

Opinion by Counsel to the
Mortgagor (FHA)

**U.S. Department of Housing and
Urban Development**
Federal Housing Administration
Office of General Counsel

OMB No. 2510-0010
(exp 10/31/2012)

**Guide For Opinion Of
Borrower's Counsel**

U.S. Department of Housing and Urban Development
Office of Housing OMB Approval No. 0000-0000
(Exp. 00/00/00)

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{For use in ~~FHA~~ HUD Insured MULTIFAMILY Transactions}

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~~This information is required by 24 CFR 200.45, 200.46, and 200.60 through 200.78. The information will be used to assure that the mortgagor or owner entity has been validly formed, lawfully exists, and that the security property and the construction thereupon comply with appropriate local laws. Responses are required to obtain benefits. This information does not lend itself to confidentiality.~~

~~APRIL 2003~~

~~DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL HOUSING ADMINISTRATION~~

~~GUIDE FOR~~

~~OPINION OF MORTGAGOR'S COUNSEL~~

{TO BE ~~TYPED~~ ON FIRM LETTERHEAD}

{INSERT DATE OF ENDORSEMENT}

Re: Project Name _____
~~FHA~~ HUD Project No. _____
Location _____
~~Mortgagor~~ _____
~~Borrower~~ _____

— form ~~HUD-91725~~ (04/2003) 1

[~~MORTGAGEE~~][LENDER]

[ADDRESS]

[~~MORTGAGEE~~ LENDER'S ATTORNEY]

[ADDRESS]

FEDERAL DEPARTMENT OF HOUSING ~~COMMISSIONER~~ AND URBAN
DEVELOPMENT{INSERT APPROPRIATE ~~FIELD OFFICE~~ HUD ADDRESS}

Ladies and Gentlemen:

We are [I am] [general/special] counsel to _____ {INSERT NAME OF ~~MORTGAGOR~~} (the "Mortgagor" BORROWER) (Borrower), a _____, {INSERT TYPE OF ENTITY} organized under the laws of the State of _____ {INSERT STATE} (the "Organizational Jurisdiction"), in connection with a mortgage loan (the "Loan") in the [original/ increased] principal amount of _____ Dollars (\$ _____) from _____ {INSERT NAME AND TYPE OF ~~MORTGAGEE~~} (the "Mortgagee") to the Mortgagor LENDER (Lender) to Borrower. The proceeds of the Loan ~~will~~ shall be used to [construct/rehabilitate/purchase/ refinance] that certain [~~multifamily housing/ hospital/ extended care facility/nursing home/board and care~~] project (the "Project"), commonly known as _____ and located in _____ {INSERT COUNTY AND STATE} (said State to be referred to hereinafter as the "Property Jurisdiction") on the property described in Exhibit B {ATTACH LEGAL DESCRIPTION} (together with all improvements and fixtures thereon) (the "Property"). The Loan is being insured by the Federal Housing Administration (FHA), an organizational unit of the United States Department of Housing and Urban Development ("HUD"), pursuant to a commitment for insurance [of advances **OR** upon completion **OR** for refinancing] issued to ~~Mortgagee~~ Lender by _____, Agent of the Federal Housing Commissioner, dated _____ [as amended by that certain letter from _____ to _____, dated _____] ("FHA Commitment"). ~~The Loan is being funded from _____ {DESCRIBE FINANCING SOURCE, e.g., tax-exempt bonds/mortgage-backed securities guaranteed by GNMA/ participation certificates, etc.} The Mortgagor~~. Borrower has requested that we [I] deliver this opinion and has consented to reliance by Mortgagee Lender's counsel in its legal representation of Lender, including rendering ~~its~~ any opinion to Mortgagee Lender and to reliance by Mortgagee Lender and HUD in making and insuring, respectively, the Loan and has waived any privity between ~~Mortgagor~~ Borrower and us [me] in order to permit said reliance by Mortgagee Lender,

counsel to [Mortgagee Lender](#) and HUD. We [I] consent to reliance on this opinion by [Mortgagee Lender](#), counsel to [Mortgagee Lender](#), and HUD.

In our [my] capacity as [general/special] counsel to [the Mortgagor Borrower](#), we [I] have prepared or reviewed the following:

