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

16.1

Introduction

11
12 This chapter sets forth general principles to guide HUD staff review of proposed cash flow
13 structures, Deposit Account Control Agreements (DACAs), Deposit Account Instructions and
14 Service Agreements (DAISAs) and lease cost/debt service payment methods. It is the
15 requesting parties' responsibility to establish structures and submit documents that comply with
16 applicable ORCF Section 232 Program rules and that are acceptable to HUD. Operators of
17 healthcare facilities typically generate accounts receivable that arise from governmental
18 healthcare insurance programs (e.g., Medicaid, Medicare, Veterans' Administration Programs, or
19 other governmental entities) ("Governmental Receivables") as well as from commercial insurers,
20 private payors, or miscellaneous revenue ("Non-Governmental Receivables").

- 21
- 22 A. **Governmental Receivables.** Healthcare insurance programs typically require that
23 Government Receivables be paid directly to the healthcare provider and/or electronically
24 deposited into a deposit account subject to the provider's control (as opposed to the Lender's
25 control). These programs typically also limit the ability to directly assign such receivables.
26 HUD expects that Governmental Receivables will be initially deposited into a separate
27 account that will be subject to the control of the provider and governed by a Deposit Account
28 Instructions and Services Agreement (DAISA).
29
- 30 B. **Non-Governmental Receivables.** HUD expects that Non-Governmental Receivables will
31 be initially deposited into an account that is subject to a Deposit Account Control Agreement
32 (DACA) (sometimes referred to as a "Blocked Account Agreement"). HUD also expects that
33 the DAISA will provide that funds from the DAISA account will be periodically (i.e. daily
34 unless otherwise approved by HUD) swept from the DAISA account into the DACA account.
35
- 36 C. **Cash Flow Structures.** Depending on the structure and nature of a particular transaction,
37 the cash flow chart typically includes the placement and number of DAISA and/or DACA
38 accounts, the type of DACA used, and the manner in which lease costs/HUD mortgage loan
39 debt service are made. Occasionally state law or a particular healthcare program may affect

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

47
48 [NOTE: Submission and approval of the cash flow chart and the use of **at least one**
49 **DACAaDACAs** (and DAISA, if there are governmental receivables) **isare** required
50 regardless of whether **ARA/R** financing is proposed.]

- 51
52 D. **Lockboxes.** A lockbox is a mechanism that allows a financial institution to collect and
53 process account receivables by having an operating entity's payments sent directly to a
54 location accessible by the financial institution. Lockboxes are often used when payments to
55 multiple operating entities are made to the same account.

56 57 **16.2**

Submission and Review

58
59 ORCF will evaluate cash flow structures, DACAs and DAISAs pursuant to the guidance
60 provided in this chapter for the following programs:

- 61
62 A. Section 232 for new construction or substantial rehabilitation,
63 B. Section 232 pursuant to Section ~~232~~/223(f)¹ for purchase or refinance,
64 C. Section 232 pursuant to Section ~~232~~/223(a)(7) or Section 232 pursuant to 223(f) pursuant to
65 223(a)(7) for refinancing,
66 D. Section 241(a) for supplemental loans in connection with a 232 loan under one of the
67 categories described above, and
68 E. Section 223(d) operating loss loans in connection with a 232 loan under one of the categories
69 described.

70
71 Review of cash flow structures, DACAs and DAISAs may take place at various times, such as
72 during the firm application process, post-closing or at a later point in time during the life of the
73 FHA-insured loan.

74 75 F. **During the Firm Application Process:**

- 76
77 1. **Section 232/223(a)(7) and Section 232/223(f)** – HUD expects review to take place as
78 part of the review of the application and document submission for closing.
79
80 2. **Section 232 New Construction** – HUD will generally not require DACAs or

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

81 DAISAs to be put in place until the project reaches 70% completion. The application
82 and initial closing submission should still include the cash flow chart and, when
83 available, any ARA/R Loan Documents. DACAs and DAISAs must be in place, in
84 any event, by the earlier of: ii) the date of final closing, or ii) the closing of any
85 ARA/R Loan.

- 86
- 87 3. **Section 232 Substantial Rehabilitation** – HUD generally requires the submission of
88 cash flow charts, DACAs and DAISAs as part of the application and document
89 submission for initial closing.
- 90
- 91 4. **Section 241(a) Supplemental Loans and 223(d)** - Operating Loss Loans in
92 connection with 232 loans in any of the above categories– HUD generally requires
93 the submission of cash flow charts, DACAs and DAISAs as part of the application
94 and document submission for initial closing.

