

## Delaware Statutory Trust MASTER LEASE REVIEW CHECKLIST

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| **MASTER LESSOR** | Must satisfy Guide requirements for Borrower structure. |
| **MASTER LESSEE** | Must satisfy Guide requirements for Borrower structure (provided that the property ownership requirements will be satisfied pursuant to Master Lessee’s interest in the Master Lease). |
| **LEASE DATE** |  |
| **REVIEW DATE** |  |

The subject matters discussed below in this Delaware Statutory Trust Master Lease Review Checklist are not intended to be exhaustive. Lender and its counsel must review, negotiate, and approve the Delaware Statutory Trust Master Lease in accordance with applicable Fannie Mae and other prudent underwriting standards, and explain below any significant risks and proposed mitigants to such risks. Lender is required to fully underwrite the DST Master Lease to confirm that the terms of the DST Master Lease, and the rights of the parties to the DST Master Lease, do not:

* conflict with the Loan Documents;
* impair Master Lessor’s or any guarantor’s ability to comply with the Loan Documents; or
* impair Lender’s exercise of remedies under the Loan Documents.

The requirements set forth in this DST Master Lease Review Checklist also apply to Sub-Master Leases. References to “Master Lessor” are intended to mean “Borrower” unless the context indicates otherwise.

The reviewer comments should reference the appropriate section numbers in the applicable DST Master Lease, Sub-Master Lease, sublease, operating lease, or other lease document, including any exhibits or amendments. This DST Master Lease Review Checklist must be delivered to Fannie Mae with the underwriting narrative, together with executed copies of all such lease documents. Any deviation from the requirements set forth herein must be approved by Fannie Mae.

