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BY EMAIL (Colette.Pollard@hud.gov)
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451 7th Street, S.W., Room 4176
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Re: HUD Multifamily Rental Project Closing Documents Renewal of Currently Approved Collection
OMB Approval Number 2502-0598

Ladies and Gentlemen:

The following comments are submitted on behalf of the American Bar Association Section of Real Property, Trust and Estate Law. These comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

The comments were prepared by members of the Committee on Legal Opinions in Real Estate Transactions of the Real Property Division of the Section of Real Property, Trust and Estate Law of the American Bar Association (the “Section”). Charles L. Menges, Chair of the Committee on Legal Opinions in Real Estate Transactions of the Section, supervised the preparation of these comments and participated in their preparation with Barry W. Hunter, David M. Kochanski, Edward J. Levin and James H. Levine. These comments were reviewed by Jack Fersko on behalf of the Section’s Real Property Division Task Force on Government Submissions. For further information in regard to the comments, please contact:

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Although members of the Section who prepared these comments may have clients who would be affected by the issues addressed, or may have advised clients on the application of such issues, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or the outcome of, the specific subject matter of these comments.
I. Instructions to Opinions of Borrower’s Counsel.

The Section has numerous concerns regarding HUD’s promulgated form of Opinion of Borrower’s Counsel (the “Opinion”), as discussed in Part II below, but the Section’s greatest concern is with the process that HUD follows in requiring legal opinions in each loan transaction. That process is described in the Instructions to Opinion of Borrower’s Counsel (the “Instructions”).

A. Requiring a Uniform Format that is Non-Negotiable

1. Proposed Revision

The Section proposes that HUD no longer prohibit changes by borrower’s counsel to the form of the Opinion and that HUD also permit borrower’s counsel to offer its own form of opinion, so long as the changes or the alternative form of opinion properly addresses the same opinions as HUD’s form and follows customary opinion practice. Therefore, the first paragraph and the third paragraph of the Instructions should be deleted in their entirety and replaced with the following:

The purpose of requiring a formal legal opinion from borrower’s counsel is to provide HUD with borrower’s counsel’s professional judgment on certain legal issues concerning the borrower and the loan transaction that HUD has determined to be important, as part of HUD’s due diligence in connection with the loan transaction. The Opinion of Borrower’s Counsel (“Opinion”) provides a format that may be used by borrower’s counsel in achieving this purpose. Borrower’s counsel is expected to provide 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 closing.

If the draft opinion of borrower’s counsel does not follow the form of the Opinion, it must nevertheless (1) conform to current, customary opinion practice for real estate loan transactions, (2) include the same opinions as set forth in the form in terms of scope, to the extent applicable, and (3) include only those assumptions, qualifications, exclusions and other limitations as are appropriate under the circumstances. Borrower’s counsel should be aware that the failure to follow the form of the Opinion may result in delays from HUD’s internal review process and additional costs to the borrower to the extent that borrower’s counsel
is required to spend additional time in preparing the opinion and responding to HUD’s requests for changes.

2. Explanation.

The Instructions set forth two contradictory purposes of the Opinion. One purpose is to be consistent with modern opinion practices while also protecting the interests of HUD. The Section believes this purpose is entirely appropriate and commends HUD for recognizing the importance of following customary opinion practice. The Section also agrees that the interests of HUD (or any lender in a real estate loan transaction) should be adequately protected, to the extent than a legal opinion serves that function. The other stated purpose is to achieve a uniform format which can be utilized in all jurisdictions. In furtherance of this purpose, the Instructions state that, except in very limited circumstances, “the format of the Opinion must be followed and is not open to negotiation.” However, requiring uniformity in legal opinions among various jurisdictions and among different lawyers or law firms and refusing to “negotiate” a legal opinion are inconsistent with modern opinion practice, for the reasons indicated below.

First, such an approach implies that legal opinions are the equivalent of the loan documents executed in the loan transaction for which the opinions are given. However, legal opinions and loan documents serve two entirely different functions, and the willingness of a borrower to enter into loan documents upon the forms prescribed by a lender should not be interpreted to mean that such borrower’s counsel should do the same with regard to a prescribed form of legal opinion. HUD’s multifamily loan documents set forth the business terms of the loan transaction as well as the legal framework of the parties’ relationship, including the security interests, protections, rights and remedies that a real estate lender typically expects in a real estate loan. So long as the loan documents accurately capture the business terms of the loan in a legal framework that at least fits within broad parameters for real estate finance transactions, a borrower may agree to enter into the loan documents notwithstanding provisions of the loan documents that the borrower finds objectionable. Such a decision by a borrower is based on its assessment of the economic risks associated with the objectionable provisions as compared to the anticipated economic benefits it will receive by proceeding to close the transaction despite such objections, including the upside of profits from the operation of the multifamily rental project and the gain to be realized upon a sale or subsequent refinancing of the project. A borrower also understands that it may have little bargaining power as compared to the lender and that continuing to insist on changes to the loan documents will be a futile effort, while accepting the lender’s forms at least provides the economic benefits noted above.
A legal opinion, on the other hand, serves a far different purpose, and the difference is critical to understanding why a “one form fits all” approach is inappropriate and inconsistent with modern opinion practice. The primary purpose of a legal opinion in a loan transaction is to serve “as part of the recipient’s [i.e., the lender’s] due diligence, providing the recipient with the opinion giver’s professional judgment on legal issues concerning the opinion giver’s client, the transaction, or both, that the recipient has determined to be important in connection with the transaction.”¹ Because a legal opinion is not a statement of the business terms of the transaction and does not contain covenants to pay or perform certain obligations but rather is an expression of the opinion giver’s professional judgment, customary opinion practice contemplates that the opinion giver should be permitted to express that judgment in its own terms rather than on terms dictated by the opinion recipient, even though the language used by opinion givers on the same topic is often very similar. As stated in the Opinion Guidelines, “[o]pinion givers and counsel for opinion recipients should be guided by a sense of professionalism and not treat opinions simply as if they were terms in a business negotiation.”²

