

Instructions To Guide For Opinion Of Borrower's Counsel

(To be used in HUD-Insured Multifamily
Transactions)

U.S. Department of Housing
and Urban Development
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_____ The purposes of ~~this~~the Guide for Opinion of Borrower's Counsel (**Opinion**) remain first, to be consistent with modern opinion practice while also protecting the interests of HUD, and second, to achieve a uniform format which can be utilized ~~by HUD counsel~~ in all jurisdictions. Certain limited changes can be authorized by HUD field counsel as required by local law or by the unique or programmatic nature of the transaction (e.g. refinancing transactions insured under the National Housing Act, as amended). An effort has been made in these revised instructions to specify examples where such changes can be authorized. Otherwise, the format of the Opinion must be followed and is not open to negotiation. In this regard, revisions cannot be justified because of a particular Opinion having been approved by another HUD field office. This exercise of discretion by one HUD field counsel in unique circumstances cannot become the basis for any modification to the Opinion. Any requested modification must be analyzed on its own merit and in a particular context.

_____ HUD regards the Borrower's Counsel ~~to Borrower~~ as essential to the process of preparing and executing the legal and administrative documents necessary to achieve a closing in those multifamily rental mortgage insurance programs where a Note is endorsed for mortgage insurance by HUD. The definition of any capitalized term or word used herein can be found in these Instructions to Guide for Opinion of Borrower's Counsel, the Guide for Opinion of Borrower's Counsel, the Regulatory Agreement between Borrower and HUD, the Note, and/or the Security Instrument. "Mortgagor" is now referred to as "Borrower," and "Mortgagee" is now referred to as "Lender;" however, those new uses are defined to mean "Mortgagor" and "Mortgagee" as those terms are used in Program Obligations. Pursuant to Program Obligations, attorneys or others in a business relationship with the Borrower are defined as "Principals." Borrower's Counsel ~~to Borrower~~ has significant obligations to its client (Borrower), Lender and HUD. In part, these responsibilities entail the exercise of due diligence to assure~~ensure~~ the accurate and timely preparation, completion and submission of the forms required by HUD in connection with the transaction. Further, the Borrower's Counsel ~~to Borrower~~ and any other attorneys involved in the transaction must be thoroughly familiar with Program Obligations pertaining to each mortgage insurance transaction in which Counsel participates ~~they each participate~~. HUD takes seriously the preparation and completion of the various documents involved in the mortgage insurance process (most of which are HUD form documents). _____

~~Article IX of the UCC was revised in virtually all of the jurisdictions in which HUD insures multifamily rental loans. It is imperative that Counsel to Borrower be aware of these changes in State law and that the UCC documentation be prepared so as to comply with State law. Lender must establish a first position in all Personalty for the duration of the HUD insurance on the Loan. Please note that the Opinion has been amended to cover these points. See G, below, for a more specific discussion of UCC securitization.~~

It is essential that the Opinion be followed in both style and substance in order to ensure a timely closing. The Borrower's Counsel ~~to Borrower~~ is expected to complete a draft Opinion for submission to HUD field counsel along with the other closing documents early enough for HUD to complete its review prior to the date of the closing. Any deviations must be specifically identified (redlined or highlighted) and discussed with HUD field counsel at that time so that the deviations can be resolved prior to the closing. Any material deviation not required by State or local law or otherwise authorized by these instructions must be brought to the attention of the Assistant General Counsel, Multifamily Mortgage Division, by HUD field counsel along with an explanation by Borrower's Counsel ~~to Borrower~~ as to the necessity for the deviation.

The Opinion can be utilized in connection with all types of insured closings: insured advances or insurance upon completion (for new construction or substantial rehabilitation); initial/final closings (for refinancings, etc.). Furthermore, the Opinion format can be adapted and used in Transfers of Physical Assets (TPAs), Section 241 supplemental loans, and the various refinancing transactions under Section 223. It is important that the correct options be selected in instances where choices are provided and that appropriate deletions or modifications ~~be made to accommodate unique circumstances or programs. HUD has made an administrative policy decision to not require an opinion by Counsel to Borrower for projects within the "Small Projects Mortgage Insurance Pilot Program (SPP)." Lender will have the option of requiring an opinion by Counsel to Borrower if Lender so elects. It is anticipated that the Certification of Borrower will be expanded slightly for use in the SPP to provide assurances and comfort to HUD in such cases.~~ are made to accommodate unique circumstances or programs.