**GENERAL DST MASTER LEASE REQUIREMENTS**

| **ITEM** | **SUBJECT MATTER** | **REQUIREMENTS** | **REVIEWER COMMENTS (REFERENCE APPLICABLE SECTION NUMBERS)** |
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|  | **Mortgagee Provisions** | The mortgagee provisions set forth on Exhibit A attached hereto must be added to the Master Lease prior to execution thereof. |  |
|  | **Master Lessee Affiliation** | Describe the relationship between Master Lessee and Master Lessor, and any Guarantor, Key Principal, operator, or manager, identifying any that is an affiliate or that controls, is controlled by, or is under common control with Master Lessee. Provide organizational charts, as applicable. |  |
|  | **Rent; Payments Under the Loan Documents** | The rent payments (e.g. rental payments required regardless of the cash flow or revenue from the Mortgaged Property) required to be paid by Master Lessee under the Master Lease must match or exceed all payment obligations of Master Lessor under the Loan Documents (including monthly debt service and funding of escrows and reserves, any indemnification obligations of Master Lessor under the Loan Documents, any other payments or fees due and payable by Master Lessor under the Loan Documents (other than the unpaid principal balance of the loan due upon maturity or loan acceleration)), as well as any late charges caused by Master Lessee’s late payments. The Master Lease must provide that Master Lessee must pay directly to Lender, on behalf of Master Lessor, all amounts due and payable under the Loan Documents (other than the unpaid principal balance of the loan due upon maturity or loan acceleration). |  |
|  | **No Abatement or Setoff** | There is no free rent, rent abatement, or rent rebate under the Master Lease and no fees are owed by Master Lessor to Master Lessee. The Master Lease must be a “triple-net”, “absolute net”, or “bondable lease” with no right of abatement or set-off and contains no *force majeure* provision that permits such abatement or set-off. |  |
|  | **Master Lease Reserves** | Identify the reserves, if any, established under the Master Lease and summarize how such reserves are funded. All reserves established pursuant to the Master Lease must be held by and in the name of Master Lessor. |  |
|  | **Term of Master Lease; No Extension/Renewal Options** | Identify the Master Lease commencement and expiration dates and confirm that there are no extension or renewal options.The Master Lease term may not expire prior to 90 days after the Maturity Date of the Mortgage Loan.  |  |
|  | **Full Force and Effect** | The Master Lease must be in full force and effect, with all conditions precedent having been satisfied or waived in writing. |  |
|  | **Estoppel Certificates** | The Master Lease must require Master Lessee to furnish Master Lessor with estoppel certificates as described in the Loan Agreement. |  |
|  | **Compliance with Laws** | The Master Lease must require that Master Lessee and the Mortgaged Property comply with all applicable laws. |  |
|  | **Mortgaged Property Ownership, Condition, Maintenance and Repair** | Except as otherwise disclosed in the Loan Agreement and approved by Fannie Mae, all real and personal property required for the ownership, operation, and management of the Mortgaged Property must be (i) owned by Master Lessor, (ii) leased by Master Lessee pursuant to the Master Lease, (iii) included among the Mortgaged Property, and (iv) pledged to Lender as the first priority Lien holder.The Mortgaged Property must be conveyed to Master Lessee in “as is, where is, with all faults” condition. |  |
|  | **Use Restrictions; Transfer of Mortgaged Property** | The Master Lease must prohibit Master Lessee from removing, selling, or transferring any part of the Mortgaged Property (including personal property) other than obsolete or worn out personalty that are contemporaneously replaced by unencumbered items of equal or better function and quality or as otherwise expressly permitted by the Loan Agreement. |  |
|  | **Amendment/ Modification/Termination** | The Master Lease must provide that neither the Master Lease nor any other Master Lease Document (i.e., any supplemental agreements entered into in connection with the Master Lease) may be amended, modified, cancelled, surrendered, or terminated without the consent of Lender. |  |
|  | **Bankruptcy** | The Master Lease must provide that a Master Lessee bankruptcy shall be an automatic default under the Master Lease. |  |
|  | **Waiver of *de facto* Guarantor’s Rights** | Master Lessee must waive its rights to claim landlord/tenant or *de facto* guarantor protections. |  |
|  | **No Brokerage/ Commissions** | Master Lessee must warrant that no brokerage or commission is due. |  |
|  | **Non-Merger Clause; Acceptance of Surrender** | The Master Lease must contain a non-merger clause (i.e., a clause providing that the Master Lease shall not terminate because of the conveyance of Master Lessee's leasehold interest to Master Lessor, or the conveyance of Master Lessor's fee interest to Master Lessee). No surrender of the Master Lease shall become effective without Lender’s written consent. |  |
|  | **No Personal Liability** | The Master Lease must provide that none of Lender, Master Lessor, nor their respective affiliates, successors, or assigns, have personal liability under the Master Lease. |  |