95

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

- 97
- 98 1. **TransfersChange of Physical Assets or Participants (CHOP): change in the**
99 **Borrower or change in Operator.** Reviews are required in connection with a
100 transferchange of physical assets (TPA) Borrower or a change in Operator. The
101 TPACHOP occurring in conjunction with an FHA-insured loan closing ~~should~~must
102 be directed to the HUD Underwriter assigned to the project.
- 103
- 104 2. **2. After a Cut-Off Time has occurred involving ARA/R Financing.** Once a Cut-
105 Off Time occurs, the FHA Lender can require the establishment of separate deposit
106 accounts into which payments with respect to Accounts arising after the Cut-Off
107 Time are to be deposited consistent with the terms of the Intercreditor Agreement.
108 The FHA Lender shall diligently exercise its rights under the applicable contractual
109 documents so as to best protect the FHA-insured collateral.

110

111 **Portfolios.** In all the above instances, it should be determined if a portfolio acceptance letter
112 applies and whether an overall cash flow chart was approved during portfolio review, so that it
113 can be determined:

- 114
- 115 1. If the proposed structure is consistent therewith, and
- 116
- 117 2.
- 118 If a DACA and/or DAISA form has been previously approved in conjunction with the
119 portfolio approval.

120

121 If a project involves accounts receivable financing and is part of a portfolio that requires a
122 portfolio review, review of the proposed cash flow structure will generally take place at the
123 time of the portfolio review and a cash flow chart ~~should~~must be submitted at that time.
124 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.

H. In all of the above instances, 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.

I. **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 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 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 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, from receipt through payment of Project/lease costs and FHA-insured loan debt service. Once the cash flow chart is approved by HUD and the FHA Lender, it is

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

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

- 170 A. All of the accounts through which ~~project~~Project funds flow, or which are related to the
171 ~~project~~Project, (including investment accounts, if any) must be shown. The account into
172 which Government Receivables are initially deposited and the account into which Non-
173 Government Receivables are initially deposited must be identified.
174
- 175 B. The depository bank name, account number and all parties named on each account must be
176 depicted. If anyone other than the Operator is named on the account, the parties must explain
177 who such person is and ~~itsthe~~ relationship to the Operator. If the DAISA account is not in
178 the name of the Operator, the parties must further demonstrate that such arrangement is
179 permitted by the applicable governmental healthcare programs.
180
- 181 C. Which accounts will be subject to DAISAs or DACAs, the parties to each, and the nature of
182 each DACA (immediate control versus future notification) must be depicted (see below, in
183 Section 16.6, for an explanation of the distinction between these two types).
184
- 185 D. If ARA/R financing is involved, the flow of ARA/R loan disbursements and repayments
186 must be shown. The cash flow chart must also show whether or not funds will go through
187 any ARA/R Lender account (e.g. for daily pay-downs) and the account into which ARA/R
188 loan draws (and any remittances of excess funds not necessary for pay-down) will be
189 deposited.
190
- 191 E. How lease costs/FHA loan debt service will be paid, must be addressed and any tenant or
192 master rent accounts that are proposed ~~should,~~ must be depicted. A “tenant rent account” is
193 an account established solely for the purpose of funding lease costs, through ARA/R loan
194 draws or otherwise.
195
- 196 F. If there is ARA/R financing involving multiple ~~projects~~Projects, the cash flow chart must
197 depict the above as to all ~~projects~~Projects within the ARA/R line.
198
- 199 G. If a master lease is involved, the chart must depict the Master Tenant’s position in the cash
200 flow process (including any Master Tenant accounts and any deposit account agreements
201 proposed to govern such accounts). Alternatively, the cash flow chart must demonstrate and
202 the Intercreditor Agreement must address, in a manner acceptable to HUD, how the rent will
203 be paid, and the Borrower(s) and Master Tenant must agree to the arrangement as evidenced
204 by their signature on the ICA. -
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16.4

Cash Flow Structures

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

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1. An “**upstream**” account is any account through which funds flow prior to reaching a particular account.

215

216

217

2. A “**downstream**” account is any account through which funds flow after leaving a particular account.

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219

220

B. **General provisions.** ~~In many instances,~~ HUD generally requires only a single DAISA account and ~~a single~~multiple DACA ~~account~~accounts, provided that ~~such~~the upstream DACA account represents the account into which all of the non-Government Receivables are initially deposited and into which the DAISA funds are swept.

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222

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225

1. Typically,

226

Specific accounts which are “downstream” of an account subject to a DACA in favor of FHA Lender ~~do not~~lender will also require a DACA on each of those accounts 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.~~lender. (See Production, Chapter 16.4.C).

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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.

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237

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, if the Project or Operator becomes entitled to any portion of any resident funds that are deposited into such accounts and to which the facility or Operator becomes entitled, those funds 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/Healthcare Facility’s contracts with residents).

