April 30, 2014

BY EMAIL (Colette.Pollard@hud.gov)

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BY EMAIL (OIRA__Submission@omb.eop.gov)

HUD Desk Officer
Office of Management and Budget
New Executive Office Building
Washington, D.C.  20503

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, in response to the 30-Day Notice of Proposed Information Collection for the captioned matter published in the Federal Register on April 1, 2014 (the “HUD Notice”). 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 Section of 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.

As detailed in the Section’s letter dated December 30, 2013 to HUD (the “Original Comment Letter”) providing comments on HUD’s Instructions to Opinion of Borrower’s Counsel (the “Instructions”) and on HUD’s promulgated form of Opinion of Borrower’s Counsel (the “Opinion”), the Section has significant concerns regarding the process that HUD follows in requiring legal opinions in each loan transaction. Although those concerns have not been alleviated by HUD’s response to the Original Comment Letter, no attempt will be made here to restate the reasons that the Section believes HUD’s process is inappropriate and inconsistent with customary opinion practice or the ways in which the Section believes such process can be modified notwithstanding the limits on HUD’s staffing capacity and the high volume of loan transactions handled by HUD. However, for the record, the Section believes that its concerns remain valid and that HUD should engage with the Section in further discussions as to how HUD’s valid objectives can be achieved without use of a uniform, non-negotiable form of opinion letter.

Similarly, we will not restate the many objections expressed in the Original Comment Letter with respect to the requirements in the Instructions regarding the closing process and the closing documents that are not the subject of the legal opinions expressed in the Opinion, even though we also believe such objections to be valid and not adequately addressed by HUD in the HUD Notice. We also note that HUD incorrectly stated in the HUD Notice that its “practice in this regard is consistent with that of Fannie Mae and Freddie Mac.” In fact, we are unaware that Fannie Mae or Freddie Mac provides formal instructions to borrower’s counsel regarding their opinion forms. In addition, contrary to the statement in the HUD Notice that HUD’s practice regarding negative assurances are consistent with that of Fannie Mae and Freddie Mac, members of our Section have found that Fannie Mae and Freddie Mac do not necessarily insist on such negative assurances. The misunderstanding on this issue may arise from the fact that, even though Fannie Mae and Freddie Mac have promulgated opinion forms that they strongly encourage borrower’s counsel to use, in practice both Fannie Mae and Freddie Mac permit
variations in their opinion forms and do not insist on a uniform, non-negotiable form of opinion letter. The Section does not agree with many aspects of the process that Fannie Mae, Freddie Mac and their respective seller/servicer counsel follow in requesting and approving opinion letters from borrower’s counsel, but those agencies demonstrate flexibility in their opinion letter requirements.

II. Opinion of Borrower’s Counsel

The Section wishes to restate its comments in the Original Comment Letter regarding HUD’s mandated form of Opinion, almost all of which were rejected by HUD. Those restated comments are set forth in full below.

In addition, the Section believes that the HUD Notice incorrectly stated the position of the Section on several of the issues related to the Opinion. Specifically:

- We did not state that an opinion that the borrower has authority to enter into the loan should be removed. Rather, we offered revised language to the effect that the borrower has the power and authority under applicable corporate, limited liability or partnership law to perform all of its obligations under the loan documents and that the execution and delivery of the loan documents and performance of its obligations thereunder have been duly and validly authorized.
- We did not request that the enforceability opinion be removed. We stated that the enforceability opinion should not be required if the loan documents have not been materially modified, which is consistent with the approach of Fannie Mae. We also stated that, if nevertheless required, the enforceability opinion should be clarified as to the remedies covered by such an opinion, and we provided specific language for that purpose.
- We did not state that an opinion that the loan documents do not contravene the borrower’s other agreements be removed. Instead, we suggested that borrower’s counsel should be permitted to provide such an opinion based on the borrower’s counsel “knowledge,” as set forth in HUD’s form or, alternatively, that borrower’s counsel should be permitted to provide such an opinion based on its actual review of agreements identified, and listed, by the borrower as relevant to the issue (thereby providing, in our view, more value to HUD than a mere knowledge opinion without any independent investigation).
- We did not state that HUD should not be permitted to rely on the opinion letter. Rather, we stated that such language at the end of the opinion letter was redundant and unnecessary because the opinion letter is addressed to HUD as well as the lender.
- We did not request that the False Claims Act warning language be deleted from the opinion process. Rather, we noted that such a warning properly belongs in the
Instructions as a warning by HUD to borrower’s counsel, instead of in a statement by borrower’s counsel in its opinion letter.