Moreover, unlike a loan document, a legal opinion imposes liability on the lawyer or law firm that issues the opinion, and not the borrower, if the lawyer or law firm fails to exercise the duty of care owed to the opinion recipient or makes a misstatement in the opinion.³ Such liability can arise out of the opinion giver’s failure to undertake adequate due diligence for the opinions expressed, but it can also arise out of the language chosen to express those opinions, out of the failure to properly qualify an opinion, out of the failure to express an opinion in a manner that does not mislead the opinion recipient or on account of a myriad of other deficiencies that may give rise to liability under third party opinion letters. Such liability is not merely a theoretical possibility. The number of lawsuits against lawyers on account of third party legal opinions continues to grow.⁴ It is not surprising, therefore, that lawyers choose to craft their own opinion letters rather than merely following unquestioningly forms mandated by a lender.

In order to manage the risk associated with third party legal opinions and to ensure quality control over the opinion process, many law firms have established opinion committees to oversee the issuance of opinions, to promulgate opinion policies and

² Opinion Guidelines, p. 248.
³ Donald W. Glazer, Scott FitzGibbon and Steven O. Weise, Glazer and Fitzgibbon on Legal Opinions, (3rd Ed. 2008), §1.6.3 (referred to hereinafter as “Glazer and FitzGibbon”).
⁴ Glazer and FitzGibbon, §1.6.3.
procedures, to train the firm’s lawyers in opinion practice and, perhaps most importantly, to develop opinion forms that the firms may require their lawyers to use in transactions (or at least to use as the starting point), with significant deviations to be approved by the opinion committee or other lawyers in the firm. The Section is not aware of any law firm that has adopted HUD’s opinion form as the prescribed or preferred opinion form for real estate finance transactions.

By mandating one form of opinion to be used without variation in every state and by every lawyer or law firm, HUD forces many borrower’s counsel to give opinions that in form and substance they find objectionable and would not otherwise provide to other real estate lenders. Unlike their clients, borrower’s counsel who feel compelled to issue the HUD-mandated form of opinion receive none of the economic benefits that the borrower receives and that might compensate for the risks associated with such an opinion. Mandating one form of opinion also effectively precludes many lawyers and law firms with strict opinion policies from participating in the FHA-insured multifamily mortgage loan program at all.

More than two decades ago, distinguished members of the bar developed a national form for third party opinion letters, accompanied by a detailed explanation as to the meaning of the phrases used in the form. The Third Party Legal Opinion Report, Including the ABA Accord, was published in 1991 by the Committee on Legal Opinions of the Section of Business Law of the American Bar Association. Although the “Accord” and subsequent bar reports in support of the Accord provided an excellent analysis of opinion practice and persuasive arguments for lawyers to adopt the Accord, very few practicing lawyers did so. In fact, the main thrust of the Accord—that lawyers should follow the prescribed form and adopt the interpretation that accompanied the form—has been largely ignored by the bar, as lawyers and bar organizations have come to realize that adopting a “uniform format” (as the Instructions mandate) is neither feasible nor necessary. Instead, the more widely accepted view is that lawyers issuing opinions should be allowed to craft their own form of legal opinions so long as such opinions reflect current customary norms of opinion practice, are responsive to the reasonable requests of the opinion recipient and, most importantly, achieve the primary objective of a third party opinion—to serve as part of the recipient’s due diligence on legal issues concerning the opinion giver’s client and the transaction.

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Although the effort to adopt a national, uniform format for third party opinion letters was unsuccessful, that did not mean that the bar abandoned its efforts to achieve a national consensus as to the specific opinions that are appropriate to request and to give in third party opinion letters, as to the words and phrases that generally should be used and the interpretation of those words and phrases, as to the qualifications and assumptions that are appropriate in legal opinions and as to the due diligence required for certain opinions. In fact, since the Accord was published in 1991, there has been a proliferation of reports published by national and state bar organizations and several treatises analyzing various aspects of opinion practice. In many cases, the reports provide illustrative opinion language that lawyers may consider utilizing in their own opinion practice. However, none of the published reports suggest that there is only one way to write certain legal opinions or that an opinion recipient is entitled to mandate a certain form of legal opinion.

The most recent, authoritative report on opinion practice in real estate finance transactions was prepared by a joint drafting committee comprised of representatives of the Committee on Legal Opinions of the ABA Section of Real Property, Trust and Estate Law, the Attorneys’ Opinions Committee of the American College of Real Estate Lawyers and the Opinions Committee of the American College of Mortgage Attorneys and is entitled “Real Estate Finance Opinion Report of 2012” (referred to herein as the “2012 Report”). The 2012 Report includes an example of an opinion letter that “illustrates how some of the fundamental issues that arise in opinion practice in real estate secured transactions may be addressed.” However, the 2012 Report makes clear that the “purpose of including such language is not to prescribe, endorse, or in any way take a position as to what an appropriate opinion letter request might be or how any given issue should be expressed in an opinion letter.”