The Opinion format **is not intended to serve as a closing checklist**; therefore, HUD field counsel may update or modify existing closing checklists as necessary to meet Program Obligations. For example, many deletions from the list of documents are appropriate for various types of refinancings, operating loss loans, equity loans, supplemental loans, and certain complex refinancings.

Brackets continue to be used in the Opinion to indicate alternate language, insertions, documents, or instructions depending on the applicable facts, and underlining is used to indicate blanks that must be completed.

The Opinion contains some instructions and definitions and is largely self-

explanatory; however, the following expanded instructions and clarifications are intended to provide additional assistance to both private counsel and HUD field counsel. The numbers and letters used below relate to the paragraph numbers and letters in the Opinion unless page numbers are specifically designated. Please note that certain capitalized words used in the Opinion and in these Instructions are defined terms in the Loan Documents.

Page 1 and ~~Introductory Paragraph:Introduction~~

- ~~Letterhead and date:~~ ~~The~~ Opinion must be on ~~the Borrower's Counsel's~~ firm letterhead and dated the date of HUD's endorsement of the ~~note by HUD~~Note.
- ~~Reference:~~ ~~Data~~data regarding the Project (name, HUD Project number, and location and the name or title of Borrower) must be accurate and inserted in the appropriate blanks.
- ~~Addressees:~~ ~~The~~ Opinion must be delivered to HUD as well as Lender to establish the explicit right of each to rely on the Opinion. Lender's counsel may be relying on the Opinion for certain aspects of its opinion. If so, the Opinion must also be addressed to counsel to Lender. In cases where counsel to Lender **elects not** to rely upon the Opinion or Borrower's Counsel ~~to Borrower~~ does not wish to permit reliance by counsel to Lender, the Opinion must not be addressed to and/or delivered to Lender's counsel. Furthermore, Lender and counsel to Lender **are not permitted** to rely upon the Opinion ~~with respect to the certification by Lender that the closing documents, which are mandated by HUD forms and models, comport with the version of such forms and models provided to Lender by HUD with the exception of the Opinion itself. Counsel to Borrower in making the certification in paragraph 29 of the Lender's Certificate (HUD-92434). Borrower's Counsel~~ must provide such certification with respect to the Opinion.
- ~~Description of the Loan:~~ ~~The~~ loan amount is the original principal amount of the Loan unless a modification is necessitated in connection with the closing.

List of Documents:

~~In General:~~ If there are no brackets around a particular document, the document is one which is commonly used for initial endorsements in cases involving insured advances; however, it is impossible to list every document for every Loan. Further, no attempt has been made to list all documents utilized in all types of refinancings. Conversely, some documents may not be utilized in a particular transaction and must be deleted from the list in the actual Opinion. Brackets around the name of the document indicate that the document may or may not be used for every Loan. If bracketed documents are not used in a particular loan transaction, then delete such documents from the list in the actual Opinion. Each document executed in connection