- A. The **{DESCRIBE ORGANIZATIONAL DOCUMENTS, e.g. for corporations: State certified copies of the articles of incorporation, the by-laws, the borrowing resolution, the incumbency certificate and the good standing certificate(s), fictitious Name Registration, Foreign Corporation Registration; for partnerships: certified copies of the partnership agreement and any amendments thereto, the certificate of limited partnership, and any amendments thereto, the good standing certificate (or its equivalent) if provided in the Organizational Jurisdiction, etc.}** of [the Mortgagor Borrower](#) (collectively, **the "Organizational Documents"**);
- B. ~~The~~ FHA Commitment [extensions and assignment(s) thereof, if any];
- C. ~~The~~ Commitment issued by [the Mortgagee Lender](#) and accepted by [the Mortgagor Borrower](#), dated _____; (**the "Loan Commitment"**);
- D. ~~The~~ Regulatory Agreement (_____) **{INSERT APPROPRIATE FORM NO.}** by and between HUD and [the Mortgagor Borrower](#), dated _____; (**the "Regulatory Agreement"**);
- E. ~~The~~ Note (_____) **{INSERT APPROPRIATE FORM NO.}** [[94001M](#)] in the original principal amount of _____ Dollars (\$ _____) **OR** in the increased principal amount of _____ Dollars (\$ _____) by [Mortgagor Borrower](#) in favor of [Mortgagee Lender](#), dated _____; (**the "Note"**);
- F. [The [Security Instrument](#) (Mortgage **OR** Deed of Trust)] (_____) **{INSERT 94000M {WITH APPROPRIATE FORM NO. STATE RIDER ATTACHED}}**, executed by [Mortgagor Borrower](#) for the benefit of [Mortgagee Lender](#), granting a security interest in the Property, dated _____, (**the "Mortgage" Security Instrument**);
- G. **{INSERT THE NUMBER OF UCC'S TO BE FILED}** Uniform Commercial Code Financing Statements [to be filed by Lender and naming Borrower as debtor](#), executed by [the Mortgagor Borrower](#) as debtor, and naming [the Mortgagee Lender](#) and HUD, as [its interest appears, as](#) secured parties ~~or as their interests may appear~~, to be filed in _____; **{INSERT LOCATION(S)}** (the Filing Offices), upon the **{DESCRIBE EVENTS}** (**the "Financing Statements"**);

H. ~~The~~ Security Agreement by and between ~~Mortgagor~~Borrower and ~~the~~ MortgageeLender, granting a security interest under the Uniform Commercial Code, in those items of personalty described therein, dated _____; (~~the~~ "~~Security Agreement~~");

[I. ~~{TO BE INSERTED IF THE~~ MORTGAGESECURITY INSTRUMENT IS ON A LEASEHOLD ESTATE} ~~The~~ Ground Lease executed by _____ ~~{INSERT LESSOR}~~ as lessor and ~~Mortgagor~~Borrower as lessee recorded in the land records of _____, dated _____; (~~the~~ "~~Ground Lease~~".)]

[J. ~~{TO BE INSERTED FOR CONSTRUCTION/REHABILITATION LOANS}~~ ~~The~~ Building Loan Agreement (~~2441~~HUD-92441M) executed by ~~Mortgagee~~Lender and ~~Mortgagor~~Borrower, dated _____; (~~the~~ "~~Building Loan Agreement~~".)]

[K. ~~{TO BE INSERTED FOR CONSTRUCTION/REHABILITATION LOANS}~~ ~~The~~ Construction Contract [~~Lump Sum (2442) or Cost Plus (2442-A)~~](HUD-92442M) executed by _____ (~~the~~ "~~General Contractor~~") and ~~Mortgagor~~Borrower, dated _____ (~~the~~ "~~Construction Contract~~".)]

L. ~~The~~ Mortgagee'Lender's Certificate (~~2434~~HUD-92434M), executed by ~~the~~ MortgageeLender, dated _____.

M. ~~The~~ Mortgagor's Certificate (~~2433~~Escrow Agreement for Working Capital (HUD-92412M)), executed by ~~the~~ MortgagorBorrower and Lender, dated _____.

N. ~~The~~ Agreement and Certification (~~3305 or 3305A or 3306 or 3306A~~),HUD-93305M) properly executed by ~~the~~ MortgagorBorrower and _____ ~~{INSERT APPROPRIATE PARTIES, IF ANY}~~, dated _____.

O. ~~The~~ Mortgagor's Oath (~~2478~~HUD-92478M), executed by ~~the~~ MortgagorBorrower, dated _____.

P. ~~The~~ MortgagorBorrower's Opinion Certification, pertaining to factual matters relied on by us [me] in rendering this opinion, executed by ~~the~~ MortgagorBorrower, dated _____, a copy of which is attached hereto as Exhibit _____ (~~the~~ "~~Certification of~~ Mortgagor"Borrower").

Q. ~~A search conducted by _____ dated _____ {no earlier than 30 days before this opinion} of the financing records of the county and Property Jurisdiction [and Organizational Jurisdiction] (the "UCC Search").~~ [~~R~~]Q. A receipt from the insurance company providing flood insurance evidencing payment for the premium, dated _____, (~~the~~ "~~Flood Insurance Receipt~~".)]

~~SR.~~ ~~The~~ Title Insurance Policy [or ~~date-down~~ [Date-Down Endorsement](#) if appropriate in a refinancing, for example] issued by _____ **{acceptable company under HUD's regulations}**, together with all endorsements, and naming HUD and ~~the Mortgagee~~ [Lender](#) as insureds as their interests may appear, dated _____, (~~the~~ **"Title Policy"**).

