## SENIORS CHECKLIST

## USE FOR OPERATING LEASES, SUBLEASES, MANAGEMENT AGREEMENTS AND

## ALL OTHER FACILITY OPERATING AGREEMENTS APPLICABLE TO THE MORTGAGED PROPERTY

|  |  |  |
| --- | --- | --- |
| **BORROWER** |  |  |
| **KEY PRINCIPAL** |  |  |
| **GUARANTOR/SPONSOR** |  |  |
| **PROPERTY OPERATOR**  **Master Lessee**  **Property Manager**  **Sublessee** | Yes\_\_\_\_; No:\_\_\_\_\_  Yes\_\_\_\_; No:\_\_\_\_\_  Yes\_\_\_\_; No:\_\_\_\_\_ | Affiliated Party: Yes\_\_\_; No \_\_\_\_  Affiliated Party: Yes\_\_\_; No \_\_\_\_  Affiliated Party: Yes\_\_\_; No \_\_\_\_ |
| **OTHER PERSONS**  **(identified in the Facility Operating Agreement)** |  | For each Person:  Affiliated Party: yes\_\_\_; no \_\_\_\_ |
| **PROPERTY ADDRESS** |  |  |
| **LOAN AMOUNT & TIER** |  |  |
| **FACILITY OPERATING AGREEMENT DATE(S)** | ***Title and dates of all documents*** |  |
| **REVIEW DATE** |  |  |

This Checklist is not exhaustive. Lender and its counsel must review, negotiate, if applicable, and approve each Facility Operating Agreement[[1]](#footnote-2) in accordance with applicable Fannie Mae and other prudent underwriting standards, explaining significant risks and proposed mitigants to such risks. Lender is required to prepare a separate Checklist for and fully underwrite each Facility Operating Agreement to confirm that its terms, and the rights of the parties to that document, do not:

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

The reviewer comments should reference the appropriate section numbers in the applicable Facility Operating Agreement, including any exhibits or amendments. For each requirement, reference the applicable document and section. If a requirement is not applicable to the transaction at hand, select “Not Applicable” from the available drop downs (do not leave blank). Where a Facility Operating Agreement is between the Borrower and an Affiliated Property Operator, responses and analysis are required only for items 1 through 9 below; items 10 through 53 below may be left blank.

This Checklist must be delivered to Fannie Mae with the underwriting narrative, true and complete executed copies of each Facility Operating Agreement and an organizational chart for each of Borrower, Key Principal, Guarantor, Sponsor, and each Property Operator. Any deviation from these requirements must be approved by Fannie Mae.

Capitalized terms have the definitions in the Series 6000 loan documents forms (SRS) published on fanniemae.com.