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C. **Exceptions.** ~~HUD may determine that~~requires a DACA ~~is required~~on additionalthe following accounts:

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247

248

~~1. For underwriting reasons,~~

249

2.1. If a Tenant Rent Account is used, (an account established to fund lease costs),

250

251

3.2. For a Master Tenant account (the account into which the lease payments from the individual facility/Healthcare F Operators are made),

252

253

4.3. On an operating account/Operating/Disbursement Account, if a DACA upstream of the ARA/R Lender account is used; such an upstream DACA typically calls for a

254 daily sweep of funds into ARA/R Lender’s account. Such an upstream DACA may
255 have an alternative instruction as to where to sweep the funds at such time as ARA/R
256 Lender no longer is entitled to exercise control of the account under the Intercreditor
257 Agreement (usually to the operating account). Further, due to the daily sweep of such
258 upstream account, the bulk of funds will generally be in the downstream operating
259 account;

260 ~~5.4. On a~~ Borrower Representative Account (described below),

261 ~~6.5.~~ If the ARA/R Lender is also the depository, additional DACA’s may be required to
262 evidence such bank’s agreement that it will waive or limit any rights of set-off,
263 recoupment, banker’s lien or contractual security interest in such other accounts (with
264 the exceptions set forth below, in Section 16.6); and

265 ~~7.6.~~ In such other instances that may be appropriate given the structure of the transaction.
266

267 D. Types of Cash Flow Structures:

268
269 1. If ~~the project~~ the Project is a single “stand-alone” ~~project~~ Project, involving just one
270 FHA mortgage loan and one Operator, the cash flow chart will typically be as set
271 forth on Appendix 16.1.
272

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

286 3. In another type of ARA/R Loan, the project’s revenues flow through an ARA/R
287 Lender account, where they are applied by ARA/R Lender to the outstanding balance
288 of the ARA/R loan on an ongoing basis. In this type of arrangement, it is usually
289 contemplated that the Operator will be routinely making draws and that ARA/R loan
290 draws will be funding most, if not all, operating expenses. A sample flow chart
291 showing this can be found at Appendix 16.2.
292

293 E. **Cash Flow Structures & Governmental Receivables.** Regardless of type, Governmental
294 Receivables must flow through a DAISA account before going through the ARA/R Lender’s
295 account.
296

297 1. For the cash flow structure type outlined above, in Section 16.4.D.3, funds may also
298 go through a project specific, or commingled “upstream” DACA account prior to

299 reaching the ARA/R Lender account. See Appendix 16.3 for a specific example of
300 this scenario.

- 301
- 302 2. An upstream DACA account must not be the project operating account. Rather, the
303 project operating account may be an account that is downstream of the ARA/R
304 Lender. Thus, if such an upstream DACA is used, it may call for a periodic (often
305 daily) sweep of funds into the ARA/R Lender account until such time as ARA/R
306 Lender is no longer entitled to give a Control Notice (i.e. until such time as the right
307 to give the Control Notice shifts to FHA Lender). The sweep of funds to ARA/R
308 Lender must not be permitted once FHA Lender is entitled to give the Control Notice.
309 The parties must plan in advance how funds will flow into the downstream operating
310 account once the ARA/R Lender is no longer in the picture.
- 311
- 312 3. In any instance where there is no upstream DACA, there must be a downstream
313 DACA at the first account which funds go through after leaving the ARA/R Lender's
314 account.
- 315
- 316 4. If the ARA/R Lender requires a DACA on a downstream account, the FHA Lender
317 should generally must also be a party. See Appendix 16.2 for a specific example of
318 this scenario.

319

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

322

323 G. **Commingled Accounts:** If it is proposed that funds from more than one project will flow
324 into an account (a "commingled account," as shown in Appendix 16.4) the parties must
325 demonstrate that:

- 326
- 327 1. Systems must be in place which will permit the identification of funds belonging to
328 each project at all times. Under the Operator's Regulatory Agreement if HUD
329 determines that deposits cannot be reliably and readily traced by facilityHealthcare F,
330 HUD may direct Operator to deposit such funds in a segregated account.
- 331
- 332 2. Operator compliance with the financial reporting required under 24 CFR 5.801 will
333 also necessitate that the Operator(s) maintain accounts in a manner that will allow
334 HUD and the FHA Lender to discern the funds attributable to each facilityHealthcare
335 Facility.
- 336
- 337 3. Generally, HUD does not permit Governmental Receivables from different
338 projectsProjects to be initially deposited into a commingled account. Any proposal to
339 commingle Governmental Receivables from different projectsProjects, in addition to
340 meeting the above standards, must demonstrate that such commingling is permitted or
341 required by the applicable healthcare program payor rules.
- 342
- 343 4. The use of commingled accounts is subject to HUD's written approval and must be
344 identified on the cash flow chart, which must show all the facilitiesHealthcare

345 Facilities whose funds are proposed to flow through such account. An approved
346 commingled account would be subject to the provisions of a DACA in accordance
347 with Section 16.6. The Operators involved must be affiliated. Generally, accounts
348 that commingle FHA-~~insured facilities~~insured Healthcare Facilities with non-FHA
349 insured facilities will not be permitted. Generally, the use of commingled accounts
350 in connection with a master lease structure may be acceptable. The Operator Security
351 Agreement and A/R Financing Certification (Form HUD-90020-ORCF) require that
352 the account into which Governmental Receivables are initially deposited be separate
353 from the account into which Non-Governmental Receivables are initially deposited.
354 So this sort of commingling is rarely permitted.
355