|  | **Surrender** | Master Lessee must surrender the Mortgaged Property to Master Lessor upon the expiration/termination of the term in the condition required by the Loan Documents.Upon request, Master Lessee must surrender the Mortgaged Property to Lender, its agent, or a receiver upon such party’s taking possession.The Master Lease must include a holdover charge (and payment of associated costs and fees) appropriate for the jurisdiction. |  |
|  | **Termination Fee** | The Master Lease must provide that no termination fee is due if Lender terminates the Master Lease or if Master Lessor terminates due to a Master Lessee default. |  |
|  | **Title Policy** | An ALTA Loan Policy must be obtained that (a) insures that the Master Lease is subordinate to the Mortgage Loan, and (b) otherwise satisfies standard Fannie Mae title policy requirements as set forth in the Guide. |  |
|  | **Insurance and Escrows** | If the Master Lease provides that Master Lessor shall obtain and maintain property damage insurance for the improvements, or pay or maintain insurance escrows, Master Lessee must assume these responsibilities in writing and pay any related amounts as part of its rent payments. *Force majeure* shall not excuse Master Lessee’s compliance with the insurance requirements. |  |
|  | **Condemnation/ Casualty Payments; Restoration** | The Master Lease must require Master Lessee to transfer and assign to Master Lessor any rights, title, and interest in any condemnation award or insurance proceeds to which Master Lessee is entitled. The casualty and condemnation provisions of the Master Lease must satisfy the Loan Document requirements for how casualty and condemnation proceeds are administered. Master Lessee must not be entitled to make any claim for condemnation/casualty proceeds on account of its leasehold interest in the Mortgaged Property.Restoration obligations, procedures, and schedules must meet the applicable requirements set forth in the Loan Documents. |  |
|  | **Total Loss or Condemnation** | The Master Lease may provide that, upon a total loss or condemnation of the Mortgaged Property, the Master Lease shall terminate upon payment in full of the Mortgage Loan, including any Prepayment Premium owing as a result of such event and any other amounts required under the Loan Documents.In the event of a total loss due to casualty, the Master Lease may provide Master Lessee an option to purchase the Mortgaged Property, provided that exercise of the purchase option results in payment in full of the Mortgage Loan, including all prepayment premiums and any other amounts required under the Loan Documents.In the event of a condemnation of the entire Mortgaged Property, the Master Lease may provide Master Lessor an option to require Master Lessee to purchase the Mortgaged Property, provided that exercise of the option results in payment in full of the Mortgage Loan, including all prepayment premiums and any other amounts required under the Loan Documents.  |  |
|  | **Purchase Options** | The Master Lease Documents may not contain any option to purchase, right of first refusal to purchase, or right of first offer to purchase the Mortgaged Property or any portion thereof unless such option results in payment in full of the Mortgage Loan, including all prepayment premiums and any other amounts required under the Loan Documents. |  |
|  | **Future Mortgages or Encumbrances** | The Master Lease must prohibit Master Lessee from mortgaging or encumbering its lessee interest in the Master Lease, its leasehold interest in the Mortgaged Property, or its fee or leasehold interest in any personalty that comprises the Mortgaged Property or is otherwise used for the operation or maintenance of the Mortgaged Property. |  |
|  | **Recording** | Neither the Master Lease nor any memorandum thereof shall be recorded among the land records unless (a) required by law, (b) required to effectuate a permitted option, or (c) required to effectuate any collateral assignments in favor of Lender. If recorded, Master Lessee shall be required to deliver a termination in recordable format upon expiration or earlier termination of the Master Lease. |  |
|  | **Taxes** | If the Master Lease provides that taxes and assessments relating to all or any portion of the Mortgaged Property or the Master Lease, or any escrows therefor, shall be paid by Master Lessor, Master Lessee must assume such responsibilities in writing and pay such amounts as part of its rent payment. |  |
|  | **Tax Appeals/Contests** | Master Lessee must not engage in a tax appeal/contest without Master Lessor’s consent. Master Lessee must have no greater right to participate in or settle a tax appeal/contest than Master Lessor. |  |
|  | **Defaults; Remedies** | Summarize and evaluate each non-standard Master Lessor and Master Lessee event of default, associated cure right, and any resulting termination right. |  |
|  | **Time of the Essence** | The Master Lease must state that time is of the essence. |  |
|  | **Jury Trial Waiver; Consent to Jurisdiction; No Arbitration** | The Master Lease must contain a jury trial waiver and consent to jurisdiction in the State and Federal courts of the Mortgaged Property jurisdiction. The Master Lease must not contain an arbitration requirement. |  |