~~TS.~~ The following documents evidencing zoning compliance, _____, **{DESCRIBE ALL DOCUMENTS FULLY}** (~~the~~ **"Zoning Certificate"**.)]

~~U.~~ ~~T.~~ The building permit(s) issued on _____ by _____ (~~the~~ **"Building Permit"**.)]

~~V.~~ ~~U.~~ The following permits, _____, {DESCRIBE PERMITS} ~~which~~ ~~that~~ are required for the operation of the ~~project~~ [Project](#), issued by _____ on _____ (**"Other Permits"**.)]

~~WV.~~ ~~The~~ Surveyor's Plat **OR** Survey showing completed ~~project,~~ [Project](#), prepared by _____, dated _____, (~~the~~ **"Survey"**.)]

~~XW.~~ ~~The~~ Surveyor's Report ([2457 HUD-92457M](#)), executed by _____, dated _____, (the **"Surveyor's Report"**.)]

~~Y.~~ ~~The deferred~~ ~~X.~~ [Deferred](#) note (~~1710, 1712 or 2223~~ [HUD-91710M, HUD-91712M or HUD-92223M](#)) executed by ~~Mortgagee~~ [Borrower](#) in favor of _____, dated _____, (~~the~~ **"Deferred Note"**.)]

~~Z.~~ ~~The~~ ~~Y.~~ Performance Bond ([2452 HUD-92452M](#)) and ~~the~~ Payment Bond ([2452 HUD-92452A-M](#)) issued by _____ (Surety) to secure payment and performance of _____ (General Contractor) and running to _____ **OR** the Completion Assurance Agreement ([2450 HUD-92450M](#)) executed by ~~the~~ General Contractor, dated _____, (~~the~~ **"Assurance of Completion"**.)]

~~AA.~~ ~~The~~ ~~Z.~~ Owner-Architect Agreement (AIA B181 with HUD Supplement) executed by _____ **{INSERT DESIGN AND/OR CONSTRUCTION ARCHITECT}** and ~~Mortgagee~~ [Borrower](#), dated _____, (~~the~~ **"Owner-Architect Agreement"**.)]

~~BB.~~ ~~The~~ ~~AA.~~ Off-Site Bond ([2479 HUD-92479M](#)) issued by _____ (Surety) to secure the completion of off-site work by _____ (General Contractor) and running to ~~the Mortgagee~~ [Lender](#) and HUD **OR** Escrow Agreement for Off-Site Facilities ([2446 HUD-92446M](#)) with Schedule **"A"** executed by _____ dated _____ (~~the~~ **"Assurance of Completion of Off-Site Facilities"**.)]

~~[CC. [BB. The following documents assuring water, electricity, sewer, gas, heat or other utility services (the "Assurance of Utility Services":~~
 _____ {DESCRIBE FULLY}.]

[CC. Contractor's and/or Borrower's Cost Breakdown (HUD-92328M) executed by the General Contractor, dated _____, (Cost Breakdown).]

~~[DD. The Contractor's and/or Mortgagor's Cost Breakdown (2328) executed by the General Contractor, dated _____, (the "Cost Breakdown").] [EE. The Latent Defects Bond (3259 HUD-93259M) issued by _____ and securing the performance of the General Contractor and running to the Mortgage Lender and HUD OR Escrow executed by _____, dated _____ (the "Guarantee against Latent Defects").]~~

~~[FF. The [EE. Escrow Deposit Agreement for Incomplete On-Site Improvements (2456) with Schedule A executed by the Construction (HUD-92456M) with Exhibit A executed by General Contractor, dated _____, (On-Site Deposit Escrow).]~~

[FF. Contractor's Prevailing Wage Certificate (on page 2 of HUD-92448M) executed by _____, dated _____, (the "On-Site Deposit Escrow").] _____, (Contractor's Prevailing Wage Certificate).]

~~[GG. The Contractor's Prevailing Wage Certificate (2403-A) executed by _____, dated _____, (the "Contractor's Prevailing Wage Certificate").] [HH. The GG. Request for Final Endorsement of Credit Instrument (2023 HUD-92023M) and/or Request for Endorsement of Credit Instrument and Certificate of Mortgagor and Mortgagee (2455 Lender, Borrower and General Contractor (HUD-92455M) executed by the Mortgagor/Borrower and the Mortgage Lender, dated _____, (the "Request for Endorsement").~~
{MODIFY AS APPROPRIATE FOR INSURANCE UPON COMPLETION, REFINANCINGS, ETC.}

~~[H. The [HH. Escrow Agreement for Operating Deficit (HUD-92476a-M) executed by _____, dated _____, (Operating Deficit Escrow).]~~

[II. Repair Escrow (2476a) executed by _____, dated _____, (the "Operating Deficit, (Repair Escrow").]