356 H. **Borrower Representatives on ARA/R Line:** Occasionally ARA/R Loan Documents (or
357 documents for a centralized deposit account held by one of the Operators or an affiliate) may
358 call for a single person or entity (usually called the “Borrower Representative”) to be the sole
359 party authorized to make draws on behalf of multiple Operators; and may also call for such
360 draws to all be initially deposited into a commingled account in the name of the Borrower
361 Representative and/or for such draws to be deposited into separate project accounts as
362 directed by Borrower Representative. Generally, this is encountered where an ARA/R Loan
363 includes many Operators (or will include, if it anticipates adding additional FHA facilities in
364 the portfolio). Sometimes the Borrower Representative is proposed to be one of the
365 Operators, and sometimes it is proposed to be a separate entity that is affiliated with the
366 Operators. The cash flow chart must always depict any such proposed arrangement and any
367 Borrower Representative accounts. Such arrangements raise a number of considerations and
368 must be acceptable to HUD.
369

370 All documents evidencing the relationship between the Borrower Representative (in its
371 capacity as such) and the Operators must be submitted for HUD’s consideration. The
372 Borrower Representative must not be a creditor of the Operators; i.e. the documents
373 ~~should~~shall establish that the Borrower Representative is making such draws as agent for the
374 other Operators and is not borrowing funds in its own capacity then “re-lending” such
375 funds to other Operators. The Borrower Representative must be obligated to make and
376 disburse draws to the respective facilities in a manner consistent with HUD Program
377 Obligations, applicable HUD Regulatory Agreements (Borrower’s Regulatory Agreement,
378 Operator’s Regulatory Agreement or Healthcare Regulatory Agreement – Master Tenant
379 (Form HUD-92337-ORCF), and the Intercreditor Agreement with respect to each Healthcare
380 Facility. Additionally, the Borrower Representative will be required to sign a certification to
381 disclose the named entity on the accounts managed or controlled by the Borrower
382 Representative.
383
384

16.5

Lease Cost/Debt Service Payment Methods

385
386 The cash flow chart must show how “Current Impositions” (i.e. the rent, taxes and insurance, and
387 deposits to escrows or reserves required under the Lease or other Borrower-Operator Agreement)
388 will be paid. If the FHA Borrower is also the Operator, there are no lease payments so the chart
389 will show only payment of debt service and deposits to escrows and reserves required by the

390 FHA-~~insured loan documents.~~ Mortgage Insurance Documents. The method detailed in the
391 cash flow chart must be consistent with and match the description in the Intercreditor
392 Agreement. The Operator's, Borrower's (and where applicable, Master Tenant's) execution of
393 the Intercreditor Agreement evidences their agreement to the lease cost payment method, and
394 also evidences the ARA/R loan borrower's authorization to the ARA/R Lender to direct the
395 proceeds of lease cost draws as provided therein.

396
397 A. **Acceptable Payment Methods.** Generally, the following methods are acceptable and
398 consistent with the Intercreditor Agreement:

- 399
- 400 1. **Direct from ARA/R Lender to FHA Lender.** The Operator directs ARA/R Lender
401 to disburse ARA/R loan advances to pay Current Impositions or the current loan costs
402 directly into an account in the name of the FHA Lender.
 - 403 2. **Disbursement into Operator Designated Account.** If the proceeds of such an
404 advance are not being paid directly to the FHA Lender, the FHA Lender must be able
405 to receive by automatic debit or otherwise have the right to withdraw from an
406 Operator account amounts at least equal to the Current Impositions or the current
407 mortgage loan costs. If the FHA Lender is only receiving current mortgage loan
408 costs, the Operator ~~should~~will be required to pay excess Current Impositions to the
409 Borrower.
 - 410 a. **Disbursement into Tenant Rent Account.** The Operator may establish a
411 "Tenant Rent Account" whose sole purpose is for payment of Current
412 Impositions and which is funded directly by ARA/R loan draws (or by the
413 Operator). The Operator must be obligated to timely cause to be deposited
414 sufficient funds each month to pay such costs. ARA/R Lender ~~should~~must
415 disclaim any interest in such an account, and it will be subject to a DACA
416 solely in favor of FHA Lender. An example of this scenario can be found in
417 Appendix 16.2.
418 [NOTE: In this scenario, it is acceptable to use an immediate control DACA
419 (as defined below) which permits the bank, after FHA Lender's debit for debt
420 service, to remit any excess to the FHA Borrower's account. FHA Lender
421 should be able to revoke such permission.]
 - 422 b. **Disbursement into Operating Account.** Alternatively, draws for Current
423 Impositions sometimes will be disbursed directly into the ~~project's~~Project's
424 general operating account. This alternative is generally acceptable for stand-
425 alone or smaller transactions (so long as the FHA Lender has the ability to
426 debit this account for Current Impositions) and may be less acceptable for
427 more complex transactions. An example of this scenario can be found in
428 Appendix 16.1.
 - 429 3. **Disbursement into Master Tenant Account.** If a master lease structure is used,
430 such advance may be made directly from ARA/R Lender into the Master Tenant's
431 account. An example of this scenario can be found in Appendix 16.3.