The Opinion Guidelines describe the appropriate process for requesting an opinion and responding to the opinion request as follows:

Early in the negotiation of the transaction documents, counsel for the opinion recipient should specify the opinions the opinion recipient wishes to receive. The opinion giver should respond promptly with any concerns or proposed

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9 47 Real Prop. Tr. & Est. J. 213 (2012)
10 Id. p. 223.
11 Id., pp. 223-224.
exceptions, providing, to the extent practicable, the form of its proposed opinions. Both sides should work in good faith to agree on a final form of opinion letter.\textsuperscript{12}

Note that the Opinion Guidelines contemplate that the opinion giver, not the opinion recipient, will provide the form of opinion letter. The lender merely provides a list of the types of opinions it expects and then allows the opinion giver to provide the actual opinion letter. Of course, many lenders do have their own form of opinion that they have developed over the years and will provide the form to the borrower’s counsel, but in those cases the form is usually just a way to facilitate the process, to provide more guidance as to what the lender’s expectations are. The fact that a lender proffers a form does not necessarily mean that it refuses to allow the borrower’s counsel to vary the form or even to start with its own form.

The Section recognizes that HUD’s current policy is grounded in its desire to make the loan closing process as efficient as possible. We understand that HUD is involved in hundreds, if not thousands, of FHA-insured multifamily mortgage loans every year and that mandating an opinion form and refusing to allow variances from the form does provide an administrative convenience to HUD. However, in the private sector, where many more finance transactions than HUD manages are undertaken day-in and day-out, the parties to those transactions are able to accommodate the opinion process described above without much difficulty. Fannie Mae and Freddie Mac also process many multifamily mortgage loans each year, and, although each such government-sponsored entity has promulgated its own forms of opinions, lawyers are allowed to make changes to those forms on a case-by-case basis. We see no reason why HUD cannot do the same.

We are not suggesting that HUD abandon its form altogether; rather, we are asking that HUD permit variations in the form as requested by borrower’s counsel and that HUD recognize that law firms that have developed their own opinion forms should be allowed to start with their forms as an alternative to using the HUD form, provided that, in each case, the final product comports with customary opinion practice and provides HUD with the comfort that a real estate lender should reasonably expect from a third party legal opinion. It is also important to point out that “negotiation” of an opinion letter, whether using a lender-supplied form or a form from borrower’s counsel, is not intended by the opinion giver to achieve an unfair advantage over the opinion recipient, to avoid responsibility for issuing opinions that are appropriate in real estate finance transactions or to eliminate legal liability of the lawyer or law firm issuing the opinion; instead, it is an attempt to craft the expression of professional judgment reflected in the opinion letter so that it states the relevant facts and legal conclusions accurately, avoids overly-broad and unnecessary

\textsuperscript{12} Opinion Guidelines, p. 247.
language and properly states the relevant qualifications, assumptions and other limitations that provide the proper context for the opinions expressed.

The Section recognizes that lawyers in private practice routinely agree to give HUD a legal opinion in the form HUD requires without any changes and that this may have led HUD to believe that its opinion form and its policy of not permitting any changes to the form are entirely appropriate and are acceptable to real estate lawyers generally. This is emphatically not the case. The willingness of lawyers to issue opinions to HUD in accordance with HUD’s requirements is a reflection of the cold reality that such lawyers have no choice in the matter. If they refuse to follow the HUD form verbatim, one of two consequences will follow: (a) they will cause their client to abandon the transaction altogether and look elsewhere for financing, which no lawyer wants to force its client to do, or (b) they will cause their client to terminate their attorney-client relationship and then retain the services of another lawyer who will issue the opinion. Lawyers should not be placed in such an untenable position.

The Section believes that, even if HUD is willing to permit borrower’s counsel to proffer its own form of opinion or to make substantial changes to the HUD form, most lawyers probably will continue to follow the HUD form without changes or at least without substantial changes. Part of the reason for this is the fact that many real estate lawyers in private practice, particularly in smaller law firms, have not developed their own opinion forms and/or are not themselves sufficiently familiar with customary opinion practice to recognize all of the issues that the Section has identified in its critique of HUD’s opinion form. In addition, borrower’s counsel may believe that their clients would be unwilling to incur the additional legal fees that may arise from opinion negotiation.13 Whatever the reason, borrower’s counsel should be free to adopt the HUD form of opinion if it determines such approach is in the best interest of its client.14 At the same time, for those lawyers who believe that their professional responsibility requires them to vary from the HUD form, such lawyers should be permitted to do so if the opinion letter that is issued adequately addresses the reasonable expectations of HUD.

Of course, allowing opinion givers to vary the HUD opinion form, or to use an alternative form, does require in-house counsel at HUD to keep abreast of customary opinion practice so that they can intelligently respond to the opinion giver’s positions with respect to opinion issues. Three years ago, when we commented on HUD’s prior opinion form and prior opinion instructions, the Section offered to provide seminars to HUD staff

13 The Section believes that the additional cost and negotiation can be kept to a minimum if both sides are adequately schooled in opinion practice.
14 We leave for HUD to determine the value of a legal opinion that borrower’s counsel gives without any attempt at negotiation.
on customary opinion practice, without charge, so that HUD’s opinion form and procedures could be brought more in line with the private sector opinion practice. We pointed out that members of the Section regularly represent lenders as well as borrowers in real estate loan transactions and therefore understand both sides of the process and the issues that are important to lenders as well as borrowers. The Section again offers to provide, through its Committee on Legal Opinions in Real Estate Transactions, such seminars or other instructional assistance, in whatever format would be most useful to HUD, after close consultation with HUD as to its needs. The objective of the Section is to make the process of drafting, negotiating, approving and issuing legal opinions in FHA-insured mortgage loan transactions as efficient as practical, while at the same time adequately meeting the needs of HUD and the professional responsibility of borrower’s counsel.