~~[JJ. The Repair Escrow executed by _____, dated _____, (the "Repair Escrow").] [KK. All documents executed by Mortgagor/Borrower and any State or local government entity pertaining to development of the Property (the "Public Entity Agreement").]~~

~~LL~~ KK. The following documents executed or delivered in connection with the financing of the loan Loan with the proceeds of bonds ~~exempt from federal taxation~~ or other third party source: _____ {LIST DOCUMENTS IN ACCORDANCE WITH INSTRUCTIONS} (~~the "Bond~~ Source Documents").]

~~MM~~ LL. The Good Standing Certificate(s) {SEE "A" ABOVE} issued by [Organizational Jurisdiction OR Property Jurisdiction, if different], dated _____ {DATE INSERTED MUST BE WITHIN THIRTY (30) DAYS OF THE DATE OF ENDORSEMENT}, (~~the "Good Standing Certificate"~~).

~~NN~~. The certificate executed by _____ {INSERT ARCHITECT OR OTHER PROFESSIONAL}, dated _____, (~~the "Certificate"~~).

~~OO~~ MM. A search conducted by _____ dated [no earlier than thirty (30) days before this opinion] of the public records of the federal District Court and State and local courts in: (i) the jurisdiction where the Property is located; (ii) the jurisdiction(s) where ~~the Mortgagor~~ Borrower is located and does business; and (iii) the jurisdiction where the general partner ~~of the Mortgagor~~ managing member, or similar person or entity is organized (~~the "Docket Search"~~).

NOTE: Numerical references in parentheses above are to FHA and HUD form numbers.

The documents listed in B through I above are referred to collectively as the "Loan Documents." The documents listed in J through ~~OO~~ NN are referred to collectively as the "Supporting Documents." The documents listed in A through ~~OO~~ NN are referred to collectively as the "Documents."

In basing the several opinions set forth in this document on "our [my] knowledge," the words "our [my] knowledge" signify that, in the course of our [my] representation of ~~the Mortgagor~~ Borrower, no facts have come to our [my] attention that would give us [me] actual knowledge or actual notice that any such opinions or other matters are not accurate. Except as otherwise stated in this opinion, we [I] have undertaken no investigation or verification of such matters. Further, the words "our [my] knowledge" as used in this opinion are intended to be limited to the actual knowledge of the attorneys within our [my] firm who have been involved in representing ~~the Mortgagor~~ Borrower in any capacity including, but not limited to, in connection with this Loan. 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.

In reaching the opinions set forth below, we [I] have assumed, and to our [my] knowledge there are no facts inconsistent with, the following:

(a) Each of the parties to the Documents, other than ~~the Mortgagor~~ Borrower (and any person executing any of the Documents on behalf of ~~the Mortgagor~~ Borrower),

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has duly and validly executed and delivered each such instrument, document, and agreement to be executed in connection with the Loan to which such party is a signatory, and such party's obligations set forth in the Documents are its legal, valid, and binding obligations, enforceable in accordance with their respective terms.

(b) Each person executing any of the Documents, other than ~~the Mortgagor~~Borrower (and any person executing any of the Documents on behalf of ~~the Mortgagor~~Borrower), whether individually or on behalf of an entity, is duly authorized to do so.

(c) Each natural person executing any of the Documents is legally competent to do so.

(d) All signatures of parties other than ~~the Mortgagor~~Borrower (and any person executing any of the Documents on behalf of ~~Mortgagor~~Borrower) are genuine.

(e) All Documents ~~which~~that were submitted to us [me] as originals are authentic; all Documents ~~which~~that were submitted to us [me] as certified or photostatic copies conform to the original document, and all public records reviewed are accurate and complete.

(f) All applicable Documents have been duly filed, indexed, and recorded among the appropriate official records and all fees, charges, and taxes due and owing as of this date have been paid.

(g) The parties to the Documents and their successors and/or assigns ~~will~~shall: (i) act in good faith and in a commercially reasonable manner in the exercise of any rights or enforcement of any remedies under the Documents; (ii) not engage in any conduct in the exercise of such rights or enforcement of such remedies that would constitute other than fair and impartial dealing; and (iii) comply with all requirements of applicable procedural and substantive law in exercising any rights or enforcing any remedies under the Documents.

(h) The exercise of any rights or enforcement of any remedies under the Documents would not be unconscionable, result in a breach of the peace, or otherwise be contrary to public policy.

(i) ~~The Mortgagor~~ Borrower has title or other interest in each item of (i) real and (ii) tangible and intangible personal property ("**Personalty**") comprising the Property in which a security interest is purported to be granted under the Loan Documents [and, where Personalty is to be acquired after the date hereof, a security interest is created under the after-acquired property clause of the Security Agreement].

In rendering this opinion we [I] also have assumed that the Documents accurately reflect the complete understanding of the parties with respect to the transactions contemplated thereby and the rights and the obligations of the parties

thereunder. We [I] also have assumed that the terms and the conditions of the Loan as stated in the Documents have not been amended, modified or supplemented, directly or indirectly, by any other agreement or understanding of the parties or waiver of any of the material provisions of the Documents. After reasonable inquiry of ~~the Mortgagor~~ 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.