432
433
434 In this scenario, it may be appropriate to use an immediate control DACA in favor of
435 FHA Lender which permits Master Tenant, after FHA Lender's debit for debt service,

436 to remit any excess to the respective FHA Borrowers. FHA Lender should be able to
437 revoke such permission.

438
439 Sometimes Current Imposition payments are proposed not to be made to the Master
440 Tenant directly but are rather debited by the FHA Lender(s) directly from an Operator
441 designated account. The Master Lease requires that rents be paid to the Master
442 Tenant, who in turn pays the FHA Borrowers. Accordingly, if HUD approves such a
443 proposal:

- 444 a. If ARA/R Financing is involved, the Intercreditor Agreement must evidence
445 approval by Master Tenant and Borrowers of such method of payment.
446 b. If ARA/R financing is not involved and HUD approves a structure under
447 which funds do not flow through Master Tenant, Master Tenant's and
448 Borrower's agreement to such method of payment ~~should~~must be
449 documented.

450
451 ~~FHA Lender~~FHA Lender agrees to apply amounts received on account of Current
452 Impositions toward payment of the FHA Borrower's monthly debt service obligation
453 under the FHA Loan and to fund applicable escrow and reserve requirements, with
454 the balance remaining of the payment so collected, if any, to be remitted by ~~FHA~~
455 ~~Lender~~FHA Lender to the FHA Borrower (or such excess may be remitted to the FHA
456 Borrower by the DACA Bank or Master Tenant after the FHA Lender debit if
457 permitted by the DACA or by such other remittance method as may be approved by
458 HUD).

16.6

Deposit Account Control Agreements (DACAs)

461
462 A Deposit Account Control Agreement (DACA) is an agreement between a debtor/account
463 owner, a secured party, and the bank maintaining the account that the bank will comply with
464 instructions from the secured party directing the disposition of funds in the deposit account
465 without further consent by the debtor/account owner.

466
467 A. **General Parameters.** Under the Uniform Commercial Code (UCC), a Lender must have a
468 DACA with the depository bank to perfect its security interest in such deposit account as
469 original collateral. There is an exception if the Lender is also the institution where the
470 account is held (i.e. the Lender has possession of the account). However, even if FHA Lender
471 is the depository bank, HUD generally still requires a DACA that clearly describes the
472 priority of the liens.

473
474 ARA/R Lender must also agree to limit its ability to assert other security interests, set-off,
475 recoupment, or banker's liens in project accounts held by it as the depository (see Section
476 16.4).
477

478 In the event it becomes appropriate to do so, the FHA Lender shall “spring” any DACAs in a
479 timely manner. In the event that the FHA Lender ultimately assigns the loan to HUD, it shall
480 also assign the DACA to HUD.
481

482 **B. Types of Deposit Account Control Agreements.** There are two primary types of DACA’s:
483 future notification, or “springing,” DACA’s, and immediate control DACA’s.
484

485 1. **Future Notification DACAs.** In a future notification, or “springing,” DACA, the
486 Operator is permitted to use the account as it normally does and to make withdrawals.
487 The bank follows the Operator’s instructions as to the account until such time as the
488 secured party notifies the depository bank that it is exercising exclusive control (such
489 a notice is referred to herein as a “**Control Notice**”). Once the Control Notice is
490 given, the bank must follow only the secured party’s instructions as to the disposition
491 of funds in the account. Typically, the secured party can only give such a Control
492 Notice and “spring” the DACA (and any associated lockbox) once an event of default
493 occurs under its loan documents.

- 494 a. The FHA Lender DACA is typically a “future notification” DACA.
- 495 b. The Operator Security Agreement contemplates that, unless otherwise
496 approved by HUD, the FHA Lender DACA will be a future notification type
497 DACA that can be triggered only on default.
498

499 2. **Immediate Control DACAs.** In an immediate control DACA, the secured party
500 exercises control immediately and the bank is obligated from the date of the
501 agreement’s execution to comply with the instructions of the secured party, and/or the
502 Operator/account holder is precluded from making withdrawals. (Sometimes a
503 DACA will be labeled “future notification” but the Lender gives the Control Notice at
504 closing or within the document; these are, in effect, immediate control DACAs).

