

CHAPTER 8. TRANSFER OF PHYSICAL ASSETS

- 8-1. INTRODUCTION. The regulatory agreement requires project owners to comply with HUD's administrative procedures for previous participation clearance and transfers of physical assets before conveying, assigning or transferring any ownership interest in the project or any beneficial interest in any trust holding title to the project. The memorandums listed in Exhibit 8-1 set forth HUD's policies and procedures related to transfers of physical assets (TPAs) on projects with fully-insured and HUD-held mortgages. For the most part, these policies and procedures also apply to projects with coinsured loans. This Chapter explains how owners and lenders may adapt Exhibit 8-1's memorandums for 223(f) coinsured loans and highlights some of the lender's responsibilities. All owners and lenders involved in TPAs of coinsured projects must read and adhere to Exhibit 8-1's policy memoranda, as modified by this Chapter.
- 8-2. DEFINITION OF TPA. HUD uses the term "transfer of physical assets" to mean a change in the ownership of a project on which there is a mortgage loan insured, coinsured or held by HUD. While TPAs usually involve the conveyance of title, TPAs can also be accomplished through other means such as conveyance of 100 percent of the beneficial interest in a passive trust which holds title to the project. Parts A and B of Exhibit 8-2 list the types of transactions HUD currently considers to be TPAs. Part C of Exhibit 8-2 lists transactions which require HUD's previous participation clearance and often occur in conjunction with TPAs but are not, in themselves, considered TPAs. Project owners and lenders should carefully review this list and also read Pages 1-3 of the December 6 Legal Opinion to determine if a proposed transaction is subject to HUD's TPA review and approval requirements. Owners and lenders should make this determination carefully as HUD may impose sanctions against owners and lenders who participate in unauthorized TPAs. Paragraph 8-6 discusses the types of sanctions HUD can impose.
- 8-3. OWNER RESPONSIBILITIES. A project owner may effect a TPA only after complying with the lender's requirements and HUD's requirements as set forth in the May 4 Administrative Memorandum and the August 30 Clarification Memorandum, listed in Exhibit 8-1. The owner can obtain copies of the HUD memorandums from HUD Headquarters Office of Multifamily Housing Management. The owner must obtain from the lender any additional requirements the lender may have established.
- a. Comply with HUD's TPA Application and Previous Participation Clearance Requirements. Exhibit 8-2 lists the types of transactions, which are subject to lender/HUD approval and shows the type of review (full, modified or previous participation clearance only) which HUD requires.
- (1) If a full review is required, the owner must submit the information and materials listed on Pages 13-23 of the May 4 Administrative Memorandum and Page 3 of the August 30 Clarification Memorandum.

-
- (2) If a modified review is required, the owner must submit the information and materials listed on Pages 23-24 of the May 4 Administrative Memorandum and Page 3 of the August 30 Clarification Memorandum.
- (3) If only previous participation clearance is required, the owner must submit a Previous Participation Certification (Form HUD-2530) listing each of the new principles in the proposed transaction.
- b. Submit TPA Applications and 2530's to the Lender. While the May 4 Administrative Memorandum requires owners of fully-insured and HUD held projects to submit TPA applications and Previous Participation Certifications to the HUD Field Office, owners of coinsured projects must submit these materials, together with the fees discussed in Paragraph 8-5, to the lender. As explained in Paragraph 8-4, coinsuring lenders process the types of TPAs for coinsured projects that HUD Field Offices process for fully-insured and HUD-held projects.
- NOTE: To expedite the lender's processing of the TPA Application, the owner should prepare the required Form HUD-2530 and submit it to the lender before submitting the rest of the application package.
- 8-4. LENDER RESPONSIBILITIES. Pages 3 and 4 of the May 4 Administrative Memorandum delegate to HUD Field Offices the authority to review and approve most TPAs on fully-insured and HUD-held projects. For TPAs on coinsured projects, the lender generally has the same authority and responsibilities as the HUD Field Office has for fully-insured and HUD-held projects. HUD Headquarters retains the authority for final review and approval of all TPAs which have any of the characteristics listed in Paragraph 8-4.d. The lender's responsibilities include the following.
- a. Comply with HUD Processing Procedures. Generally, the lender must use the forms, complete the review steps, involve HUD Headquarters and process the application within the deadlines required by Pages 13-24 of the May 4 Administrative Memorandum. The lender must adapt the HUD forms by deleting references to HUD offices and substituting the lender's name, where appropriate. HUD will consider waiving these requirements if the lender demonstrates to HUD's satisfaction that a modified procedure will not jeopardize HUD's interest in the project and is a better way to process TPAs. The lender must submit