B. Opinion Instructions as Closing Instructions

1. Proposed Revisions

The second paragraph of the Instructions should be revised to delete the following sentences:

HUD regards the Borrower’s Counsel 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. . . Borrower’s Counsel has significant obligations to its client (Borrower), Lender and HUD. In part, these responsibilities entail the exercise of due diligence to help to 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 and any other attorneys involved in the transaction must be thoroughly familiar with Program Obligations pertaining to each mortgage insurance transaction in which 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).

In addition, the guidance provided in the Instructions with regard to closing documents that are not the subject of the Opinion should be deleted. For example, the Instructions state, under “List of Documents,” that: “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 is not assuming responsibility for the content of documents that Borrower’s
Counsel does not prepare and/or that Borrower does not execute. Borrower’s Counsel’s review of such documents is necessary to ensure consistency from document to document.” The foregoing language should be deleted. In addition, the instructions regarding the construction contract, owner-architect agreement, the title insurance policy, building permit, other permits required for operation of the Project, survey and surveyors report, survey affidavit of no change, assurance of completion, assurance of utility services, contractor’s prevailing wage certificate and docket search should be deleted.

2. Explanation

The Section does not necessarily disagree with the guidance provided in the Instructions regarding the foregoing. However, the language that we propose to delete addresses the closing process and closing documents generally rather than legal opinions; therefore, it is not relevant to the Instructions and confuses the duties of borrower’s counsel with regard to preparation of closing documents generally with the duties of borrower’s counsel regarding legal opinions. If HUD wishes to provide general closing instructions to borrower’s counsel, it should do so in a separate document rather than in the Instructions that are intended to relate only to legal opinions. Another alternative would be to separate the Instructions into two parts, one dealing with the closing process and closing documents generally, and the other dealing with the Opinion.

C. Instructions related to the Opinion

1. Proposed Revisions

The Instructions should be revised to conform to the comments by the Section as to the Opinion itself (see Part II below). Among other things, those comments relate to the following:

- Eliminating reliance by lender’s counsel.
- Conforming the list of documents to those that are relevant to the opinions expressed.
- Requiring an enforceability opinion only if the loan documents have been materially modified.
- Permitting borrower’s counsel to give an opinion as to “no violation” of other agreements based on specific agreements identified by the borrower in the Certification of Borrower.
- Eliminating the confirmation as to the existence of liens.
- Eliminating or modifying the confirmation as to litigation.
• Including the statement regarding “False Statements” in the Instructions rather than in the Opinion.

2. Explanation

See explanations under Part II below.

II. Opinion of Borrower’s Counsel

The Section proposes the following revisions to the Opinion itself:

A. List of Documents Reviewed

1. Proposed Revisions

Delete references to the following documents: the Ground Lease, the Construction Contract, the Owner-Architect Agreement, the Cost Breakdown, the Residual Receipts Note, Public Entity Agreement, the Source Documents, any secondary financing documents, the Lender’s Certificate, the Title Policy, the Zoning Certificate, the Building Permit, the Other Permits, the Survey, the Surveyor’s Report, the Assurance of Completion, the Assurance of Completion of Off-site Facilities, the Assurance of Utility Services, the Guarantee against Latent Defects and the Contractor’s Prevailing Wage Certificate.

2. Explanation

The documents listed as reviewed in the opinion letter should include only documents with respect to which counsel is providing an opinion. The list should not serve as a closing checklist for the transaction or include documents as to which counsel is not providing an opinion. Each loan transaction has a separate closing checklist listing all of the documents for the transaction, so there is no need to include documents in the opinion letter as to which counsel is not opining. Including such documents in the opinion letter may be construed to imply that borrower’s counsel is opining with regard to such documents.

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15 See 2012 Report, Paragraph 1.4(c).
B. Definition of Loan Documents

1. Proposed Revisions

The term “Loan Documents” should only include the following documents: Regulatory Agreement, Note, Multifamily Mortgage, Building Loan Agreement and any escrow agreements. No other document should be considered to be a Loan Document.

2. Explanation

Loan Documents are those on which the due authorization, enforceability and no violation opinions are given. It is not appropriate for these opinions to be provided for any of the other documents listed. For example, counsel should not be giving enforceability opinions with respect to the Ground Lease, the Residual Receipts Note or the Borrower's Oath.

C. Genuineness of Signatures

1. Proposed Revisions

In assumption paragraph (g) of the Opinion, borrower’s counsel should be allowed to assume that the signatures of all parties, including the borrower, are genuine.

2. Explanation

Counsel should not be expected to opine as to the genuineness of any signatures. Counsel are not handwriting experts and do not necessarily witness their clients signing the loan documents. If HUD wants to verify the genuineness of all signatures, HUD should require all of them to be notarized or ask the parties to participate in a signature guarantee program.

D. Knowledge

1. Proposed Revisions

The first 3 sentences of the paragraph on page 7 of the Opinion that begins with “In basing the several opinions…” should be replaced with the following language:

As used in this opinion letter, the phrase “to our [my] knowledge,” or words of similar import signify [my current actual knowledge] [the current actual knowledge of the particular attorneys in our law firm who have represented Borrower in connection with the transactions contemplated by the Loan Documents and who have given substantive attention to the preparation and negotiation of the Loan Documents].

16 2012 Report, Paragraph 2.1(d)
2. **Explanation**

Consistent with customary opinion practice, the definition of “knowledge” in the opinion should be revised so that it means the actual knowledge of the attorneys involved in the Loan transaction, rather than all attorneys who have represented the Borrower in any capacity.\(^\text{17}\)

E. **Negative Assurances**

1. **Proposed Revisions**

   - Delete the following sentence from page 7 of the Opinion: “We [I] have no reason to believe that any of the documents on which we [I] have relied contain matters which, or the assumptions contained herein, are untrue, contrary to known facts, or unreasonable.”