**ADDITIONAL DST TRUST AGREEMENT REVIEW**

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| **PARTIES** |  |
| **DATE** |  |

Lender and its counsel must review the governing instrument of the DST (Trust Agreement) in accordance with prudent underwriting standards and explain below any significant risks and proposed mitigants to such risks, and ensure that the governing instrument does not:

* conflict with the Loan Documents;
* impair borrower’s ability to comply with the Loan Documents; or
* impair Lender’s exercise of remedies under the Loan Documents.

The reviewer comments should reference the appropriate section numbers in the DST Trust Agreement, including any exhibits or amendments.

| **ITEM** | **SUBJECT MATTER** | **REQUIREMENTS** | **REVIEWER COMMENTS (REFERENCE APPLICABLE SECTION NUMBERS)** |
| --- | --- | --- | --- |
|  | **Purposes and Powers** | The DST Borrower’s purpose and powers must be limited to owning, operating and leasing the Mortgaged Property, obtaining the Mortgage Loan, executing and performing under the Loan Documents[[1]](#footnote-1), and executing and performing under the Master Lease Documents[[2]](#footnote-2).  |  |
|  | **Authority** | The DST Borrower must be authorized to enter into and perform under the Loan Documents[[3]](#footnote-3), including obtaining the Mortgage Loan, and the Master Lease Documents[[4]](#footnote-4). The individual(s) executing the Loan Documents and Master Lease Documents must be authorized to act, including executing documents, on behalf of the DST Borrower. |  |
|  | **Irrevocable Statutory Trust** | The Trust Agreement must expressly state that the trust is a statutory trust under the Delaware Statutory Trust Act and must provide for the filing of a certificate of trust for the Borrower with the Delaware Secretary of State.The Trust Agreement must also provide that the trust is irrevocable and cannot be terminated by the beneficial owner(s). |  |
|  | **Term** | The Trust Agreement must provide that the term of the trust is longer than the term of the Mortgage Loan, and the term of the irrevocable trust is not affected by the terms of any of the beneficial owners’ interests. |  |
|  | **SPE** | The Trust Agreement must contain the Single Asset Entity provisions from the Loan Agreement. |  |
|  | **No Division** | Borrower is restricted from effecting a Division. |  |
|  | **DST Conversion** | The Trust Agreement must provide with specificity the terms under which the Delaware statutory trust is to convert into a Delaware limited liability company and the Mortgaged Property transferred to such limited liability company. |  |
|  | **Business Address** | The Trust Agreement must clearly identify the principal place of business which matches the Borrower’s General Business Address in the Loan Documents. |  |
|  | **Compliance with Loan Documents** | No provision of the Trust Agreement conflicts with the terms of the Loan Documents or the Trust Agreement provides that to the extent of a conflict, the Loan Document terms govern. |  |
|  | **Independent Trustee** | The Trust Agreement must require the appointment of an Independent Trustee in accordance with the terms of the Loan Agreement. Specifically, the Independent Trustee must not (a) have any fiduciary duties to the beneficial owners or any other Person bound by the Trust Agreement, and (b) be liable to Borrower, any beneficial interest owner or any other Person bound by the Trust Agreement for breach of contract or breach of duties (including fiduciary duties), unless the Independent Trustee acted in bad faith or engaged in willful misconduct. The Independent Trustee may be the same Person serving as the Delaware statutory trustee. |  |

**EXHIBIT A**

**Mortgagee Provisions**

The following provisions must be incorporated into the Master Lease prior to execution with the applicable terms modified as necessary to match the defined terms in the Master Lease:

**Section [\_\_]. Mortgagee Provisions.**

Notwithstanding anything to the contrary contained in this [Master Lease], for so long as the [Mortgage Loan] remains outstanding, the following provisions shall apply and control:

1. [Master Lessee] shall pay [Lender], on [Lessor]’s behalf, any and all payments of any kind required pursuant to the Loan Documents[[5]](#footnote-5) irrespective of “cash flow” from, or revenue with respect to, the [Mortgaged Property], and such payments shall not be subject to set off against any rent payments under this [Master Lease]; provided that Master Lessee is not understood or intended to be, and shall not be treated as, a *de facto* co-borrower, guarantor, agent or similar party for or under the Mortgage Loan.
2. All amounts (including, without limitation, rent) owed by [Master Lessee] to [Lessor] pursuant to any provision of this [Master Lease] shall bear interest from the date due until paid at a rate equal to or greater than the default rate required pursuant to the Loan Documents, subject to applicable law.
3. [Master Lessee] shall not take, or fail to take, any action which would result in a violation of the terms of the Loan Documents, including, without limitation, [Master Lessee] shall operate, maintain, use or permit the [Mortgaged Property] to be used in such a manner as to comply with the “Operating Covenants” (as defined in the Loan Documents).
4. All insurance policies required to be maintained by [Master Lessee] pursuant to this [Master Lease] shall at all times comply with the insurance requirements set forth in the Loan Documents, and shall specifically name Fannie Mae as an additional insured and contain a mortgagee clause and loss payable clause for the benefit of Fannie Mae, its successors and assigns.
5. [Master Lessee] acknowledges and agrees that, pursuant to the Loan Documents, [Lender] has the right to terminate this [Master Lease] after a Master Lease Termination Event (as defined in the Loan Documents).
6. [Master Lessee] acknowledges and agrees that to the extent there is any inconsistency or conflict between the terms of this [Master Lease] and the terms of the Loan Documents, the Loan Documents shall govern.
7. [Master Lessee] has executed and delivered an assignment of leases and rents and other documents required by [Lessor] to secure [Master Lessee]’s obligations under this [Master Lease], which documents are hereby deemed to be lease documents together with this [Master Lease].
8. [Master Lessee] agrees to execute and deliver an estoppel certificate in a form required by [Lender].
9. [Master Lessee] (a) acknowledges and agrees that (i) this [Master Lease], [Master Lessee]’s leasehold estate and any payments or reimbursements or amounts due [Master Lessee] are hereby made subject and subordinate to the [Mortgage Loan], the Loan Documents and all liens created thereunder, and (ii) [Master Lessee]’s and any guarantor’s claims against [Lessor] are hereby made subordinate to Lender’s claims against [Lessor], and (b) agrees to execute and deliver a subordination agreement in favor of [Lender] confirming such subordination.
10. [Master Lessee] acknowledges and agrees that [Lessor] may (a) enter into the [Mortgage Loan], (b) encumber [Lessor]’s fee estate and the other [Mortgaged Property] as described in the Loan Documents, and (c) assign its interest in the Master Lease Documents (as defined in the Loan Documents) as described in the Loan Documents.
11. [Master Lessee] acknowledges and agrees that [Lender]’s exercise of remedies under the Loan Documents shall not be affected or impaired by the terms of this [Master Lease], or by whether a default under this [Master Lease] has occurred.
12. [Master Lessee] represents and warrants that all representations and warranties with respect to the [Mortgaged Property] and [Master Lessee] set forth in the Loan Documents are true and correct.
13. With respect to any Master Lessee obligations in any Master Lease Document, [Master Lessee] shall be responsible for indemnifying or reimbursing [Lessor] for [Lessor]’s indemnification, reimbursement, and other similar obligations to [Lender], and [Master Lessee] shall maintain appropriate insurance for such purposes.
14. [Master Lessee] acknowledges and agrees that [Master Lessee]’s engagement of a property manager and the amendment and termination of any property management agreement shall comply with the criteria set forth in the Loan Agreement (as defined in the Loan Documents).
15. Other than Residential Leases for individual dwelling units, [Master Lessee] shall not assign, sublease, or transfer [Master Lessee]’s interest in this [Master Lease], without the prior written consent of [Lender].