any requests for procedural changes to HUD Headquarters' Office of Multifamily Housing Management. When HUD puts its TPA procedures in Handbook form, HUD will consider giving lenders greater discretion in processing TPAs involving coinsured projects.

b. Review and Comment on Previous Participation Certifications.

- (1) The lender must review the 2530 for completeness and accuracy in accordance with the procedures in HUD Handbook 4566.1. If the lender knows that a proposed principal is currently suspended

5/84

8-2

or debarred by HUD or has violated civil rights laws, the lender must advise that person that HUD may not approve his or her participation in the TPA.

- (2) After completing its review, the lender must attach its comments on the proposed principals' previous participation. For each of the proposed principals, the lender's comments must state whether, to the best of the lender's knowledge, the proposed principal has or has not been involved with a project where there was non-compliance with HUD regulations or administrative procedures. If the proposed principal has been involved with a project where there was non-compliance, the lender must indicate:
 - (a) the nature of the non-compliance;
 - (b) whether the principal was involved with the project when the non-compliance occurred;
 - (c) the capacity in which the principal was involved; and
 - (d) whether and how the non-compliance was resolved.
- (3) The lender should retain a copy of the 2530 and its comments in the project file. The lender must send the following materials to the HUD Field Office:
 - (a) A cover letter explaining that it is submitting the 2530 in connection with a TPA application. The cover letter must state when the lender anticipates the transfer will occur.
 - (b) Original copy of the 2530.
 - (c) Lender comments required by Paragraph 8-4.b.(2) above.

c. Comply with HUD's Criteria for Approval. In deciding whether to approve or disapprove a TPA request, the lender must use the

"Determinative Criteria for Area/Service Office Review of Transfer of Physical Assets Proposals." While the list below briefly outlines these criteria, lenders must carefully read and use the criteria described on Pages 5-12 of the May 4 Administrative Memorandum and in the August 30 Clarification Memorandum.

- (1) The proposed Owner/Managing General Partner has 2530 clearance and has sufficient net worth and experience to successfully own and manage the project.
- (2) The proposed management agent has 2530 clearance and is qualified to manage the project.
- (3) The proposed cash contribution is sufficient to meet the project's physical needs.

5/84

8-3

-
- (4) The proposed cash contribution is sufficient to meet the project's financial needs.
 - (5) The proposed transfer complies with all of HUD's outstanding regulations and administrative procedures.
 - (6) When the transfer involves secondary financing, such financing complies with HUD's legal and administrative guidelines.
 - (7) When the transfer involves a conversion to condominium or cooperative ownership, the transfer complies with HUD policies regarding condominium or cooperative conversion.
- d. Send to HUD Headquarters all Applications which Require HUD Headquarters' Approval. After completing its review and processing responsibilities, the lender must submit to the Office of Multifamily Housing Management all TPA applications which the lender believes are acceptable but which have any of the characteristics listed below. The lender must send the HUD Field Office a copy of the transmittal letter.
- (1) The transfer requires full TPA review and the lender receives the application within two years after the date the project was endorsed for coinsurance.
 - (2) The project's physical and/or financial needs will not be met in full within 24 months from the date of transfer.
 - (3) The project's physical and/or financial needs will be met as a result of an infusion of Federal subsidy into the project.