   - Delete the following sentence from page 8 of the Opinion: “After reasonable inquiry of Borrower, we [I] have no knowledge of any facts or information that would lead us [me] to believe that the assumptions in this paragraph are not justified.”

   - Delete the phrase “and to our [my] knowledge, there are no facts inconsistent with” from the sentence of the Opinion that appears immediately before the assumptions.

   - Delete the sentence on page 8 of the Opinion that says: “After reasonable inquiry of Borrower, we [I] have no knowledge of any facts or information that would lead us [me] to believe that the assumptions in this paragraph are not justified.”

   - Delete the sentence on page 8 of the Opinion that says: “After reasonable inquiry of Borrower as to the accuracy and completeness of the Certification of Borrower, the Status Certificate, [Foreign Status Certificate] [and such other Documents], we [I] have no knowledge of any facts or information that would lead us [me] to believe that such reliance is not justified.”

2. **Explanation**

Under modern opinion practice, such negative assurances, confirmations and conduit opinions are not appropriate in most legal opinions for loan transactions. Neither a negative assurance nor a factual confirmation is an opinion; instead, it is a statement of fact. Under current opinion practice, lawyers are not permitted to assume facts which they know or have reason to know are not accurate or which do not warrant reliance under the

\(^{17}\) 2012 Report, Paragraph 4.7.
circumstances. Therefore, there is no need to ask them to confirm their lack of knowledge of particular factual matters. Factual confirmations should be included in representations in the Loan Documents or in certificates provided by the Borrower, not in legal opinions by the Borrower’s counsel.

F. General/Special Counsel.

1. Proposed Revisions

On pages 1 and 2 of the opinion letter, the words “[general/special]” should be deleted.

2. Explanation

Customary opinion practice discourages the use of the phrase “general counsel” in opinion letters unless the attorney, for example, is in-house general counsel of the borrower. Merely because a lawyer represents a borrower on a regular basis in its financing transactions does mean that such lawyer is the borrower’s general counsel. Many lawyers also prefer not to designate themselves as “special counsel” out of concern that it suggests that the lawyer has a specialized or unique expertise in a certain area of law, although a designation as “special Pennsylvania [or other state] counsel” may be appropriate for a lawyer issuing an opinion under Pennsylvania [or such other state] law. In most cases, merely the term “counsel” should be sufficient, and, in any event, the attorney issuing the opinion letter should be permitted to use the designation it considers appropriate.

G. Due Organization

1. Proposed Revision

The opinion on “due organization” should be deleted in all instances in favor of an opinion as to “valid existence.” For example, the opinion as to the Borrower would read as follows:

Based solely on the Status Certificate, Borrower is a _______________ (INSERT TYPE OF ENTITY), validly existing [(ADD FOR ENTITIES IF LAWS OF ORGANIZATIONAL JURISDICTION SO PROVIDE:) and in good standing] under the laws of the Organizational Jurisdiction [(ADD IF THE ORGANIZATIONAL JURISDICTION IS DIFFERENT FROM THE PROPERTY JURISDICTION AND IF THE LAWS OF THE PROPERTY JURISDICTION PROVIDE FOR REGISTRATION OF APPLICABLE FOREIGN ENTITIES:) and, based solely on

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18 Glazer and FitzGibbon, §4.3.4.
19 See Glazer and FitzGibbon, §2.5.3.
the Foreign Status Certificate, is qualified or registered to do business as a foreign __________________ (INSERT TYPE OF ENTITY) in the Property Jurisdiction].

2. **Explanation**

We recommend eliminating the differentiation between the organizational status opinion if the borrower’s counsel prepared the organizational documents and the organizational status opinion if the borrower’s counsel did not. In either case, modern opinion practice has moved away from an opinion that an entity is “duly organized.” The concept of due organization applies only to corporations and not other types of entities. That is, for a corporation to be duly organized, certain actions, such as issuing stock, holding an organizational meeting, adopting bylaws, and electing directors and officers, must be taken. Partnerships, limited liability companies, and trusts involve different procedures to be formed as an entity. In addition, irrespective of whether counsel organized the borrower, the cost of undertaking the necessary due diligence to ascertain whether the corporation was duly organized (which would require examination of the law in effect on the date the corporation was organized as well as old corporate records that might be incomplete, or otherwise unavailable) greatly outweighs any benefits that the Lender and HUD would receive. Due organization, which is a question of past events, is irrelevant as to whether the borrower is currently in existence, in good standing (if applicable), and bound by the Loan Documents. Therefore, the opinion should be limited to “valid existence” and good standing (or the equivalent), and such opinion is based solely on the good standing or other status certificate issued by the Organizational Jurisdiction.

As discussed later, an opinion which is based solely on a certificate (a “conduit opinion”), adds no value to the opinion recipient and generally is not appropriate under customary opinion practice. One acknowledged exception to this principle is when the opinion is based on a certificate issued by a public official. For this reason we have not suggested deleting the validly existing and good standing opinions, but such deletion could be made without any detriment to the Lender or HUD, and would facilitate the transaction and be consistent with modern opinion practice.

H. **Power and Authority to Comply with Statutes**

1. **Proposed Revisions**

The opinion on power and authority to comply with statutes and regulations should be deleted as it would be redundant to the extent the borrower is obligated under the Loan Documents to comply with such statutes and regulations. As revised, it will read as follows:

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20 Glazer and FitzGibbon, §6.3.
Borrower has the [corporate/limited liability company/partnership/trust] power and authority to own and operate the Project and to perform all of its obligations under the Loan Documents.