with the Loan must be listed by its correct title, showing each party executing it and its date. If documents are dated "as of" a particular date, then such phrase must be included in the description in the text. The appropriate HUD or FHA form number, if applicable, must be indicated in parentheses after each document. **It is imperative that Borrower's Counsel take care ~~must be taken~~ that the initial draft Opinion submitted to ~~compile~~ HUD includes** a list that accurately and completely reflects the transaction ~~in the submission to HUD of the initial draft.~~ After HUD review of the initial draft, the Opinion may have to be modified, ~~as necessary,~~ to satisfy HUD. To the extent documents are later found in the closing docket file which do not comport with Program Obligations and which were not shown on the list, HUD reserves the right to refuse to accept or recognize the documents unless the documents are brought into compliance with Program Obligations. The Opinion may need to be modified or supplemented at final endorsement because of matters such as modification of the commitment or other closing documentation. For example, there could be an increase or reduction in the amount of the Loan resulting in a modified Security Instrument. All documents executed in connection with the loan transaction must be listed regardless of whether the documents are required by HUD or whether Borrower is a party to the documents. Borrower's Counsel ~~to Borrower~~ is not assuming responsibility for the content of documents that Borrower's Counsel does not prepare and/or that Borrower does not execute. The Borrower's Counsel's review of such documents is necessary to provide assurance of ensure consistency from document to document. The appropriate HUD or FHA form number, if applicable, must be indicated in parentheses after each document.

A.— Organizational Documents: All of the Organizational Documents must be reviewed for compliance with Program Obligations.

~~G. HUD must be named as its interest appears in the Financing Statements filed by Lender. It is the responsibility of Lender to ensure that such Financing Statements and Security Agreements are properly filed in the name of Lender and HUD as its interest appears. Counsel to Borrower must check to ensure that Lender has properly filed such Financing Statements and has properly structured the Security Agreement(s). HUD requires that there be specificity in the UCC documentation with respect to the securitization of such Personalty, including a provision to cover after-acquired Personalty. The Security Agreement(s) must cover all Personalty. Further, all Receivables must be specifically described. Please note that the Receivables, to the extent permissible under state law, must all be securitized in favor of Lender and HUD, as its interest appears.~~

~~J.—H.~~ Building Loan Agreement: This document is a "bracketed document" that must only be used in cases involving new construction or substantial rehabilitation. The document is not required in equity loan transactions, most refinancing transactions and many supplemental loan transactions.

~~K.—I.~~ Construction Contract. See instructions under ~~JH.~~ above.

M. Certification of Borrower: The language in the Certification of Borrower has been clarified regarding references to the Public Entity Agreement and the Regulatory Agreement. ~~L. — Some types of Public Entity Agreements may also involve a regulatory agreement, and the certification is being clarified to cover both the HUD Regulatory Agreement and the other regulatory agreement.~~

N. Lender's Certificate: All fees, escrowed accounts, etc. must be disclosed in the Lender's Certificate. The document now contains a certification (in paragraph 29) that the closing documents conform to the HUD-approved format except for changes approved by HUD field counsel. In this regard, the document is crucial to HUD's endorsement of the Note for insurance. Borrower's Counsel ~~to Borrower~~ is not responsible for the ~~execution content~~ of the document and only needs to review the document in ~~theits~~ capacity as Borrower's Counsel ~~to Borrower~~ to be certain that the document conforms to the transaction Borrower is agreeing to and that the document accurately reflects the fees and escrows, etc. that are required of Borrower.

In secondary financing cases (such as under Section 241) where the consent of the first lender is obtained for a second Security Instrument insured by HUD, a separate document evidencing the consent (for which there is no specified format) is utilized. ~~That document has nothing to do with the consent of the first lender to the secondary financing transaction.~~

~~P. Certification of Borrower: The language in the Certification of Borrower has been clarified regarding references to the Public Entity Agreement and the Regulatory Agreement. Some types of Public Entity Agreements may also involve a regulatory agreement, and the certification is being clarified to cover both the HUD Regulatory Agreement and the local regulatory agreement.~~

~~Q. Flood insurance receipt: This document is necessary in equity loan, supplemental loan and refinancing transactions. Flood plain maps change. In insuring a first or a second Security Instrument, HUD must know whether the property is located in an area where flood insurance is required and, if so, whether the insurance is in effect regardless of whether a prior HUD-insured first Security Instrument is in effect. HUD would not necessarily have the data on file, and it was determined that this is a matter which Counsel to the Borrower could confirm under item (f) near the end of the Opinion. Counsel to Borrower is not required to opine as to flood insurance in most closings, but verification of the factual determinations indicated in the flood insurance receipt is required in all cases.~~

RO. Title Insurance Policy: ~~Currently the 1992 ALTA Format (with appropriate endorsements) is required by HUD in most jurisdictions. HUD field counsel will provide guidance as to should be consulted about~~ the appropriate Title Insurance Policy format.