**GENERAL REQUIREMENTS**

| **ITEM** | **SUBJECT MATTER** | **REQUIREMENTS/ANALYSIS** | **DOCUMENT NAME/SECTION REFERENCE(S)** | **COMPLIANCE WITH REQUIREMENTS** | **RISKS/MITIGANTS**  **RECOMMENDATION** |
| --- | --- | --- | --- | --- | --- |
|  | **Ownership and Management** | Describe the relationship between and among the parties to the Facility Operating Agreement. |  |  |  |
|  | **Other Properties** | Is the Mortgaged Property the only Seniors Housing Facility governed by the Facility Operating Agreement?  If no, identify and describe all other Seniors Housing Facilities subject to the Facility Operating Agreement. |  | Choose an item. |  |
|  | **Licenses** | Does Borrower hold all Licenses?  If no, what Person(s) are obligated to hold and maintain the Licenses? |  | Choose an item. |  |
|  | **Mortgage Loan Authorized** | Is Borrowerauthorized under the Facility Operating Agreement to:  (a) enter into the Mortgage Loan?  (b) encumber the fee estate and the other Mortgaged Property?  (c) assign its interest in the Facility Operating Agreement to Lender? |  | Choose an item.  Choose an item.  Choose an item. |  |
|  | **Rent** | Describe the rent calculus (*e.g.*, does it include base rent, additional or percentage rent, and rent escalation clauses or cost of living increases).  Does rent include taxes and assessments?  Does rent cover all payments (including and funding of escrows and reserves) and indemnification obligations of Borrower under the Loan Documents, as well as any late charges caused by a late payment by Property Operator?  Is the default rate of interest under Facility Operating Agreement equal to the Default Rate?  For any Operating Lease or Sublease, is it  1) a bond Lease;  2) a triple net lease; or  3) a double net lease? | ` | Choose an item.  Choose an item.  Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Reserves/Additional Rent** | Characterize the Facility Operating Agreement (e.g., triple net, absolute net, etc.)  Is Borrower responsible for funding reserves?  If yes, describe (*e.g.,* replacements reserves, repair escrows, insurance reserves, real estate tax reserves, or similar reserves).  If no, identify the party responsible for these funding obligations.  What other payments (e.g., utilities, taxes, insurance, etc.) are required to be made and by whom? |  | Choose an item. |  |
|  | **No Abatement or Setoff** | Does Facility Operating Agreement contain any rent abatement provisions?  If yes, describe rent abatement provisions and describe the effects of termination of the rent abatement provisions. |  | Choose an item. |  |
|  | **Term; Extension/Renewal** | What is the commencement date?  What is the expiration date?  Does the term of the Facility Operating Agreement extend at least 3 years beyond the Maturity Date?  Are there any renewal or extension rights under the Facility Operating Agreement?  If yes, on what terms? |  | Choose an item.  Choose an item. |  |
|  | **Indemnification** | Is Property Operator responsible for indemnifying or reimbursing Borrower for its indemnification, reimbursement, and other similar obligations to the Lender?  If yes, Is Property Operator responsible for maintaining appropriate insurance for these obligations? |  | Choose an item.  Choose an item. |  |
|  | **Representations; Warranties; Covenants** | Do the representations, warranties and covenants made by Property Operator in the Facility Operating Agreement mirror those made by the Borrower in the Loan Agreement?  If no, which ones are missing? |  | Choose an item. |  |
|  | **Full Force and Effect** | Is the Facility Operating Agreement in full force and effect? |  | Choose an item. |  |
|  | **Estoppel Certificates** | Is Property Operator required to furnish Borrower with estoppel certificates?  If yes, does that requirement align with Borrower’s estoppel obligations in the Loan Agreement?  If no, how do the obligations differ? |  | Choose an item.  Choose an item. |  |
|  | **Compliance with Laws** | Does Facility Operating Agreement contain a “compliance with applicable laws provision” covering the parties and the Mortgaged Property? |  | Choose an item. |  |
|  | **Alterations** | Is the Property Operator prohibited from making alterations to the Mortgaged Property?  If no, does permitted alterations language align with the Loan Documents? |  | Choose an item.  Choose an item. |  |
|  | **Entry; Inspection; Audit** | Does Borrower have the right to enter and inspect the Mortgaged Property?  If yes, how does this right differ from the inspection and entry rights granted by Borrower to Lender under the Loan Documents?  Does Borrower have the right to audit Property Operator’s books and records?  If yes, how does this audit right differ from the right granted by Borrower to Lender under the Loan Documents? |  | Choose an item.  Choose an item. |  |