- Even in certain instances in which we recommended the removal of certain opinions, such as whether a security instrument created a lien on the mortgaged property, and the removal of certain statements (not constituting a legal opinion), such as factual confirmation as to the financial interest of the borrower’s counsel and a factual confirmation as to pending litigation, we also provided alternative language for such matters that were more tailored to modern opinion practice. It appears that all of our suggested changes were rejected.

The following comments set forth in the Original Comment Letter, we believe, remain valid and appropriate, and we urge HUD to reconsider each of them. Only certain of the comments were accepted by HUD, and those comments are so noted if applicable.

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.¹ 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.

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].

2. **Explanation**

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2 2012 Report, Paragraph 2.1(d)
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.³

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 circumstances.⁴ 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.

⁴ Donald W. Glazer, Scott FitzGibbon and Steven O. Weise, Glazer and Fitzgibbon on Legal Opinions, (3rd Ed. 2008) (referred to hereinafter as “Glazer and FitzGibbon”), §4.3.4.
1. Proposed Revisions

On pages 1 and 2 of the opinion letter, the words “[general/special]” should be deleted. [NOTE: This comment was accepted by HUD.]

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.5

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 the Foreign Status Certificate, is qualified or registered to do business as a foreign ____________________
(INsert type of entity) in the Property Jurisdiction]. [NOTE: This comment was accepted in part by HUD.]

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

5 See Glazer and FitzGibbon, §2.5.3.
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.\(^6\) 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:

*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

\(^6\) Glazer and FitzGibbon, §6.3.
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. 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, local laws and ordinances are not covered by third party closing opinions unless expressly stated otherwise.

J. Due authorization

1. Proposed Revisions

Revise Paragraph 4 to read as follows:

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].

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7 See, e.g., 2012 Report, Paragraphs 3.7 and 3.8.
2. **Explanation**

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

**K. Enforceability Opinion**

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:

> 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:

(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

(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

(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

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9 2012 Report, Paragraph 4.3.
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 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.

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10 2012 Report, Paragraph 3.7(d).
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.11

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:

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.12 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

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11 See 2012 Report, Paragraph 3.7(b).
12 2012 Report, Paragraph 3.6(a).
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.

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.13

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.

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13 2012 Report, Paragraph 3.8(a). See also Glazer and FitzGibbon, §13.2.2.7.
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;

2. Explanation.

As a matter of customary practice, lawyers are not required to disclose financial interests in clients. 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:

   [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.

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14 Glazer and FitzGibbon, §2.5.5.
15 See 2012 Report, Paragraph 3.11.
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.

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 confirmations 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.16 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.

16 2012 Opinion Report, Paragraph 5.1(c).
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 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.

Although the Section is disappointed that HUD was unwilling to accept the vast majority of the comments contained in the Original Comment Letter, including those reiterated here, we do wish to express our appreciation for HUD’s consideration of those comments and for the time that HUD devoted to meeting with representatives of the Section in person. The Section hopes that HUD will be willing to continue a dialogue with the Section on this topic to find common ground that recognizes the needs and the constraints of HUD in regard to its process for procuring third party opinion letters as well as the legitimate concerns of the real estate bar regarding that process and the substantive issues of the HUD form of opinion.

Very truly yours,

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

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