16. [Master Lessee] acknowledges and agrees that [Lender] (and its assignee or nominee) may transfer the lessor’s interest in this [Master Lease] without notice to or consent of [Master Lessee] following a foreclosure under the Security Instrument (as defined in the Loan Documents) (or a deed in lieu of foreclosure or any other comparable exercise of remedies).
17. To the extent that [Lessor] is obligated to make replacement/repair escrow deposits in this [Master Lease], Master Lessee shall assume such responsibilities and pay any related amounts as part of its rent payment.
18. [Master Lessee] acknowledges and agrees that, notwithstanding anything to the contrary contained in the Master Lease Documents, in the event that an “Event of Default” under the Loan Documents is also a default under the Master Lease Documents, or vice versa, the cure period, if any, for such default shall be the shorter of cure period, if any, set forth in the Master Lease Documents and the cure period, if any, set forth in the Loan Documents.
19. Subject to the terms of the Subordination Agreement (DST Master Lease) (as defined in the Loan Documents), [Lessor] agrees that all applicable remedies available to [Lender] under the Loan Documents are available to [Lessor] under this [Master Lease].
20. In no event shall [Master Lessee] be entitled to special, consequential, or punitive damages and [Lessor]’s liability under this [Master Lease] shall be limited to its interest in the [Mortgaged Property].
21. [Lessor] and [Master Lessee] shall copy [Lender] on any notice of default delivered under this [Master Lease] or any other Master Lease Document.
22. [Master Lessee] acknowledges and agrees that (a) [Lessor]’s election of one remedy under this [Master Lease] shall not impair the exercise of alternate or additional remedies or constitute a waiver thereof, and (b) [Lessor] shall have no duty to mitigate damages unless required by law.
23. [Master Lessee] hereby irrevocably constitutes and appoints [Lessor] as [Master Lessee]’sattorney-in-fact to demand, receive and enforce its rights with respect to the provisions set forth in the Master Lease Documents and to do any and all acts in [Master Lessee]’s name or in the name of [Lessor] with the same force and effect as [Master Lessee]could do if this power of attorney had not been granted. The foregoing appointment shall be deemed to be coupled with an interest and irrevocable. [Master Lessee] (a) acknowledges that such power of attorney has been or will be assigned to [Lender], (b) consents to such assignment, and (c) agrees to recognize [Lender] as [Lessor]’s attorney-in-fact.
24. This [Master Lease] shall be governed by the laws of the [Mortgaged Property] jurisdiction.
25. This [Master Lease] shall be binding upon [Lessor]’s and [Master Lessee]’s respective permitted successors and assigns.
26. The invalidity or unenforceability of any provision of this [Master Lease] shall not affect the validity or enforceability of any other provision of this [Master Lease], all of which shall remain in full force and effect. This [Master Lease] contains the complete and entire agreement among the parties as to the matters covered, rights granted and the obligations assumed in this [Master Lease].
27. [Master Lessee] acknowledges and agrees that any consent of [Lessor] required under this [Master Lease] shall never be deemed and shall require [Lessor]’s actual written consent.
28. [Master Lessee] acknowledges and agrees that (a) notices under this [Master Lease] shall be given in the same manner as set forth in the Loan Agreement, and (b) [Lessor] is authorized to deliver any notice, request, report, or other communication received from [Master Lessee] to [Lender].
29. [Master Lessee] acknowledges and agrees that [Lessor] and [Lender] may disclose all information received from [Master Lessee] concerning [Master Lessee], the Master Lease Documents, or the Mortgaged Property without [Master Lessee]’s consent.
30. [Master Lessee] shall not Divide (as defined in the Loan Agreement).
1. “Loan Documents” as described in the Trust Agreement must specifically include the “Loan Documents” as defined in the Multifamily Loan and Security Agreement and “any other documents or instruments executed in connection with the Mortgage Loan”. [↑](#footnote-ref-1)
2. “Master Lease Documents” as described in the Trust Agreement must specifically include the “Master Lease Documents” as defined in the Multifamily Loan and Security Agreement and “any other documents or instruments executed in connection with the Master Lease”. [↑](#footnote-ref-2)
3. See footnote 1. [↑](#footnote-ref-3)
4. See footnote 2. [↑](#footnote-ref-4)
5. “Loan Documents” must be defined to include all loan documents executed in connection with the mortgage loan including the loan agreement. [↑](#footnote-ref-5)