for individual properties. However, more and more mortgages approved by FHA have a common or corporate ownership structure which significantly increases the concentration risk for FHA should the parent ownership entities encounter significant financial, market or legal risks. In order to counteract the additional risks, ORCF has determined that owners of multiple properties must provide additional support in the form of a master lease.

The purpose of utilizing a master lease structure is twofold:

1. To provide a mechanism for a master tenant to access available profit from any of the other facilities that are a party to the master lease in order to assist an individual property that may be experiencing inadequate cash flow to meet its financial obligations.
2. The master lease is also a tool to ensure that in the event of a bankruptcy that all project obligations are utilized to maximize HUD's recovery.

A master lease is not a traditional cross collateralization of all project collateral (which would be an accepted practice for a bank loan, a Commercial Mortgage Backed Securities (CMBS) or a bond financed facility). For FHA-insured projects, the master lease is a cross default of only the individual subtenants. A master lease reduces the risk of "cherry picking" – a practice in which the subtenants of multiple FHA-insured facilities maintain the lease in financially successful projects while rejecting the leases of poorly performing projects. A master lease can prevent "cherry picking" in that the master lease is an indivisible lease which requires a debtor in bankruptcy to accept all leases or reject all leases included within a master lease.

B. **Description of the Master Lease**

A master lease is a primary lease that controls subsequent leases. The master tenant will sublease its interest to a subtenant operator. All subtenant operators are subject to the master lease. A master lease essentially ties together multiple facilities with the same ownership.

Under each sublease, the operator will be obligated to pay to the master tenant a minimum of base rent plus reserves and escrows owed by the borrower on the FHA-insured loan. Each operator will sign a Cross-Default Guaranty of Subtenants, pursuant to which each operator guarantees to the master tenant the performance of the obligations of the other subtenants under their collective subleases. If any subtenant defaults on any single sublease, that default would trigger a default on the master lease and all subtenants.

It is not in FHA's interest for a default to occur for all subtenants, so it has provided a mechanism to provide a reasonable timeframe for the master tenant and the parent operator to correct any deficiencies and or cure a default to the project as long as there is not a substantial and imminent risk of a revocation or termination of the license or other necessary permits or approvals.

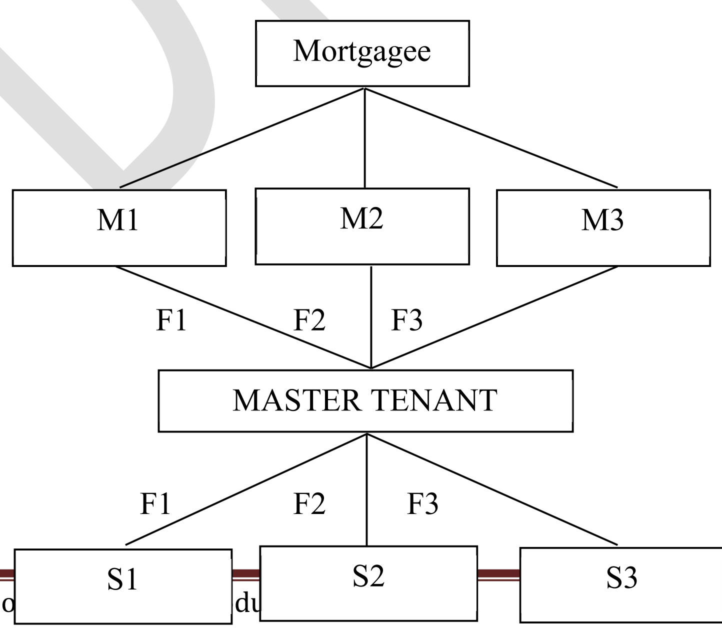
C. **Underwriting of Projects included in a Master Lease**

Each mortgage insurance application must meet FHA's underwriting standards on its own merit. HUD does not permit a master lease structure to be used to justify the approval of applications for mortgage insurance for fundamentally weak projects, and HUD will not accept the premise that "the strong projects will take care of the weak projects." As with all FHA projects, each loan will have a separate note for each borrower and each note will be secured by its own security instrument. FHA does not cross collateralize the real estate of projects included in a master lease structure.

D. **Master Lease Structure**

Under the master lease arrangement, the Borrower for each property included in the master lease is collectively known as the landlord. The landlord enters into a master lease with the master tenant. The master tenant will enter into a separate operating sublease with each healthcare project operator entity. Each sublease will be included in the master lease. Each subtenant operator therefore enters into a separate lease agreement with the entity that owns the facility (i.e. the landlord).