- (4) The project's physical and/or financial needs will be met as a result of the implementation of a workout agreement which is beyond the scope of the authority of the lender to approve.
- (5) The transfer involves secondary financing secured by the project, which does not meet HUD's Determinative Criterion #6, described at Pages 7 through 12 of the May 4 Administrative Memorandum.
- (6) The transfer involves secondary financing, either unsecured or secured by collateral other than the project (e.g., partnership interest), which fails to meet the relevant portions of Determinative Criterion #6.
- (7) The transfer involves a land contract which does not satisfy the relevant portions of Determinative Criterion #6, described at Pages 10 through 12 of the May 4 Administrative Memorandum.

5/84

8-4

-
- (8) The transfer involves conversion to condominium or cooperative ownership.
- e. Maintain a TPA Processing Control Log. The lender must maintain a control log that tracks the activity of all TPA applications which the lender is processing. The lender may adapt the Control Log Form shown as Attachment F in the May 4 Administrative Memorandum. Page 27 of that memorandum explains when the lender must submit the control log to HUD Headquarters' Office of Multifamily Housing Management.
 - f. Notify HUD of Final TPA Approvals. The lender must notify HUD Headquarters' Office of Multifamily Housing Management and the HUD Field Office's Loan Management Branch within five days after the lender issues final approval of a TPA application. The lender's notification must include copies of the following documents:
 - (1) Preliminary Approval Letter, showing any conditions the lender required for approval (Form #9, May 4 Administrative Memorandum).
 - (2) Final Approval Letter (Form #13, May 4 Administrative Memorandum).
 - (3) Transfer of Physical Assets Information Sheet (Attachment E, May 4 Administrative Memorandum).
 - (4) (a) If a new regulatory agreement is executed, a copy of the new regulatory agreement and the owner's and lender's agreement modifying the mortgage to incorporate the new regulatory agreement.

- (b) If a new regulatory agreement is not executed, the owner's agreement assuming the existing regulatory agreement.
- g. Monitor the Transaction and the Project. The lender must monitor all TPAs as required by Pages 25 and 26 of the May 4 Administrative Memorandum and Page 3 of the August 30 Clarification Memorandum. Lenders should note that this required monitoring begins at preliminary approval and continues until the later of the following dates:
 - (1) the date the owner demonstrates, to the lender's satisfaction, that it has satisfied all of the terms and conditions agreed to at preliminary approval; or
 - (2) three years from the preliminary approval date.
- h. Maintain TPA Records. The lender must maintain copies of all TPA applications and records documenting the lender's processing and subsequent monitoring of TPAs. The lender must maintain these records for three years from the date the transaction is completed.

8-5

5/84

8-5. TPA APPLICATION FEES.

- a. Lender Fee. The lender may not collect a fee for processing transactions which require only previous participation clearance or a modified TPA review. For transactions which require a full TPA review, the lender may collect a fee of up to \$1.00 per \$1,000 of the original mortgage amount.
 - b. HUD Fee. HUD does not require a fee for processing Previous Participation Certifications. For all TPA Applications which the lender is required to submit for HUD Headquarters' review and approval, the lender must pay HUD a fee of \$0.50 per \$1,000 of the original mortgage amount. The lender may collect this fee from the project owner. The lender must send this fee to HUD when the lender submits the TPA application for HUD review. The fee must be in the form of a certified check, cashier's check or money order, payable to the U. S. Department of Housing and Urban Development. The lender must put the following note on the check: "TPA Application Fee for (Project Name and FHA Project Number)."
- 8-6. UNAUTHORIZED TPA'S. As part of its ongoing servicing responsibilities, the lender should be alert to unauthorized TPAs. The Rent Schedule and Financial statements contain information on the composition of the ownership entity. When reviewing these forms, the lender should determine that any new principals have obtained the appropriate 2530 clearance and/or TPA approval. If the lender learns of an unauthorized TPA, the

lender must (1) immediately notify HUD Headquarters' Office of Multifamily Housing Management, and (2) take action to correct the situation including, if necessary, use of the remedies available to the lender under the mortgage and regulatory agreement. The lender's report to HUD must describe the corrective actions the lender is taking or intends to take. The report should also include the lender's recommendations for HUD legal action and/or administrative sanctions. Philip Abrams' May 4, 1983 Letter to All Multifamily Mortgagors states HUD's commitment to aggressively enforce its policy on unauthorized TPAs. A copy of this letter is shown in Appendix 27. Lenders and owners should also read the May 4 Legal Memorandum for a more detailed explanation of HUD's policy, legal remedies and administrative sanctions for unauthorized TPAs. While the Abrams' Letter and the Legal Memorandum apply to projects with fully-insured and HUD-held mortgages, the same policies apply to projects with coinsured mortgages.