|  | **Mortgaged Property Ownership, Condition, Maintenance and Repair** | Does anyone other than Borrower own any of the Personalty?  If yes, who owns and what do they own?  Do the repair and maintenance requirements in the Facility Operating Agreement satisfy the Loan Document requirements for repair and maintenance of the Mortgaged Property?  If no, how do they differ?  Is Borrower is responsible for all repairs to and maintenance of the Mortgaged Property under the Facility Operating Agreement?  If no, does Property Operator make representations, warranties, and covenants with respect to the condition and maintenance of the Mortgaged Property that correspond with the representations, warranties and covenants Borrower makes the Loan Documents?  If no, how do they differ? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Capital Improvements Escrow** | Is Borrower responsible for capital improvements under the Facility Operating Agreement?  If no, identify the responsible party.  [**NOTE:** Lender must establish a Replacement Reserve if Borrower is responsible for capital improvements.] |  | Choose an item. |  |
|  | **Use Restrictions; Transfer of Mortgaged Property** | Does the Facility Operating Agreement restrict use of the Mortgaged Property to a Seniors Housing Facility?  Does the Facility Operating Agreement prohibit Property Operator from removing, selling, or transferring any part of the Mortgaged Property (including Personalty) other than obsolete or worn out Personalty that is promptly replaced by unencumbered items of equal or better function and quality? |  | Choose an item.  Choose an item. |  |
|  | **Assignability of Leases, Rents, Security Deposits** | Identify the party entering into the Leases.  Are Leases, Rents, security deposits and guaranties assignable? |  | Choose an item. |  |
|  | **Amendment/ Modification** | Can the Facility Operating Agreement be amended, modified, cancelled, surrendered, or terminated without the consent of Lender (or any first lien holder)?  Does the Facility Operating Agreement require the parties to amend the Facility Operating Agreement if and as requested by Lender (or any first lien holder)? |  | Choose an item.  Choose an item. |  |
|  | **Waiver of *de facto* Guarantor’s Rights** | Does Property Operator waive its rights to claim landlord/tenant or *de facto* guarantor protections? |  | Choose an item. |  |
|  | **No Brokerage/ Commissions** | Does Property Operator represent and warrant that no brokerage commission is due? |  | Choose an item. |  |
|  | **Non-Merger Clause** | Does the Facility Operating Agreement contain a non-merger clause (i.e., a clause providing that the Facility Operating Agreement shall not terminate because of the conveyance of the Property Operator leasehold interest to Borrower, or the conveyance of Borrower’s fee interest to Property Operator)? |  | Choose an item. |  |
|  | **No Personal Liability** | Does Borrower have personal liability under the Facility Operating Agreement?  If yes, is Borrower’s liability limited to (i) its interest in the Mortgaged Property, and (ii) gross negligence, willful misconduct, or wrongful acts or omissions occurring during the time it holds record title to the Mortgaged Property? |  | Choose an item.  Choose an item. |  |
|  | **Surrender** | Is Property Operator required to surrender the Mortgaged Property to Borrower upon the expiration/termination of the term?  Is Property Operator required to surrender the Mortgaged Property to the Lender, its agent, or a receiver upon such party’s taking possession?  Is Property Operator allowed to surrender the Mortgaged Property without Lender’s prior written consent in any other circumstance?  Does the Facility Operating Agreement include a holdover charge (and payment of associated costs and fees) appropriate for the Mortgaged Property jurisdiction? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Termination by Operator** | Identify and evaluate any termination rights given to the Property Operator upon a default and upon the occurrence of other events, and describe accompanying termination fees, not tied to defaults, as well as any notices required in connection with any termination right. |  |  |  |
|  | **Contract Termination** | Does the Facility Operating Agreement require all of Property Operator’s agreements with third parties to be terminable for convenience upon no more than 30 days’ notice?  If yes, is such termination without penalty? |  | Choose an item.  Choose an item. |  |
|  | **Subordination** | Does the Facility Operating Agreement include express subordination language sufficient to ensure full subordination to the Security Instrument?  If yes, does the subordination language specify that Lender’s exercise of remedies under the Loan Documents shall not be affected or impaired by the terms of the Facility Operating Agreement, or by whether a default has occurred under the Facility Operating Agreement?  Are all Property Operator claims against Borrower subordinated to the Lender’s claims?  [**NOTE:** All subordination agreements must be recorded in the land records.] |  | Choose an item.  Choose an item.  Choose an item. |  |