SP. Evidence of zoning compliance: The evidence of zoning compliance will vary depending on the circumstances. The evidence must establish that the building, if constructed according to plans and specifications, shall comply with all zoning requirements. The evidence may be in the form of a letter or certificate from the appropriate local official stating that, if the building is constructed according to the plans and specifications submitted for review, the building shall comply with all zoning requirements. HUD does not maintain data pertaining to zoning law, and data with respect to previously endorsed loans is outdated. Therefore, in refinancing cases where no construction is involved, the evidence may be in the form of a letter certifying that the existing building(s) is (are) in compliance with outstanding zoning requirements or, if not, the nonconforming variance, etc., is acceptable. If the locality has no zoning ordinance, a letter must be submitted from the chief executive officer of the locality stating such. In those circumstances, it may be necessary to obtain a letter from the local planning body of the county in which the project is located, that the proposed development is compatible with the county's comprehensive plan. If the zoning approval is based upon a variance or other special action, the closing may have to be delayed until the time for appeals has run. In extremely complex cases, an opinion may need to be obtained from legal counsel specializing in local zoning matters. Such letter must be attached as an exhibit to the Opinion.

TR. Building permit(s): If no building permit is required, this document is not applicable and must be deleted from the Opinion. (This would also be true with respect to occupancy permits (under VR.) unless new permits are required under local law in connection with refinancing transactions which involve no hard costs of construction.)

UR. Permits required for the operation of the projectProject. In all cases, including refinancings, HUD requires that any permits needed for the continued operation of the Project be in place. In existing Projects, HUD must be assured that no new requirements have been imposed which would prevent continued operation of the Project.

VS. Surveyor's platPlat or surveySurvey: The survey must be signed, sealed and dated within 90120 days of the closing. In certain refinancing transactions, a survey would not normally be required because no new construction would have taken place and, presumably, nothing would have changed with respect to the building(s) and the site. In such situations, if there is other satisfactory evidence that no site changes have occurred, an administrative waiver would permit the deletion of the item from the Opinion. ~~See X. below.~~ If Borrower's Counsel to Borrower were to become aware of any changes, this would have to be addressed in the Opinion, and HUD may require a survey depending upon the circumstances.

WT. Surveyor's Report: Unless there is a title endorsement protecting against encroachments, lot line violations, construction activity, etc., there will have to be a surveyor's certificate indicating that nothing has changed since the last survey. As

an alternative to a surveyor's certificate, Borrower's Counsel to Borrower may rely upon an appropriate certificate from a qualified architect and insert appropriate language in the Opinion.

~~YV.~~ Assurance of ~~completion~~Completion (bonds or agreement): This —documentation (now bracketed) would only be used in cases involving some construction where the regulation pertaining to assurance of completion is applicable. This documentation would not be utilized in refinancings or equity loan transactions with no construction activity.

~~ZW.~~ Owner-Architect Agreement: This document (now bracketed like Documents ~~JH~~ and ~~KI~~) must only be used in cases involving new construction or substantial rehabilitation.

AA.- Assurance of Completion of Off-Site Bond Facilities (bond or Agreement; escrow agreement): This document must only be used in cases where off-site work is involved. As such, the document would not normally be used in pure equity loan transactions or in refinancing transactions involving no construction.

BB. Assurance of ~~utility services~~Utility Services: These documents do not pertain to pure Section 241(f) equity loan transactions and certain refinancing transactions and, therefore, must be deleted in those instances.

EE. On-Site Deposit Escrow Agreement for Incomplete Construction: If any such improvements are required in connection with an equity loan, supplemental loan or refinancing transaction, the form document specified must be tailored to the situation as determined by HUD field counsel. In a situation where such an escrow is necessary, Borrower's Counsel to Borrower must modify the form as necessary and present it to HUD field counsel for review.