In rendering our [my] opinion ~~in paragraph 13,~~ we [I] also have assumed that: (i) ~~all Personalty~~ if Fixture filings are required under the UCC, all Fixtures in which a security interest is created under the ~~Documents (other than accounts or goods of a type normally used in more than one jurisdiction)~~ is UCC are located at the Property and (ii) ~~Mortgagor's~~ except for the following itemized property: _____, and (ii) if Borrower is not a registered entity, Borrower's [state of organizational formation] [Chief Executive Office] [only place of business] [residence] is located in _____. After reasonable inquiry of ~~the Mortgagor~~ Borrower, we [I] have no knowledge of any facts or information that would lead us [me] to believe that the assumptions and factual exception set forth in this paragraph are not justified.

In rendering this opinion, we [I] have, with your approval, relied as to certain matters of fact set forth in the Certification of ~~Mortgagor~~ Borrower, the Good Standing Certificate(s) [and certain other specified Documents,] as set forth herein. After reasonable inquiry of ~~the Mortgagor~~ Borrower as to the accuracy and completeness of the Certification of ~~Mortgagor~~ Borrower, the Good Standing Certificate(s), [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.

Based on the foregoing and subject to the assumptions and qualifications set forth in this letter, it is our [my] opinion that:

{TO BE USED IN CASES WHERE ORGANIZATIONAL DOCUMENTS WERE PREPARED BY ~~MORTGAGOR~~ BORROWER'S ATTORNEY}

1. ~~The Mortgagor~~ Borrower is a _____ **{INSERT TYPE OF ENTITY}** duly organized and validly existing under the laws of the Organizational Jurisdiction. ~~The Mortgagor~~ Borrower is duly qualified to do business and, based solely on the Certificate(s) of Good Standing, copy attached hereto as Exhibit [], is in good standing under the laws of the Organizational Jurisdiction, [and is qualified to do business as a foreign _____ entity in the Property Jurisdiction based on a review of _____.]

{OR, IF ~~THE MORTGAGOR~~ BORROWER IS A TRUST OR LIMITED LIABILITY COMPANY (LLC)}

~~The Mortgagor~~ Borrower is _____ **{INSERT NAME OF THE TYPE OF TRUST OR NAME OF LLC}** duly formed and validly existing under the laws of the

Organizational Jurisdiction [, and is qualified to do business as a foreign _____ entity in the Property Jurisdiction].

**{AND, IF THE GENERAL PARTNER OF A PARTNERSHIP
MORTGAGORBORROWER OR MANAGING MEMBER OF AN LLC BORROWER IS
AN ENTITY}**

The general partner ~~of the Mortgagor~~ or managing member of Borrower is a _____ **{INSERT TYPE OF ENTITY}**, duly organized, validly existing and, based solely on the Certificate(s) of Good Standing, copy attached hereto as Exhibit [], in good standing under the laws of the Organizational Jurisdiction [and is qualified to do business as a foreign _____ **{INSERT TYPE OF ENTITY}** in the Property Jurisdiction].

**{TO BE USED IN CASES, PRINCIPALLY REFINANCINGS, WHERE
ORGANIZATIONAL DOCUMENTS WERE NOT PREPARED BY
MORTGAGORBORROWER'S ATTORNEY}**

1. Based solely on the Certificate(s) of Good Standing, copy attached hereto as Exhibit [], ~~the Mortgagor~~ Borrower is a _____ **{INSERT TYPE OF ENTITY}** validly existing under the laws of the Organizational Jurisdiction and in good standing under the laws of the Organizational Jurisdiction [and is qualified to do business as a foreign _____ entity in the Property Jurisdiction].

{OR, IF THE MORTGAGORBORROWER IS A TRUST}

~~The Mortgagor~~ Borrower is _____ **{INSERT NAME OF THE TYPE OF TRUST}** validly existing under the laws of the Organizational Jurisdiction [and is duly qualified to do business as a foreign _____ entity in the Property Jurisdiction].

**{AND, IF THE GENERAL PARTNER OF A PARTNERSHIP
MORTGAGORBORROWER OR THE MANAGING MEMBER OF AN LLC IS AN
ENTITY}**

Based solely on the Good Standing Certificate(s), copy attached hereto as Exhibit [], the general partner of ~~the Mortgagor~~ Borrower is a _____ **{INSERT TYPE OF ENTITY}**, validly existing and in good standing under the laws of _____ **{INSERT STATE}** [and is qualified to do business as a foreign _____ **{INSERT TYPE OF ENTITY}** in the Property Jurisdiction].

2. ~~The Mortgagor~~ Borrower has the [corporate/partnership/trust] power and authority ~~and possesses all necessary governmental certificates, permits, licenses, qualifications and approvals~~ to own and operate the Property and to carry out all of the transactions

required by the Loan Documents and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA Commitment.