2. **Explanation**

We recommend deletion of the separate opinion regarding the Borrower’s powers and authority to comply with laws and regulations in effect on the date of the FHA Commitment. Such an opinion is not typical in modern opinion practice. In addition, the opinion already covers the power and authority of the borrower to perform its obligations under the Loan Documents. To the extent the Loan Documents require compliance with federal statutes and regulations (or with any other matters), the issue is covered by the opinion.

**I. No Violation of Laws.**

1. **Proposed Revisions**

Borrower’s counsel should not be required to opine as to the borrower’s future compliance with laws or with respect to nonmonetary obligations. Paragraph 3 should be revised to read as follows:

   The execution and delivery by Borrower of, and the performance of its payment obligations under, the Loan Documents do not violate the Organizational Documents of Borrower, and the execution and delivery by Borrower of, and the performance of its payment obligations under, the Loan Documents, do not, and will not, violate any applicable laws of the Property Jurisdiction.

2. **Explanation**

We recommend the opinion that the performance by the borrower of its obligations under the Loan Documents will not violate any applicable law of the Property Jurisdiction be revised to provide that the performance of the borrower’s payment obligations under the Loan Documents will not violate any such law. This would make the opinion consistent with customary practice in real estate secured loan transactions.\(^{21}\) This is necessary because the Loan Documents include a number of nonmonetary obligations related to the Property to be performed after the closing, such as rebuilding upon a casualty loss, maintenance of the Property, etc., and borrower’s counsel is not in a position to know whether the borrower will comply with all applicable laws in its performance of such obligations in the future. It should also be noted that, under customary opinion practice,

\(^{21}\) See, e.g., 2012 Report, Paragraphs 3.7 and 3.8.
local laws and ordinances are not covered by third party closing opinions unless expressly stated otherwise.\textsuperscript{22}

\textbf{J. Due authorization}

\textbf{1. Proposed Revisions}

Revise Paragraph 4 to read as follows:

\textit{The execution and delivery of the Loan Documents by or on behalf of Borrower, and the consummation by Borrower of the transactions contemplated thereby, and the performance by Borrower of its obligations thereunder, have been duly and validly authorized by all necessary [corporate/limited liability company/partnership/trust] action by, or on behalf of, Borrower [and the Principal].}

\textbf{2. Explanation}

We recommend revisions to paragraph 4 for the purpose of conforming the language to terms and concepts used elsewhere.

\textbf{K. Enforceability Opinion}

\textbf{1. Proposed Revisions}

The enforceability opinion should not be required for HUD approved Loan Documents unless materially modified. However, if retained, such opinion should be clarified as to the remedies covered. As revised, Paragraph 5 will read as follows:

\textit{Each of the Loan Documents has been duly executed and delivered by Borrower [(ADD IF ANY OF THE LOAN DOCUMENTS HAVE BEEN MATERIALLY MODIFIED OTHER THAN BY A STANDARD SCHEDULE OR EXHIBIT)] and constitute the valid and binding obligations of Borrower, enforceable against Borrower in accordance with its terms, subject to the following qualifications:}

\textit{(i) the effect of applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and other similar laws affecting the rights and remedies of creditors and secured parties generally; and}

\textit{(ii) the effect of the exercise of judicial discretion in accordance with general principles of equity (whether applied by a court of law or of equity); and}

\textsuperscript{22} 2012 Report, Paragraph 3.8.
(iii) certain remedies, waivers, and other provisions of the Loan Documents may not be enforceable, but, subject to the qualifications set forth in this paragraph at (i) and (ii) above, such unenforceability will not render the Loan Documents invalid as a whole or preclude (a) the judicial enforcement in accordance with applicable law of the obligation of Borrower to repay the principal of the Loan, together with interest thereon, as provided in the Note, (b) the acceleration of the obligation of Borrower to repay the principal of the Loan, together with interest thereon, upon a material default by Borrower in the payment of such principal or interest or upon a material default by Borrower in any other material provision of the Loan Documents and (c) the foreclosure in accordance with applicable law of the lien on, and security interest in, the Property created by the Security Instrument upon maturity or upon acceleration pursuant to clause (b) above.

2. Explanation

Since borrower’s counsel may represent clients in closing FHA-insured mortgage loans for projects in states where borrower’s counsel does not practice, the enforceability opinion may impose the additional cost and burden of retaining local counsel in the Property Jurisdiction for the sole purpose of giving the enforceability opinion. HUD prepared the Loan Documents and has already determined that they are enforceable in each state so long as each borrower has the power and authority to enter into the Loan Documents, has duly authorized the execution, delivery and performance of the Loan Documents and has duly executed and delivered the Loan Documents. If the borrower’s counsel provides an opinion as to the foregoing matters, HUD does not need the additional opinion that the Loan Documents prepared by HUD will be enforceable under the laws of the Property Jurisdiction. In addition, eliminating the enforceability opinion also eliminates borrower’s concern regarding the proper qualifications that should be included in the enforceability opinion, which is often subject to considerable negotiation in most loan transactions, increasing the cost of the transaction and causing unnecessary delays. Although the Section recognizes that most lenders have not yet adopted this approach, it is also true that most lenders do not have state-specific, standard loan forms that have been pre-approved for every state. One lender that has adopted this approach is Fannie Mae, thereby accommodating the increasing trend toward multijurisdictional practice of many attorneys who close Fannie Mae multifamily mortgage loans. The only exception is if Fannie Mae’s standard documents have been materially modified, and the proposed revision to the Instructions also includes this exception. Therefore, we recommend that an enforceability opinion be required only if there have been material modifications to any of the Loan Documents other than by a standard schedule or exhibit.