|  | **Title Policy** | An ALTA Loan Policy must be obtained that (a) insures that the Facility Operating Agreement is subordinate to the Mortgage Loan, and (b) otherwise satisfies standard Fannie Mae title policy requirements as set forth in the Guide. |  |  |  |
|  | **Financial Reporting** | Is Property Operator required to deliver financial reports and reports regarding the Mortgaged Property to Borrower?  If yes, does that reporting comply with the requirements in the Loan Documents?  In no, describe differences. |  | Choose an item.  Choose an item. |  |
|  | **Insurance and Escrows** | Do the insurance requirements in the Facility Operating Agreement satisfy the Loan Documents and Guide requirements for insurance?  If no, what are the differences?  Is Borrower required to obtain and maintain property damage insurance for the Improvements, or pay or maintain insurance escrows?  If yes, does Property Operator assume these responsibilities in writing and pay any related amounts as part of its rent payments?  Does *force majeure* excuse Property Operator’s compliance with the insurance requirements? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Condemnation/ Casualty Payments; Restoration** | Is Property Operator required to transfer and assign to Borrower any rights, title, and interest in any condemnation award or insurance proceeds to which Property Operator is entitled?  Do the casualty and condemnation provisions of the Facility Operating Agreement satisfy the Loan Document requirements for how casualty and condemnation proceeds are administered?  Can Property Operator make any claim for condemnation/casualty proceeds on account of its leasehold interest in the Mortgaged Property?  Do the restoration obligations, procedures, and schedules of the Facility Operating Agreement meet the applicable requirements set forth in the Loan Documents? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Total Loss or Condemnation** | In the event of a total loss due to casualty, does the Facility Operating Agreement provide the Property Operator an option to purchase or Borrower an option to require Property Operator to purchase the Mortgaged Property?  If yes, does the Facility Operating Agreement require that exercise of the purchase option result in payment in full of the Mortgage Loan?  In the event of a condemnation of the entire Mortgaged Property, does the Facility Operating Agreement provide Borrower an option to require the Property Operator to purchase the Mortgaged Property?  If yes, does the Facility Operating Agreement require that exercise of the option result in payment in full of the Mortgage Loan? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Purchase Options** | Does the Facility Operating Agreement contain any purchase rights or options (*e.g.*, right of first refusal or right of first offer to purchase the Mortgaged Property or any portion thereof)?  If yes,  (a) does the option/right expire prior to Maturity Date?  (b) will the purchase price be sufficient to pay off the Mortgage Loan?  (c) does the option/right contemplates Property Operator’s assumption of the Mortgage Loan? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Assignability/Transfers** | Does the Facility Operating Agreement permit assignment, sublease, or transfer of any of Property Operator’s interest in the Facility Operating Agreement?  If yes, is Borrower consent required?  If Borrower consent is required, is Property Operator also required to assign or transfer its rights in and to any supplemental agreements?  If Borrower consent is required, is Property Operator also required to assign or transfer its rights in and to any Leases and Rents?  Is the Property Operator prohibited from making or allowing any Transfers prohibited by the Loan Agreement?  Does any assignment or transfer of the Facility Operating Agreement by Borrower include an assignment or transfer of the Borrower’s rights in any supplemental agreements entered into in connection with the Facility Operating Agreement?  Does the Facility Operating Agreement permit Lender (and its assignee or nominee) to transfer the Borrower’s interest in the Facility Operating Agreement after a Foreclosure Event without notice to or consent of Property Operator? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Property Operator Financing and Collateral** | Identify and evaluate Is there any financing involving Property Operator, its parent, or other affiliate?  If yes, describe and evaluate all such financing.  Is there an assignment or pledge by Property Operator, its parent, or its affiliate of any of the Mortgaged Property, other than to Borrower under the Facility Operating Agreement?  If yes, describe and evaluate. |  | Choose an item.  Choose an item. |  |
|  | **No Liens** | Is Property Operator prohibited from encumbering the Mortgaged Property? |  | Choose an item. |  |
|  | **Recording** | Does the Facility Operating Agreement allow recordation?  If yes, is Property Operator required to deliver a termination in recordable format upon expiration or earlier termination of the Facility Operating Agreement? |  | Choose an item.  Choose an item. |  |