3. The execution and delivery of the Loan Documents by or on behalf of ~~the~~ MortgagorBorrower, and the consummation by ~~the~~ MortgagorBorrower of the transactions contemplated thereby, and the performance by ~~the~~ MortgagorBorrower of its obligations thereunder, have been duly and validly authorized by all necessary [corporate/partnership/trust] action by, or on behalf of, ~~the~~ MortgagorBorrower.

4. ~~All authorizations, consents, approvals, and permits have been obtained from, appropriate actions have been taken by, and necessary filings have been made with all necessary Organizational and Property Jurisdictions or federal courts or governmental authorities, all as disclosed on Exhibit ___, attached hereto, and as listed and set forth in Paragraph(s) 2 and _____ of this opinion [i.e. good standing certificate]. To the best of our knowledge, these represent all such authorizations, consents, approvals, permits, actions and filings that are required in connection with the execution and delivery by the Mortgagor of the Loan Documents and the ownership [and operation] of the Property.~~ 5. Each of the Loan Documents has been duly executed and delivered by ~~the~~ MortgagorBorrower and constitute the valid and legally binding promises or obligations of ~~the~~ MortgagorBorrower, enforceable against ~~the~~ MortgagorBorrower in accordance with its terms, subject to the following qualifications:

(i) the effect of applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws affecting the rights of creditors 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~~ shall not preclude (a) the enforcement of the obligation of ~~the~~ MortgagorBorrower to make the payments as provided in the MortgageSecurity Instrument and Note (and HUD's regulations), and (b) the foreclosure of the MortgageSecurity Instrument upon the event of a breach thereunder.

~~[6.5. {TO BE INSERTED WHEN ANY OR ALL OF THE LOAN DOCUMENTS ARE NOT HUD APPROVED FORMS OR WHEN HUD APPROVED FORMS HAVE BEEN REVISED OR MODIFIED IN CONNECTION WITH THE LOAN}~~ The execution and delivery of, and the performance of the obligations under, the Loan Documents ~~will~~ shall not violate the Organizational Documents of ~~the~~ MortgagorBorrower or any applicable provisions of local or State law.

~~[7. {INSERT FOR LOANS INVOLVING CONSTRUCTION OR REHABILITATION} To our [my] knowledge there are no proposed change(s) of law, ordinance, or governmental regulation (proposed in a formal manner by elected or appointed officials) which, if enacted or promulgated after the commencement of~~

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~~construction/rehabilitation, would require a modification to the Project, and/or prevent the Project from being completed in accordance with the plans and specifications, dated _____, executed by _____ {INSERT MORTGAGOR} and _____ {INSERT GENERAL CONTRACTOR}, and referred to in the Construction Contract (the "Plans and Specifications").~~ [8.6. **{INSERT IF THERE IS NO ZONING ENDORSEMENT INCORPORATED INTO THE TITLE POLICY}** The attached Zoning Certificate states that the Property appears on the zoning maps of [Property ~~jurisdiction~~ Jurisdiction] as being located in a _____ zone. According to the zoning ordinance of the Property Jurisdiction, the use of the Property as a _____ is a permitted use in such zone.

OR

{INSERT WHERE THE USE IS AN EXCEPTION TO THE ZONING ORDINANCE} Based solely on the Zoning Certificate, the Property may be used for _____ as a permitted use.]

~~[9. **{USE FOR NEW CONSTRUCTION OR SUBSTANTIAL REHABILITATION IN CASES WHERE THE DEPARTMENT DOES NOT RECEIVE A CERTIFICATE DIRECTLY FROM THE PROFESSIONAL}** Based solely on the Certificate, construction/rehabilitation of the Project in accordance with the Plans and Specifications will comply with all applicable land use and zoning requirements.~~

~~**{USE FOR REFINANCINGS}** Based solely on the Certificate, the Project complies with all applicable land use and zoning requirements.] 10.7. Based solely on (a) our [my] knowledge and (b) the Certification of ~~Mortgagor~~ Borrower, the execution and delivery of the Loan Documents ~~will~~ shall not: (i) cause ~~the Mortgagor~~ Borrower to be in violation of, or constitute a default under the provisions of, any agreement to which ~~the Mortgagor~~ Borrower is a party or by which ~~the Mortgagor~~ Borrower is bound, (ii) conflict with, or result in the breach of, any court judgment, decree or order of any governmental body to which ~~the Mortgagor~~ Borrower is subject, or (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever on any of the property or assets of ~~the Mortgagor~~ Borrower, except as specifically contemplated by the Loan Documents.~~

~~11. Based solely on (a) our [my] knowledge, (b) the Certification of ~~Mortgagor~~ and (c) the Docket Search; there is no litigation or other claim pending before any court or administrative or other governmental body or threatened in writing against the ~~Mortgagor~~, or the Property, [**{TO BE INSERTED WHEN MORTGAGOR IS NOT A SOLE-ASSET MORTGAGOR}** or any other properties of the ~~Mortgagor~~] [, except as identified on Exhibit _____]~~

12.8. The Mortgage Security Instrument is in appropriate form for recordation in _____ **{INSERT PROPER NAME OF LOCAL LAND RECORDS OFFICE}** of _____ **{INSERT COUNTY, STATE OR CITY, STATE}**

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of the Property Jurisdiction, and is sufficient, as to form, to create the encumbrance and security interest it purports to create in the Property.