If an enforceability opinion is nevertheless required, we recommend the following changes be made to the text: (i) include fraudulent conveyance in the list of bankruptcy exceptions since this concept is deemed, under customary opinion practice, to be included
(whether mentioned or not) as a standard qualification, and (ii) revise the general assurances to be a complete explanation of what remedies are accorded the Lender in the event of a material default in the Loan Documents (i.e., the right to judicially enforce the repayment of the principal and interest due under the Loan, to accelerate the debt, and to foreclose on the Property subject to the Security Instrument in accordance with applicable laws). We have also recommended adding the assurance used in customary opinion practice that the Loan Documents would not be rendered invalid as a whole due to the lack of enforceability of any provisions.  

L. Zoning Conduit Opinion

1. Proposed Revisions

The zoning conduit opinions currently included in paragraph 6 should be deleted.

2. Explanation

Conduit opinions, such as the zoning opinion based solely on a zoning certificate, add nothing beyond the certificate itself. Except in those instances involving the existence, good standing or qualification to do business of an entity where tradition has ensconced the conduit opinion in customary practice, counsel should not give an opinion that serves no purpose; giving such opinion may be misleading to the opinion recipient who thinks it means something when it does not, or such an opinion may impose a duty on the borrower’s counsel to investigate the reliability of the certificate when borrower’s counsel has not undertaken such an investigation. If a zoning endorsement to the title insurance policy is not available in a given state, the Lender should rely on the zoning certificate itself.

M. Noncontravention Opinion as to Agreements.

1. Proposed Revisions

As an alternative to the noncontravention opinion based on the “knowledge” of borrower’s counsel, as set forth in paragraph 7, borrower’s counsel should be permitted to provide such an opinion based on a list of agreements identified by the borrower as relevant to the issue. As revised, paragraph 7 would read as follows:

The borrowing of the Loan, and the execution and delivery by Borrower of, and performance of its payment obligations in, the Loan Documents do not: (i) cause Borrower to be in breach of, or constitute a material default under, the provisions of, any of the agreements, if any, or any of the judgments, decrees or orders of any governmental body, if any, to which Borrower is a party or by which it is bound or

23 2012 Report, Paragraph 4.3.
subject, that are listed in Exhibit A to the Certification of Borrower as having been reviewed (collectively, the “Reviewed Documents”), except that we express no opinion with respect to a violation or default under any such provision of a financial or numerical nature or requiring computation, or (ii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever, except as specifically contemplated by the Loan Documents, upon any assets of Borrower pursuant to the terms of any of the Reviewed Documents.

2. Explanation

Instead of referring to all agreements, judgments, decrees and orders to which the borrower is a party or by which it is bound and instead of being qualified “to our knowledge,” the optional, revised opinion refers to specific agreements, judgments, decrees and orders identified by the borrower in the Certification of Borrower as relevant to the issue. The existence of any of the foregoing is a factual matter appropriate to be certified by the borrower. This approach requires the borrower’s counsel actually to review such documents rather than merely stating whether it is aware of any such document or violation. This is the preferred approach under customary opinion practice for several reasons. First, the opinion recipient is getting added value because counsel actually reviews the specified documents and gives an opinion with respect thereto. Second, the proposed opinion language eliminates the knowledge qualifier which should be used only with respect to a factual assertion, never a legal opinion. Third, the knowledge qualified opinion is just another form of negative assurance which should only be used in the case of publicly issued (and in some limited private placements of) securities where counsel has done extensive due diligence (which would never be the case in a loan transaction). We have also clarified that the opinion does not cover violations as to covenants requiring financial computations (e.g., debt limitations measured by net worth, capitalization, etc.), which lawyers are not qualified to determine. We have also limited the opinion to “payment obligations” under the Loan Documents.

N. Security instrument

1. Proposed Revisions

The opinion in paragraph 8 regarding the recordability of the Security Instrument and the creation of the lien and security interest should be deleted altogether if a lender’s policy of title insurance is provided. In any event, the opinion should be limited to the borrower’s interest in the property and, as revised, would read as follows:

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24 2012 Report, Paragraph 3.7(d).
25 See 2012 Report, Paragraph 3.7(b).
The Security Instrument is in appropriate form for recordation in ______________ {INSERT PROPER NAME OF LOCAL LAND RECORDS OFFICE} of ______________ {INSERT COUNTY, STATE OR CITY, STATE} of the Property Jurisdiction, and is sufficient, as to form, to create the lien and security interest it purports to create in Borrower’s right, title and interest in the Property.

2. Explanation

Opinions as the effectiveness of a mortgage to create a lien on real estate are not appropriate. If a lender’s policy of title insurance is provided, it insures that the Security Instrument has been recorded in the appropriate land records and that the Security Instrument grants a valid lien on the real property described therein. Therefore, an opinion on such subjects is unnecessary and provides no additional “due diligence” for the lender. If such an opinion is provided, it should recognize that the Security Instrument can create a lien on, or security interest in, the Property only to the extent of the borrower’s interest in the Property.

O. Source Documents and Public Entity Documents

1. Proposed Revisions

Paragraphs 10 (Source Documents) and 11 (Public Entity Agreement) should be deleted.

2. Explanation

We recommend eliminating the opinions as to the Source Documents and the Public Entity Agreement because it is inappropriate for borrower’s counsel to give them. The borrower’s counsel opinion should be limited to the Loan Documents, and the Lender and HUD should rely upon opinions given by other counsel respecting Source Documents and Public Entity Agreements. If an opinion letter has been issued by bond counsel or other counsel involved in another financing, the Lender and HUD should rely on that opinion rather than requiring borrower’s counsel to opine as to which documents govern. It is also not appropriate for borrower’s counsel to opine as to whether there is a default under a Public Entity Agreement (a factual determination in part) or whether construction in accordance with the Construction Contract will lead to a default under the Public Entity Agreement. However, to the extent relevant, the list of “Reviewed Documents” covered by the noncontravention opinion may include the Source Documents and any Public Entity Agreement.