FF. Contractor's Prevailing Wage Certificate: This item is no longer required in the HUD closing checklist; however, the item must be reviewed by Borrower's Counsel to Borrower for the purpose of assuring consistency between the documents and performance under the Construction Contract to which Borrower is a party.

JJ. Public Entity Agreement: There are references to the Public Entity Agreement and to the Regulatory Agreement in the Certification of Borrower. The two separate references are intended, and a clarification has been made as discussed in ~~P. above.~~M. above. By use of the term "All documents," HUD intends for a listing of development and contractual documents between Borrower and any State or local government entity where both parties are signatories.

KK. Bond Source Documents: This does not include all documents involved in the typical bond financing. It does include those principal documents such as the Prospectus, the Indenture, a sample Bond, etc. All documents executed by Borrower or which establish or describe any obligations of Borrower must be

included.

MM. Docket ~~search~~Search: The Docket Search can be conducted by either the title insurance company, a reputable document search firm, the Borrower's Counsel ~~to Borrower~~ or any other attorney licensed in the jurisdiction.

—If Borrower is created or located in a jurisdiction other than the location of the Project, then a record search in both jurisdictions shall be necessary. In the case where a sole-asset borrower is being created within thirty (30) days before the date of the Opinion, a search of the public records in the jurisdiction where Borrower is located (assuming a different location from the others iterated) is unnecessary. The Opinion could be amended in those instances to indicate that particular state of facts; however, all of the other searches would have to be performed.

Opinions:

-1.- This paragraph contains several options depending upon whether Borrower's organizational documents were prepared by Borrower's Counsel rendering the Opinion and the type of borrower entity. Care must be taken to ensure that the correct option is selected and that the requisite information is inserted correctly. It is intended that, where Borrower or general partner of Borrower is established by Borrower's Counsel ~~to Borrower~~, no reliance on other sources is permitted and Borrower's Counsel must opine as to the due organization of Borrower. If a Certificate of Good Standing is not available in the State, but an equivalent document is (i.e., Certificate of Existence), then the bracketed language must be revised to reflect the name/title of the equivalent document so obtained. Any Certificate of Good Standing or equivalent document issued by the applicable governmental authority must be dated no more than 30 days prior to the date of the Opinion of Borrower's Counsel. If Borrower is a foreign corporation or partnership, the Opinion must recite the review of all government approvals required to do business in the Property Jurisdiction. If a Certificate of Good Standing or equivalent document cannot be obtained from the applicable governmental authority (e.g., for general partnerships), then Borrower's Counsel ~~to Borrower~~ shall be required to do the due diligence necessary to give the opinion or may engage other counsel to render such opinion. If the Property Jurisdiction is not the state of formation for the borrower entity, Borrower's Counsel must also opine that Borrower is qualified to transact business in the Property Jurisdiction. Such opinion may be made solely on the basis of a certificate from the applicable governmental authorities of the Property Jurisdiction, and if Borrower's Counsel is relying on such certificate(s), then the opinion must expressly identify those certificate(s) and they must be attached to the Opinion as an exhibit. ~~If Borrower is an individual, paragraph one must be deleted from the Opinion.~~

9. If Borrower is a trust (other than a land trust), then Paragraph 9 must be included in the Opinion. The second sentence need only be included if the trust was formed in a jurisdiction other than the Property Jurisdiction.

—10. This ~~Section~~Paragraph has been modified to clarify that taxable as well as tax-exempt bond financing is covered and that other third-party source of funds financings are also covered.