~~13. Filing of the Financing Statements in the Filing Offices will perfect the security interest in the Personalty of the Mortgagor located in the Project Jurisdiction, but only to the extent that, under the Uniform Commercial Code in effect in the Project Jurisdiction, a security interest in each described item of Personalty can be perfected by filing. The Filing Offices are the only offices in which the Financing Statements are required to be filed in order to perfect the Mortgagee's security interest in the Personalty.~~

~~14. The Loan does not violate the usury laws or laws regulating the use or forbearance of money of the Property Jurisdiction.~~

~~15.9. {FOR USE ONLY IF MORTGAGOR BORROWER IS A TRUST} The Mortgagor Borrower is an irrevocable trust that has a term consistent with HUD's requirements Program Obligations and the term of the irrevocable trust is not affected by the terms of any of the beneficiaries' interests.] [The laws of the Property Jurisdiction govern the interpretation and the enforcement of the Loan Documents notwithstanding that the Mortgagor Borrower may be formed in a jurisdiction other than the Property Jurisdiction. The Mortgagor Borrower can sue and be sued in the Property Jurisdiction without the necessity of joining any of the beneficiaries of the Mortgagor Borrower, including without limitation, a suit on the Note or a foreclosure proceeding arising under the Mortgage Security Instrument. Venue for any foreclosure proceeding under the Mortgage Security Instrument may be had in [Property jurisdiction Jurisdiction].~~

~~16.10. {USE IN CASES INVOLVING TAXABLE OR TAX EXEMPT BOND FINANCING AND ANY OTHER FINANCINGS WHERE A THIRD PARTY SOURCE IS INVOLVED} Based solely on the opinion of _____ {INSERT BOND COUNSEL OR COUNSEL RENDERING OPINION IN THIRD PARTY SOURCE TRANSACTIONS}, dated as of the date hereof and attached hereto as Exhibit ____, to the extent that any of the provisions of the Bond Source Documents are inconsistent with any of the provisions of the Loan Documents or Supporting Documents, the provisions of the Loan Documents or Supporting Documents shall govern.]~~

~~17.11. {USE IN CASES WHERE THE DEVELOPMENT OF THE PROPERTY IS GOVERNED BY AN AGREEMENT WITH A PUBLIC ENTITY} Based upon our knowledge and the Certification of Mortgagor Borrower, there is no default under the Public Entity Agreement, {ADD THE FOLLOWING WHERE CONSTRUCTION IS INVOLVED} and construction in accordance with the Plans and Specifications and within the time frame specified in the Construction Contract will shall not lead to a default under the Public Entity Agreement.]~~

In addition to the assumptions set forth above, the opinions set forth above are also subject to the following qualifications:

~~(i) The Uniform Commercial Code of the Property Jurisdiction requires the periodic filing of continuation statements with _____ [and _____] not more than _____ prior to and not later than the expiration of the _____ year period from the date of filing of the Financing Statements and the expiration of each subsequent _____ year period after the original filing, in order to maintain the perfection and priority of security interests and to keep the Financing Statements in effect. (ii) We express no opinion as to the laws of any jurisdiction other than the laws of the Property Jurisdiction Jurisdiction [and the Organizational Jurisdiction, if it is different,] and the laws of the United States of America. The opinions expressed above concern only the effect of the laws (excluding the principles of conflict of laws) of the Property Jurisdiction [and the Organizational Jurisdiction, if it is different] and the United States of America as currently in effect. We assume no obligation to supplement this opinion if any applicable laws change after the date of this opinion, or if, after the date of this opinion, we become aware of any facts that might change the opinions expressed above ~~after the date of this opinion~~.~~

We [I] confirm that:

(a) ~~based~~ Based on the Organizational Documents, the name of ~~the Mortgagor~~ Borrower in each of the Documents and the Title Policy and FHA Commitment is the correct legal name of the ~~Mortgagor~~ Borrower;

(b) ~~the~~ The legal description of the Property is consistent in the Documents wherein it appears and in Exhibit B hereto;

(c) Except as provided in paragraph (d), we [I] do not have any financial interest in the Project, the Property, or the Loan, other than fees for legal services performed by us, arrangements for the payment of which ~~has~~ have been made; and we [I] agree not to assert a claim or lien against the Project, the Property, ~~the Mortgagor~~ Borrower, the Loan proceeds or income of the Project;