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26 2012 Report, Paragraph 3.6(a).
P. Local Laws and Ordinances

1. Proposed Revisions

The Opinion should expressly exclude laws, ordinances, regulations and rules of any municipality, county or other political subdivision of any state.

2. Explanation

Local laws and ordinances are customarily not included in third party closing opinions. 27

Q. Factual Confirmations

1. Proposed Revisions

Paragraphs (a) (name of the Borrower), (b) (legal description of the Property), (e) (liens against the Property) and (f) (side deals) of the “confirmations” should be deleted.

2. Explanation

We have deleted (a) and (b) since each of those is basically a recital of fact and confirmation of certain facts that are either true or not true, but have no relevance to a legal opinion. It is not necessary for counsel to opine as to either the title insurance policy or the public records, each of which speaks for itself. Opinions regarding title are separate and inappropriate for a legal opinion in connection with a loan. The “opinions” requested by (e) and (f) represent both negative assurances, which are inappropriate, and factual allegations whereby the attorney is asked to be a conduit for the client. These opinions merely restate facts based on the Certification of the Borrower, which stand on their own.

R. Financial Interest

1. Proposed Revisions

Paragraph (c) of the factual confirmations should be deleted altogether or revised to read as follows:

Except as provided in paragraph ([b]), [I do not have] [neither the attorneys who devoted substantive attention to this transaction nor, to our knowledge, any of the other attorneys in our firm, has] any financial interest in the Project, the Property, or the Loan, other than fees for legal services performed by [me] [us], arrangements for the payment of which have been made, and [I] [we] agree not to assert a claim or lien against the Project, the Property or the Loan proceeds for such fees;

27 2012 Report, Paragraph 3.8(a). See also Glazer and FitzGibbon, §13.2.2.7.
2. **Explanation.**

As a matter of customary practice, lawyers are not required to disclose financial interests in clients.\(^{28}\) However, if HUD insists on such disclosure, we have revised (c) in order to retain limited rights to pursue the payment of legal fees. We are certain that it is not the intent of HUD to aid a borrower in the avoidance or evasion of lawfully earned legal fees.

S. **No Litigation Confirmation**

1. **Proposed Revisions**

The confirmation in clause (g) as to no litigation should be deleted entirely or, alternatively, limited as follows:

\[\text{[We] [I] are not representing Borrower in any pending litigation, in which the Borrower is a named defendant, in which the pleadings request as relief that any of the obligations of Borrower under the Loan Documents be declared in valid or subordinated or that the performance by Borrower of the Loan Documents be enjoined;}\]

2. **Explanation.**

The no litigation confirmation is already covered by a representation by the Borrower in the loan documents and is therefore unnecessary. It also raises concerns among lawyers as to waivers of attorney-client privilege. Alternatively, we have revised the statement so that it references actual pending litigation, and only in such litigation where the opining law firm represents the Borrower in a matter directly affecting the transaction. Other types of litigation are adequately addressed by representations in the Loan Documents.\(^{29}\)

T. **Deviation from HUD Form**

1. **Proposed Revisions**

The statement in clause (h) that begins, “this document does not deviate from the standard Opinion of Borrower’s Counsel. . .,” should be deleted in its entirety.

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\(^{28}\) Glazer and FitzGibbon, §2.5.5.

\(^{29}\) See 2012 Report, Paragraph 3.11.
2. **Explanation**

Borrower’s counsel should be permitted to start with its own form of legal opinion or otherwise substantially modify the HUD form for the reasons indicated in Part I above.

U. **Reliance by HUD**

1. **Proposed Revisions**

   The statement that “the foregoing confir mations and opinions are for the exclusive reliance of HUD [and Lender OR Lender and Lender’s counsel], and have been made, presented, and delivered for the purpose of influencing an official action of HUD in insuring the Loan, and may be relied upon by HUD” should be deleted its entirely or revised merely to state that “the foregoing confirmations and opinions are for the exclusive reliance of HUD and Lender.”

2. **Explanation**

   Since the opinion letter is addressed to the lender and to HUD, there is no need for a redundant statement as to reliance. If such an opinion is given, we have modified the reliance language to be only for HUD and the Lender, and not Lender's counsel. It is not appropriate that counsel to the opinion recipient be entitled to rely on the opinion letter. Lender's counsel has prepared the Loan Documents and has the same access to supporting documentation as borrower's counsel. The decision and official action on the part of HUD to insure the Loan is usually made long before the borrower's counsel is involved in the transaction. The purpose of the opinion is not to influence an official action, but to provide the professional judgment of a lawyer with respect to certain legal matters related to the Borrower and the loan documents themselves.

V. **False Statements and Claims**

1. **Proposed Revisions**

   The “Warning” regarding a false, fictitious or fraudulent statement or claim should be deleted entirely.

2. **Explanation.**

   Such a statement does not belong in a legal opinion, which is a statement by borrower’s counsel as to the matters covered, not a statement by HUD. The warning almost characterizes counsel as an affiliate of Borrower that stands to receive economic benefits from HUD as a result of the Loan rather than an independent professional.

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30 2012 Opinion Report, Paragraph 5.1(c).
proffering an opinion as to the current status of the law. If HUD wishes to bring this to the attention of Borrower’s counsel, it should be included in the Instructions.

Very truly yours,

Susan G. Talley
Chair, ABA Section of Real Property,
Trust and Estate Law

cc: Cara Lee T. Neville, Secretary, American Bar Association
    Thomas M. Susman, ABA Governmental Affairs