- 505 a. If a Tenant Rent Account is used for the lease cost payment method, it may be
506 appropriate to use an immediate control DACA in favor of FHA Lender on
507 the Tenant Rent Account. Likewise, if a Master Lease is involved and lease
508 payments are being made into a Master Tenant Account, it may be appropriate
509 to use an immediate control DACA in favor of FHA Lender on such Master
510 Tenant account.
- 511 b. Where there is a DACA in place upstream of an ARA/R Lender account, such
512 DACA may call for daily sweeps into the ARA/R Lender’s account and no
513 withdrawals by the Operator.
 - 514 i. Typically, if the FHA Lender is party to this DACA, FHA Lender’s
515 ability to exercise control will still be linked to its future notification if
516 the parties intend that this account serve as a general operating account
517 once ARA/R Lender control terminates.
 - 518 ii. In this scenario, it may be appropriate to require a DACA on the
519 downstream projectProject operating account.
520

521 **C. Key elements of DACA.** HUD does not have a required form of DACA, though one or
522 more sample forms are posted as unofficial guidance. These sample forms are only

523 examples, and the responsible parties may use a different form, at their discretion, provided
524 the form used addresses the key elements and is consistent with HUD Program Obligations.
525

526 Key elements for DACA's include those set forth below. Elements that include "must" are
527 expected to be included in all forms. The remaining elements should be included, but HUD
528 has discretion to permit deviations (and additional provisions) that do not materially affect
529 HUD's interests.
530

531 **1. Parties to DACA:**

- 532 a. Where no ARA/R Loan is involved, the FHA Lender must be the only secured
533 party named in the DACA. Parties will generally be the Bank, FHA Lender,
534 and the Operator (or named account holder). The depository bank must be an
535 organization engaged in the business of banking.
- 536 b. Where an ARA/R Loan is involved, both the ARA/R Lender and FHA Lender
537 can be named as secured parties in a single DACA, or a First Lien DACA (in
538 favor of ARA/R Lender) and a Second Lien DACA (in favor of FHA Lender)
539 may be used.
- 540 c. HUD must not be a party to a DACA (unless the loan is held by HUD).
- 541 d. If a party other than the Operator is named on, or has an interest in, a deposit
542 account in the flow of funds, such arrangement must be acceptable and
543 comply with any restrictions in the FHA ~~insured loan documents~~. Mortgage
544 Insurance Documents. If required by FHA Lender and/or HUD, such third
545 party must execute such joinders, security agreements, DACA's or other
546 documents to bind such party's interest.

- 547
- 548 **2. Notification of Security Interests.** The DACA must include a provision notifying
549 the Depository that the FHA Lender has a security interest in the deposit account and
550 all checks, funds, monies or other items now or hereafter deposited therein and any
551 lockboxes associated therewith.
552

- 553 **3. No Other DACAs.** The DACA should include representations to the effect that
554 there are no other control agreements affecting the account and that none will be
555 placed on the account (other than the DACA(s) approved as part of the transaction).
556

557 In any instance where a First Lien DACA and Second Lien DACA are used, the First
558 Lien DACA must refer to and permit the Second Lien DACA (and vice versa).
559

- 560 **4. Accounts Covered.** The DACA must identify the account (or accounts) that are
561 subject to the DACA. The account number(s) must match the cash flow chart (and
562 the DAISA must be checked to ensure that it is sweeping funds into an account
563 identified in the DACA). If the DACA covers more than one account, it should
564 provide that FHA Lender can give a Control Notice as to any or all accounts.
565

- 566 **5. UCC Control Language and Execution.** To establish "control" within the meaning
567 of the Uniform Commercial Code, the DACA must provide that Depository Bank will
568 comply with FHA Lender's instructions as to disposition of funds without further

569 consent of the debtor (typically the Operator). This language is referred to as “UCC
570 Control Language”. The DACA must be authenticated; i.e. it must be fully executed
571 by all of the parties. Notarization is not required, unless required by state law.
572 Provisions in the DACA allowing Depository Bank to file an interpleader action
573 should not include disputes between depositor and FHA Lender/HUD.
574

- 575 6. **When Each Secured Party Is Entitled to Give Control Notice.** If both ARA/R
576 Lender and FHA Lender are parties to the same DACA, the DACA must clearly set
577 forth when the Depository is obligated to follow the FHA Lender’s (as opposed to
578 ARA/R Lender’s) instructions, which must be consistent with the “change in control”
579 or termination of DACA provisions in the Intercreditor Agreement.
580

581 In any instance where a First Lien DACA and Second Lien DACA are used, the First
582 Lien DACA must terminate or provide for a change in control over to the Second
583 Lien DACA consistently with the “change in control” and termination provisions in
584 the Intercreditor Agreement.
585