|  | **Taxes/Appeals** | Does the Facility Operating Agreement require Borrower to pay taxes and assessments?  Is Property Operator authorized to engage in a tax appeal/contest without the Borrower’s consent?  Does the Facility Operating Agreement afford Property Operator any greater right to participate in or settle a tax appeal/contest than Borrower has? |  | Choose an item.  Choose an item.  Choose an item. |  |
|  | **Replacement/Repair Escrows** | Do the replacement/repair escrow requirements of the Facility Operating Agreement satisfy the Loan Document requirements for Replacement/Repair Escrows?  If the Facility Operating Agreement required Borrower to make replacement/repair escrow deposits, does Property Operator assume such responsibilities in writing and pay any related amounts as part of its rent payment? |  | Choose an item.  Choose an item. |  |
|  | **Cure** | Does the Facility Operating Agreement:  (a) allow Property Operator time and opportunity to cure any failure to meet any of its obligations under the Facility Operating Agreement?  (b) include cure periods relating to rent payments?  (c) include cure periods relating to maintenance of insurance?  (d) contain Property Operator cure periods that run concurrently with any corresponding cure periods in the Loan Agreement? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Defaults** | Summarize and evaluate each Borrower and Property Operator default under the Facility Operating Agreement.  Does the Facility Operating Agreement provide that:  (a) any default under the Loan Documents an automatic default?  (b) bankruptcy by Property Operator is an automatic default?  (c) Borrower and Property Operator are required to copy Lender on any notice of default under the Facility Operating Agreement?  (d) Property Operator is obligated to accept the Lender’s performance of Borrower’s obligations? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Remedies** | Summarize and evaluate each Borrower and Property Operator remedy under the Facility Operating Agreement.  Is Property Operator entitled to seek special, consequential, or punitive damages?  Does Property Operator’s election of one remedy impair the exercise of alternate or additional remedies or constitute a waiver thereof?  Is Borrower required to mitigate damages?  Does the Facility Operating Agreement provide that upon an Event of Default under the Loan Documents, irrespective of the existence of a default under the Facility Operating Agreement, Lender shall have the right to exercise all remedies set forth in the Loan Documents? |  | Choose an item.  Choose an item.  Choose an item.  Choose an item. |  |
|  | **Power of Attorney** | Does the Facility Operating Agreement include a power of attorney from Property Operator to Borrower?  If yes, is that power of attorney assignable? |  | Choose an item.  Choose an item. |  |
|  | **Governing Law** | Is the Facility Operating Agreement governed by the laws of the Mortgaged Property jurisdiction? |  | Choose an item. |  |
|  | **Successors and Assigns** | Is the Facility Operating Agreement binding upon Property Operator’s and Borrower’s respective permitted successors and assigns? |  | Choose an item. |  |
|  | **Counterparts** | Is counterpart execution of the Facility Operating Agreement permitted? |  | Choose an item. |  |
|  | **Integration; Severability** | Does the Facility Operating Agreement include integration and severability clauses? |  | Choose an item. |  |
|  | **No Deemed Consent** | Is Borrower’s consent deemed to be provided in the absence of a response? |  | Choose an item. |  |
|  | **Notices** | Are notices under the Facility Operating Agreement given in the same manner as set forth in the Loan Agreement?  If no, describe notice parameters.  Is Borrower authorized to deliver any notice, request, report, or other communication received from Property Operator to the Lender? |  | Choose an item.  Choose an item. |  |
|  | **Disclosure of Information** | May Borrower and Lender disclose all information received from Property Operator concerning Property Operator, the Facility Operating Agreement, or the Mortgaged Property? |  | Choose an item. |  |
|  | **Time of the Essence** | Does the Facility Operating Agreement state that time is of the essence? |  | Choose an item. |  |
|  | **Jury Trial Waiver; Consent to Jurisdiction; No Arbitration** | Does the Facility Operating Agreement contain  (a) a jury trial waiver?  (b) consent to jurisdiction in the State and Federal courts of the Mortgaged Property jurisdiction?  Does the Facility Operating Agreement contain a requirement for (or the option of) arbitration? |  | Choose an item.  Choose an item.  Choose an item. |  |

**ATTACH ORGANZATION CHART(S) FOR PROPERTY OPERATOR**

1. “**Facility** **Operating Agreement**” means, individually and collectively, any of an Operating Lease, Sublease, Management Agreement or any other agreement setting forth the responsibilities for the operation, management, maintenance or administration of the Mortgaged Property as a Seniors Housing Facility. [↑](#footnote-ref-2)