Master Lease Structural Map



The chart above describes the master lease structure. The chart demonstrates that the mortgagee issues a note and provides a mortgage for each individual standalone project (M1, M2 M3). The master tenant leases all of the facilities and enters into subleases (F1, F2, F3) for each subtenant (S1, S2, S3).

The master lease and the related subleases are subordinate to the FHA-insured mortgage. The master lease should be structured so that additional properties may be added later to the master lease in connection with future FHA-insured loan transactions upon approval by HUD.

Note: Portfolios financed through a CMBS often have provisions that allow projects to be removed from their master lease into one with an FHA-insured mortgage.

E. **Alternative Forms of Project Structures and Variations in Master Lease Structures**
The basic master lease structure described above may not always be appropriate due to other factors such as follows:

- Multiple Minority Owners
- Multiple Operators
- Multiple Lenders
- Legal Restrictions
- Contractual Restrictions

1. **Multiple Minority Owners**
For projects that have majority common owners but have a limited number of minority owners, the master lease structure will be used but with minor modifications. The master lease project cash flows may be segmented so that minority partners do not need to share their minority profit with other projects where they do not have an ownership interest. However, the majority owners' profit will be pledged to all projects in the master lease. If there is more than one master lease, the majority owners will pledge their profit to support all master leases.

If the minority ownership interests are different between projects or there is more than one non-related minority partner, the carve-out amounts shall be proportionally determined. The master lease should have a provision that if the minority ownership position is purchased or obtained by the majority owners, the master lease will be changed to reflect that the interests of the majority partners is 100% or whatever the ownership position is determined to be. Any related party to the minority party after the buyout shall be considered the common majority owner.

HUD understands that the ownership interests of multiple facilities can vary due to the inclusion of minority interests in differing ownership entities. ORCF has structured master lease transactions with unique and atypical circumstances. HUD has been able to achieve creative solutions in consultation with lenders and OGC to structure master lease documents that protect HUD’s interest while not interfering in the legal rights of or fairness to minority ownership interests.

See the Pledge of Cash Flow Model in Appendix13.1 for a sample diagram.

2. **Multiple Operators**
For projects that have multiple third party operators, such as REITS, a master lease can be constructed for only those units that are leased to one operator. HUD recognizes that one operator cannot and should not be liable for the financial obligations of another unrelated third party operator. However, the owner is not excused from its obligation to provide financial support to all troubled projects. If there is more than one master lease for a common ownership group due to different operators, the majority ownership group will pledge their profit from all master leases constructed with different operator entities to support all of the projects that are subject to each of all master leases. This may be accomplished through a master landlord.

See the Master Landlord Structure in the Appendix 13.2 for a sample diagram.

3. **Multiple Lenders**
If the same borrower uses multiple lenders for its financing, the borrower will be allowed to enter into a separate master lease with each lender. The duties and obligations of each lender may conflict if projects within one master lease have differing requirements or need to utilize funds or obligations under the control of a different lender. HUD does not support allowing one lender to interfere with another lender’s master lease in a manner that could jeopardize the viability of another lender’s projects that are performing under a separate master lease for a different lender that is meeting all of its performance obligations.

In such situations, a master lease for each lender with subordinate cross-default guarantee agreements may be a suitable alternative.

See Multiple Lender Master Lease Alternative diagram in Appendix 13.3.

Also, the master leases from different lenders may contain a provision that a default under one master lease may constitute a default under all master leases if HUD, in consultation with all lenders, determines that a cross default provision should be exercised.

4. **Legal Restrictions**
HUD understands that there may be a limited number of situations where a master lease is not feasible due to external factors such as jurisdictions where a master lease would be inconsistent with State law~~ or would be subject to onerous asset transfer taxes.~~. In those cases, HUD will impose alternative risk mitigation requirements.

If there are legal restrictions or other legal provisions that effectively negate the advantages of the master lease structure, the lender and HUD must seek comparable remedies that offer the utmost protection to HUD's interest by ensuring that provisions are adopted in the form of guarantees that provide a means by which profit from projects performing successfully ~~to~~will be utilized to support projects that are unable to meet their financial obligations. If comparable protections are not available, HUD reserves the option not to approve the portfolio. HUD may compensate for the loss of protection normally achieved by master leases by requiring, without limitation, cross guarantees, corporate guarantees, increased debt service reserves, more stringent underwriting criteria for debt service coverage and loan to value, and/or restrictions on surplus cash distributions.