586 7. **Giving and Implementing Control Notices:**

- 587 a. The DACA must clearly set forth the manner for sending a Control Notice and
588 ~~should~~must identify when it is deemed given or received. The manner of
589 giving a Control Notice must include expeditious means (i.e. it ~~should~~must
590 not be limited to delivery by mail, but also include personal delivery or other
591 prompt means).
592 b. The depository bank ~~should~~must agree to implement the notice as soon as is
593 reasonably practicable. The key is to be able to identify when the block
594 begins, which must not be subject to significant delay. Implementation
595 periods of longer than three business days after notice will not be acceptable.
596 c. Once a Control Notice goes into effect, depository bank must agree to (a)
597 disregard further instructions delivered by the Operator/account holder and
598 block Operator’s/account holder’s access to the account (except for the
599 purpose of making and accepting deposits) and (b) rely solely on instructions
600 of the Secured Party giving the Control Notice.
601

- 602 8. **Set-Off, Recoupment, Bank Liens and Security Interests.** The depository bank, in
603 its capacity as Depository Bank, must agree to limit any rights of set-off, recoupment,
604 banker’s lien, or contractual security interest in the account and Account Collateral.
605 Generally, these should be limited to:

- 606 a. If depository bank is also the ARA/R Lender the obligations secured by the
607 ARA/R loan/security agreement, provided any such setoff must be subject to
608 the Intercreditor Agreement;
609 b. Its customary and usual fees in its capacity as depository bank related to the
610 DACA account; and
611 c. Returned items, customary collecting bank, or similar items related to the
612 DACA account.
613

614 Because DAISA funds are swept daily and may be subject to legal restrictions that
615 limit the bank’s ability to debit from such account, the foregoing (b) and (c) may
616 include fees, returned items, etc. related to the DAISA account as well.
617

618 **9. Termination of DACA:**

- 619 a. By Operator: Operator (debtor) ~~should~~**must** not be able to terminate the
620 DACA (unless via a joint instruction with the Secured Party or Parties).
621 b. By depository bank: The depository bank must be obligated to give notice to
622 ~~FHA Lender~~**FHA Lender** prior to its voluntary termination. A notice period of
623 at least 30 days is expected (unless for breach, when a shorter period may be
624 acceptable). Longer notice periods are favored.
625 c. By secured parties: Either secured party can terminate their interest under the
626 DACA by notice. The provisions on when ~~ARA/R~~ Lender must terminate are
627 controlled by the Intercreditor Agreement and do not need to be addressed in
628 the DACA, but the DACA must be consistent with the Intercreditor
629 Agreement. A termination by ~~ARA/R~~ Lender must not terminate FHA
630 Lender’s interest under the DACA (or if a First Lien/Second Lien DACA are
631 used, the Second Lien DACA); nor result in disposition of funds out of the
632 account.
633 d. Disposition of Funds on Termination: Generally, if the DACA is being
634 terminated by the Operator or the bank, the DACA should direct the bank to
635 direct the funds in the account on termination to an account designated by the
636 Secured Party or Parties. This would typically be a replacement account set
637 up by the Operator.
638

639 **10. Other Key Elements.** See Section 16.8 for additional key elements that apply to
640 both DACAs and DAISAs.
641
642

16.7

Deposit Account Instructions and Service Agreements (DAISAs)

643 A Deposit Account Instructions and Service Agreement (DAISA) refers to the instructions
644 provided to the bank by the account holder that details how the bank is to dispose of
645 governmental healthcare funds in the deposit account. A DAISA must be used with respect to
646 the deposit account(s) into which Government Receivables will be initially deposited. It is the
647 parties’ responsibility to assure that the DAISA comports with applicable healthcare program
648 restrictions.
649

650
651 **A. Key elements of a DAISA.** Currently HUD does not have a required form of DAISA,
652 though it may post one or more sample forms as unofficial guidance. The sample forms are
653 only examples, and the responsible parties may use a different form provided it addresses the
654 key elements and is not inconsistent with HUD Program Obligations.
655

656 Key elements for DAISA’s include those set forth below. Elements that include “must” are
657 expected to be included in all forms. The remaining elements should be included, but HUD

658 has discretion to permit deviations (and additional provisions) that do not materially affect
659 HUD interests.