a. Legal Remedies. The regulatory agreement sets forth the legal actions which the lender or HUD can initiate for regulatory agreement violations, including unauthorized TPAs. These include but are not limited to:

- (1) suit for the appointment of a receiver;
- (2) an injunction against an unauthorized TPA;

5/84

8-6

- (3) suit for reconveyance of title from the purchaser;
- (4) suit for damages;
- (5) civil action for specific performance under the terms of the agreement; and
- (6) with HUD's prior written approval, acceleration of the mortgage debt and institution of foreclosure proceedings.

b. Administrative Sanctions. In addition to using the legal remedies listed above, HUD can impose the following administrative sanctions under 24 CFR Part 24:

- (1) temporary denial of participation, which precludes the mortgagor or transferee from participating locally in HUD programs for one year; and
- (2) suspension or debarment, which preclude the mortgagor or transferee from participating in HUD programs nationwide.

5/84

8-7

CONTROLLING ISSUANCES ON TRANSFERS OF PHYSICAL ASSETS

1. May 4, 1983 Memorandum from Philip Abrams to field entitled Transfer of Physical Assets - Administrative Standards and Procedures for Review of Proposals to Transfer or Modify the Ownership of Properties Encumbered by HUD-Insured or HUD-Held Mortgages. (May 4 Administrative Memorandum)
2. May 4, 1983 Memorandum from Maurice L. Barksdale and John Kennedy to field entitled Enforcement Remedies for Unauthorized Transfer of Physical Assets. (May 4 Legal Memorandum)
3. December 6, 1982 Legal Opinion from Charles J. Bartlett to field entitled Review of Transfer of Physical Assets Proposals. (December 6 Legal Opinion)
4. August 30, 1983 Memorandum from Philip Abrams to field entitled Transfer of Physical Assets. (August 30 Clarification Memorandum)

NOTE: Since HUD may supplement or amend these issuances from time to time, mortgagors and lenders should contact HUD's Office of Multifamily Housing Management to obtain copies of the most current issuances on TPAs before preparing or reviewing a TPA application.

5/84

8-8

EXHIBIT 8-2

TRANSACTIONS REQUIRING LENDER/HUD APPROVAL
AND TYPES OF REVIEWS REQUIRED

- A. Full TPA Review
 1. Transfer of title from the mortgagor/seller to the buyer.
 2. Conveyance by land contract.
 3. Transfer of 100 percent of the interest in the partnership/mortgagor within a one year period if such transfer constitutes a dissolution of the partnership under State law.
 4. Transfer of 100 percent of the beneficial interest in a passive trust within a one year period.
 5. Transfer of 100 percent of the stock of the corporate/mortgagor within a one year period.
- B. Modified TPA Review
 1. Transfer of an amount in excess of 50 percent and up to 100 percent of the interest of the partnership/mortgagor within a one year period as long as such transfer does not constitute a dissolution of the partnership under State

law.

2. Substitution of one or more of the general partners.
3. Transfer of an amount in excess of 50 percent and less than 100 percent percent of the corporate stock of the corporate/mortgagor within a one year period.
4. Transfer of an amount less than 50 percent of the total corporate stock of the corporate/mortgagor where such transfer results in a change in control of the corporate/mortgagor.

C. Previous Participation Clearance Only

1. Transfer of at least 25 percent but not more than 50 percent of the interest of the partnership/mortgagor within a one year period.
2. Transfer of at least 10 percent but not more than 50 percent of the total corporate stock of the corporate/mortgagor where such transfer does not result in a change in control of the corporate/mortgagor.