In the event that the lender has additional issues or restrictions that interfere with executing a standard master lease, the lender should contact the Director of ORCF to work with the lender and OGC to try to structure reasonable modifications that will permit HUD's objectives to be met while accommodating any unique needs of the portfolio.

5. **Contractual Restrictions**
   In the event that existing contractual arrangements, such as credit facilities, do not permit a traditional master lease structure, a HUD-acceptable alternative will be required. HUD may consider alternative structures that will provide equivalent protection. If HUD determines that the proposed alternative mechanism is satisfactory, then HUD may accept the projects for mortgage insurance.

F. **Alternatives to Master Lease.** The master lease requirement applies to projects that are utilizing, or will utilize, a lessee-operator "PropCo/OpCo" structure. ~~For organizational structures with no operating lease, however,~~HUD understands that there may be a limited number of situations where a master lease is not feasible due to external factors such as jurisdictions where a master lease would be inconsistent with State law or the organizational structure has no operating lease. In those cases, HUD will impose alternative risk mitigation requirements. HUD looks to an alternative means of mitigating the concentration of risk inherent in the common ownership (e.g., a Limited Guaranty and Security Agreement).

13.4 Master Lease Criteria

The master lease procedures that are applicable to for-profit and non-profit owners and operators of residential care facilities are stated below.

A. ~~A~~The types of transactions that trigger the requirement for a master lease ~~will be required where there is~~("applicable transactions") include:

1. An application for mortgage insurance for purchase or refinance of an existing facility pursuant to Section 223(f);
2. An application for mortgage insurance involving new construction or substantial

rehabilitation pursuant to Section 232 NC/SR;

3. An application for mortgage insurance for refinance of an existing FHA-insured facility currently in a master lease pursuant to Section 223(a)(7);
4. ~~A transfer~~Change of ~~physical assets (TPA);~~Participants (CHOP) of the facility owner; or
5. ~~A change in control~~CHOP of the facility operator. This will generally be a change in the lessee of a facility, a change in the operating license holder, or a change in the operating entity that provides patient care to residents (a management agent in some circumstances).

B. A master lease and/or an addendum to a master lease will ~~also~~ be required when:

1. ~~A~~An applicable transaction includes three or more properties and/or $15 million or more in aggregate mortgage amount (meeting either threshold is sufficient);
2. The borrowers will either be under same ownership or a majority ownership individual or group will control the properties;
3. The operators of each property will be a lessee with the same ownership; and
4. Subsequent application(s) received ~~within 18 months from the last project~~ with the same ownership and operating structure as an existing FHA-insured portfolio with a master lease in place, that property must be added to the existing master lease. In cases where there are different minority owners, different operators or different lenders, refer to the guidance in Section 13.3.E. above - Alternative Forms of Project Structures and Variations in Master Lease Structures~~; and~~.
5. ~~The applications for mortgage insurance are submitted within any rolling 18-month timeframe that begins when the first application is assigned to an ORCF underwriter. The submission of an application creates an open window for a master lease. The window remains open for 18 months following the start of processing of the most recent application. Thus for multiple submissions, the cumulative open window may be longer than 18 months from the first application to the last.~~

   ~~This 18-month timeframe may be expanded, at the discretion of ORCF where necessary, to accomplish the intent of a master lease and to fully evaluate the risk to the General Insurance Fund.~~

The master lease must be in place at closing for all projects that meet any of the above criteria. The master lease is required regardless of whether the borrower and operator are ~~either~~ identity-of-interest ~~or independent or third party~~ entities.

The master lease requirement applies to newly insured facilities, CHOPs and ~~TPAs.~~ existing insured facilities currently in a master lease. If existing insured facilities are not currently in a master lease, HUD will not reach back and require that ~~existing FHA-insured~~those facilities be placed in a new master lease ~~except when they are within a portfolio of properties submitted for financing or refinancing within the open window, or if~~unless credit considerations on a new transaction would otherwise warrant a master lease requirement being imposed as a risk mitigant.

13.5 Term of Master Lease and Subleases

The master lease is meant to mitigate the concentration of risk for the term of the mortgages to which the master lease applies. Accordingly, it is expected that the master lease shall run at least as long as the mortgage having the longest remaining term.