Acceptability of Counsel:

~~• Counsel to Borrower The attorney signing the Opinion is responsible for ensuring that he or she has the necessary experience, expertise and authority to provide the Lender and HUD with the required opinions relating to the laws of the applicable states and local jurisdictions governing the transaction, and to seek additional opinions when necessary. Borrower's Counsel must opine as to the law of the Property Jurisdiction and must also opine as to the law of the state of Borrower's Borrower's organization, if different from the Property Jurisdiction. HUD requires that Counsel to Borrower be admitted to practice law in each jurisdiction in which such admission is required by the laws or ethical considerations of the bar to be able to give the opinion. If multiple jurisdictions are involved, two opinions may be required: one with respect to the organization of Borrower and another with respect to the real property and loan issues. Certain matters covered in the Opinion may require a separate opinion by specialty counsel. A combination of Borrower's regular Counsel, special local counsel, and/or specialty counsel may be required. If Counsel's satisfaction of these requirements is not evident from the letterhead of the firm, the field counsel must include a written explanation in the Washington docket. In all events, each provision in an attorney rendering the Opinion must be addressed has a concern about whether ~~one~~ its issuance may be considered an unauthorized practice of law, that attorney should contact the relevant authorities for clarification and/or retain additional counsel as necessary. HUD attorneys are not responsible for the actions or more opinions are required to do so determinations of Borrower's Counsel on this matter, unless there is a specific state law or requirement to the contrary.~~

Signatures:

• The Opinion ~~may shall~~ be signed by an authorized ~~partner attorney~~(s) of the law firm, in the name of such ~~partner attorney~~(s)-, in the name of the law firm or on behalf of the law firm.

Certification of Borrower:

• A form of Certification of Borrower is attached. The form represents the minimum amount of information that must be obtained from Borrower (but additions, revisions and rephrasings are acceptable so long as Borrower is certifying as to factual matters and not legal conclusions).

Identity of Interest:

_____ The attorney signing the Opinion cannot have an identity of interest with any party to the transaction. No waivers are possible in such instance. In instances where other members of the firm have an interest in Borrower or another entity involved in the transaction, such interest must be disclosed. ~~Field~~HUD field counsel must decide if the interest is acceptable based upon a legal opinion interpreting the ethics rules of the applicable bar ~~as well as being and the identity of interest must also be~~ administratively acceptable to HUD ~~In addition, 2530 clearance must be obtained~~. It is unacceptable for counsel to Lender to represent Borrower in whole or in part or to provide all or a part of the Opinion. Confirmation (d) reflects this requirement.

Liens:

• ~~_____ Confirmation (f):-e). Borrower's~~ Counsel ~~to Borrower~~ must confirm that there are no liens or encumbrances against the Mortgaged Property regardless of ~~an argument that, at the time of closing, there may be liens that have actually not been released even though the title company has received funds and/or release documents to do so and intends to process the release after the closing.~~ Except in cases involving the insurance of secondary loans, HUD is only authorized to insure first mortgages; consequently, there cannot be any liens and encumbrances on the Mortgaged Property when HUD endorses the Note for insurance. Paragraph (f) must not be changed.

Litigation:

• ~~_____ Confirmation (h):- If(g): if~~ Borrower or any Principal of Borrower is involved in any litigation or there is any litigation pertaining to the Project, all such litigation matter(s) must be disclosed in writing to HUD field counsel in order that HUD can determine whether the endorsement of the Note is possible. Note that litigation involving a Principal of Borrower must be disclosed. If the litigation involves compliance with civil rights requirements, it must immediately be brought to the attention of appropriate Fair Housing and Equal Opportunity personnel (regardless of whether a Principal or some lesser component of Borrower is the subject of the litigation). Litigation must also be listed on an exhibit to the Opinion and Confirmation (g) must reference such exhibit.

Reliance on ~~other opinions:~~Other Opinions

_____ In instances where ~~Borrower's~~ Counsel ~~to Borrower~~ is relying on opinions issued by other attorneys, the Opinion must be modified. Examples include cases involving a separate opinion for bond financing documentation, property jurisdiction vs. organizational jurisdiction, zoning, etc. It is imperative that ~~Borrower's~~ Counsel ~~to Borrower~~ specifically reference and attach the additional opinion(s) and that such opinions track the language of the Opinion as close as is practical under the circumstances. HUD field counsel will exercise discretion in this area, taking the unique circumstances into account.

| Reliance on Opinion by ~~subsequent holders~~ Subsequent Holders of Note:

| The last paragraph of the Opinion permits subsequent holders of the Note to rely upon the Opinion.