- 660
- 661 1. **Parties to DAISA.** If no ARA/R Lender is involved, parties are typically the
662 depository bank and Operator, and FHA Lender. If an ARA/R Lender is involved,
663 parties typically include the depository bank, Operator, ~~FHA Lender~~FHA Lender and
664 ARA/R Lender. HUD must not be a party. If a party other than the Operator is
665 named on or has an interest in the account, such arrangement must be acceptable to
666 HUD and the parties must demonstrate this is permitted or required by the applicable
667 government healthcare program. If required by FHA Lender and/or HUD, such third
668 party must execute such DAISA's, joinders, security agreements, or other documents
669 to bind such party's interest.
670
 - 671 2. **Notification of Security Interests.** ~~The HUD requires that the~~ DAISA ~~should~~ include
672 a provision notifying the Depository that the FHA Lender has a security interest in the
673 deposit account and all checks, funds, monies or other items now or hereafter
674 deposited therein and any lockboxes associated therewith (especially if FHA Lender
675 is not a party). Note that this provision is intended to serve notice of the security
676 interest and does not constitute perfection of the security interest
677
 - 678 3. **No DACAs.** The DAISA should include representations to the effect that there are
679 no control agreements affecting the account and that none will be placed on the
680 account (other than those approved for the transaction).
681
 - 682 4. **Accounts Covered.** The DAISA must identify the account(s) that are subject to the
683 DAISA, which must match the cash flow chart, and any lockboxes associated with
684 the account.
685
 - 686 5. **Sweep Instructions.** The account holder (*not* the secured party) must instruct the
687 depository bank to initiate a funds transfer ("daily sweep") of available funds each
688 business day (or, if expressly approved by FHA Lender and HUD when the DACA is
689 approved, the account holder instruction may be for less frequent sweeping of the
690 funds, but typically not more than 48 hours) into another account that is identified in
691 the DAISA (typically, this will be the DACA account, unless HUD has approved a
692 direct sweep into an ARA/R Lender account). The account holder (not the Secured
693 Party) should also instruct the bank not to permit account holder to make withdrawals
694 from the account.
 - 695 a. The DAISA must not grant either Lender the right to direct disbursement or to
696 give instructions. It is not a control agreement and must not include the UCC
697 Control Language or provisions allowing Lenders to give control notices.
 - 698 b. Generally, Operator's sweep instructions should be revocable and the DAISA
699 should be terminable by the Operator (account holder) in order to comply with
700 governmental healthcare program restrictions.
 - 701 i. Restrictions on the account holder's revocation or termination rights
702 that are tantamount to FHA Lender control over the account should be
703 avoided. For example, the DAISA should not condition the account

704 holder's right to revoke its instructions on FHA Lender consent *under*
705 *the DAISA*. However, such a revocation or termination remains a
706 default under the Operator Security Agreement if FHA Lender's
707 consent is not obtained under such security agreement.

- 708 ii. Provisions which delay implementation of a changed instruction
709 and/or which require prior notice to FHA Lender are encouraged,
710 though lengthy periods may be inconsistent with healthcare program
711 restrictions and should generally be avoided. Exculpatory clauses
712 restricting bank's liability for failing to give such a notice are
713 acceptable.

714
715 **6. The Bank must agree to limit rights of setoff, recoupment or any security**
716 **interest or banker's lien.** Limited exceptions (such as for their reasonable and
717 customary fees, returned items, posting errors, etc.) may be acceptable but should be
718 limited to items and fees related to this account only. No exceptions should be made
719 for contractual security interests. ~~ARA/R~~ Lender must waive its right to set off its
720 loan against the DAISA account to the extent required by applicable law or
721 governmental healthcare insurance program rules.

722
723 **7. Termination of DAISA:**

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

746
747 **8. Other Key Elements.** See Section 16.8 for additional key elements that apply to
748 both DACAs and DAISAs.
749

16.8**Key Elements for Both DACAs and DAISAs**

751

752

A. As referenced above, there are some elements that HUD expects to see in both DACAs and DAISAs. Those elements are as follows:

753

754

755

1. **Access to Account.** For the DACA, and for any DAISA to which FHA Lender is a party, depository bank must agree 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.

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761

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

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

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

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779

4. **Conflicts:**

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794 5. **Bank Fees.** These should be limited to usual, customary and reasonable fees in the
795 normal course of business of the bank.

796
797 6. **Indemnification obligations.** These should typically be limited to the Operator
798 (debtor) and, if required by the depository bank, a guarantor(s).
799

800 Indemnities binding FHA Lender are not encouraged. However, if **FHA**
801 **Lender** agrees to such obligations, they should typically be limited to
802 third party claims arising from compliance by Bank with FHA Lender's written
803 instructions after a Control Notice is given and reimbursement of returned items to
804 the extent FHA Lender received the proceeds thereof. The Operator should be
805 primarily responsible for indemnities. HUD must be expressly excluded from all
806 such indemnification obligations.
807

808 Any indemnification provided by the FHA Lender (and preferably, by Operator) to
809 the Depository Bank should exclude indemnification for indirect damages, lost
810 profits, or special, punitive or consequential damages, and at a minimum, bank's
811 gross negligence or intentional misconduct. If **ARA/R** Lender is also the depository,
812 it should be clear the indemnity is geared towards its capacity as depository and not
813 as secured party.
814

815 7. **Boilerplate.** Should include standard provisions dealing with governing law,
816 execution of counterparts, execution by facsimile (or other electronic) signature, etc.
817 Provisions which would not permit venue in a federal district court are not permitted.
818

819 8. **Assignment:** The DACA must permit assignment of the DACA by the FHA Lender.
820 The assignment provisions must not be materially inconsistent with, or unduly
821 burden, HUD assignment of claims procedures. For example, an assignment clause
822 which requires the assignee to execute an assumption shall not apply to an assignment
823 to HUD.