HUD recognizes that in some situations such an initial term may not be feasible, such as where, for example, the operator entities and ownership entities are unrelated parties, or where state law would prohibit or impose substantial negative financial consequences on such a long-term lease.

In such situations, the lender must provide the basis for that determination and propose an alternative ~~terms~~term that addresses HUD's long-term intent. Any proposed alternative structure shall, at a minimum, specify that:

1. Unless HUD approves otherwise, the subleases shall each be, and remain, coterminous with one another, and
2. Each borrower's Regulatory Agreement will include an addendum to be approved by HUD requiring that in the event the master lease will terminate prior to the maturity date of the FHA-insured mortgage, the borrower shall enter into a new master lease with another party acceptable to HUD covering all subject properties prior to the expiration of the existing master lease.

The master lease shall only include facilities insured by FHA under the Section 232 program. Projects with affiliated ownership that are not insured under Section 232 shall not be included in a HUD master lease.

13.6 Master Lease Review

HUD has developed a series of approved legal documents that are required to be utilized for master lease transactions.

The legal documents are as follows and are available on the Section 232 Program website:

1. Cross-Default Guaranty of Subtenants,
2. Guide for Opinion of Master Tenant's Counsel,
3. Healthcare Regulatory Agreement - Master Tenant,
4. Master Lease SNDA,
5. Master Lease Addendum,
6. Master Lease Estoppel Agreement,~~ and~~
7. Master Tenant Security Agreement,
8. Master Tenant Assignment of Leases and Rents, and
9. ~~7.~~ Uniform Commercial Code financing statement and fixture filing.

HUD requires a Master Lease Review Package that must include the items listed above. For midsize and large portfolios, the master lease documents must be in final form prior to any applications being submitted to the queue. To that end, both OGC and ORCF will review the information to insure that it meets HUD's requirements prior to the application being submitted to the queue.

For small portfolios, ~~prior to the ORCF Loan Committee and the issuance of a Firm Commitment, both~~at closing, the OGC closing attorney and ORCF underwriter will review the information to ensure that it meets HUD's requirements.

Notwithstanding the above, the lender and the borrower are responsible for ensuring that all HUD requirements are met. Please label and ~~tab~~arrange all~~ hardcopy~~ materials following this outline, and submit these documents to ORCF. **HUD's review of documents can be expedited by indicating if the HUD master lease form documents are being used without any requested revisions.**

A. Lender shall provide a narrative which describes the following:

1. The terms and conditions of the master lease;
2. Any waiver or other requests for modifications to the master lease regime that deviate from the standard requirements specified in the HUD forms, policies or practices for master leases;
3. Any proposed payments (fees, income, etc.) to or from the master tenant;
4. The lease agreements between borrower and the master tenant, and the lease agreements between the master tenant and the subtenants;
5. The collection and flow of funds from the subtenants to the master tenant and from the master tenant to the borrower. Include the involvement of funds flow with the ~~AR~~A/R lender if an ~~AR~~A/R lender is providing ~~AR~~A/R loans to the project; and
6. A diagram or other visual depiction of the flow of funds from each Operator to the master tenant to the Borrower. Specify the depositories for each individual project funds, as well as for the master tenant as applicable.

B. Lender shall provide a spreadsheet with the following:

1. The names of the facilities to be included under the master lease;
2. The proposed mortgage amount for each facility;
3. The recommended appraised value of each facility;
4. The proposed debt service coverage ratio for each facility including the mortgage insurance payment;
5. The number of beds at each facility;
6. The CMS Star Rating at each facility, if applicable;
7. The current balance of each facility's replacement reserve account; and
8. Any other reserve funds that will be available to the owner/operator to fund project costs.

C. Description of the Legal Structure: A narrative shall be provided describing the legal structure of the borrower or master landlord entity, the master tenant, and the operating entity/subtenant. The legal structure must disclose all tiers of ownership. If the Borrower or Operator has multiple tiers of ownership, the narrative shall include a diagram or chart identifying all parties and their relationship to one another and any conflicts of interest between the parties.

D. ORCF Review: ORCF, in cooperation with OGC, will review the following items to ensure agreement with the contents of the lender's application:

1. Master Lease and Subleases;
2. Base rent amount;
3. Escrow amounts (for example, taxes, MIP, property insurance, etc.);
4. Term of the master lease;
5. HUD mandated immediate and/or critical repairs;
6. HUD required replacement reserves; and
7. Any other required reserves.