~~(d) Other~~ Other than as ~~counsel for the Mortgagor~~ Counsel to Borrower, we [I] have no interest in ~~the Mortgagor~~ Borrower (or any principal thereof) or ~~the Mortgagee~~ Lender or any other party involved in the Loan transaction and do not serve as [a director, officer or] [an] employee of ~~the Mortgagor or the Mortgagee~~ Borrower or Lender. We [I] have no ~~undisclosed~~ interest in the subject matters of this opinion. ~~We other than as previously disclosed to and approved by HUD. We [I] do not represent the mortgagee-of-record~~ Lender, any investing lender or investor in the ~~loan~~ Loan transaction, any bridge lender involved in the ~~loan~~ Loan transaction, any lender with a commitment to purchase the ~~loan~~ Loan or any interest therein or any other party involved in the Project or the ~~loan~~ Loan transaction;

~~(e) based~~ Based solely on the Surveyor's Report and the Surveyor's Plat or _____, flood insurance [is **OR** is not] required pursuant to 42 U.S.C. 4012a(a); **{INSERT IF FLOOD INSURANCE IS REQUIRED}** Based solely on the Flood Insurance Receipt, flood insurance is in effect ~~which~~ that satisfies the requirements of 42 U.S.C. 4012a(a);] ~~and~~

(f) ~~(f) to~~ To our [my] knowledge, there are no liens or encumbrances against the Property ~~which~~that are not reflected as exceptions to coverage in the Title Policy;

(g) Based upon the Certification of Borrower and to the best of our [my] knowledge, there are no side-deals (transactions outside the parameters of the HUD form closing documents and the commitment) between Borrower and any party to the transaction) other than as disclosed in the Documents; and

(h) Based solely on (a) our [my] knowledge, (b) the Certification of Borrower and (c) the Docket Search; there is no litigation or other claim pending before any court or administrative or other governmental body against Borrower (or any Principal thereof as defined in the HUD regulations), or the Property, [TO BE INSERTED WHEN BORROWER IS NOT A SOLE-ASSET BORROWER] or any other properties of Borrower (or any Principal)] [, except as identified on Exhibit ____].

(i) This document does not deviate from the format approved by OMB and obtained from HUD on _____ except for such changes as have been identified to and specifically approved by HUD counsel.

The foregoing opinions are for the exclusive reliance of ~~[Mortgagee, its counsel] and HUD; however, they may be made available for informational purposes to, but not for the reliance of, the assigns or transferees of Mortgagee, or prospective purchasers of the Loan. We [I] acknowledge that the making, or causing to be made, of a false statement of fact in this opinion letter and accompanying materials may lead to criminal prosecution or civil liability as provided pursuant to applicable law, which may include 18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802.~~ HUD, [Lender OR Lender and Lender's counsel] and any subsequent holder of the Note

Sincerely,

[Authorized Partner Signature]

This instrument has 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.

Name of Entity: _____

By: _____ /s/ _____

Printed Name, Title: _____

_____ Dated: _____

By: _____ /s/ _____

Printed Name, Title: _____

Dated: _____

{ADD ADDITIONAL LINES IF MORE THAN TWO SIGNATORIES}

Warning

Any person who knowingly presents a false, fictitious, or fraudulent statement or claim in a matter within the jurisdiction of the U.S. Department of Housing and Urban Development is subject to criminal penalties, civil liability, and administrative sanctions.

Document comparison by Workshare Professional on Thursday, April 01, 2010 5:55:56 PM

Input:	
Document 1 ID	interwovenSite://HKDMS/Active/9308034/1
Description	#9308034v1<Active> - ABA/RPTE Spring Symposium - Current HUD Form Opinion
Document 2 ID	interwovenSite://HKDMS/Active/9308036/1
Description	#9308036v1<Active> - ABA/RPTE Spring Symposium - Proposed 2010 HUD Form Opinion
Rendering set	standard

Legend:	
Insertion	
Deletion	
Moved from	
Moved to	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	297
Deletions	362
Moved from	8
Moved to	8
Style change	0
Format changed	0
Total changes	675

AMERICAN BAR ASSOCIATION

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March 22, 2010

Regulations Division, Office of General Counsel,
Department of Housing and Urban Development
451 7th Street, SW., Room 10276
Washington, DC 20410-0500

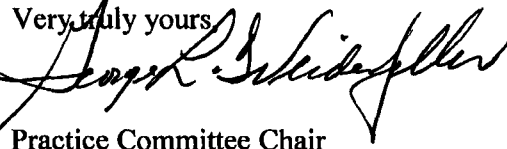
RE: FR-5354-N-01, HUD Multifamily Rental Project Closing Documents; Proposed
Revisions and Updates and Notice of Information Collection.

The following comments are submitted on behalf of the American Bar Association
Forum on Affordable Housing & Community Development Law in response to the
notice referenced above.

These comments were prepared by members of the HUD Programs Practice
Committee of the Forum on Affordable Housing & Community Development Law of
the American Bar Association. George Weidenfeller, Chair of the HUD Programs
Practice Committee, supervised the preparation of this letter. The principal drafting
responsibility of this letter was exercised by George Weidenfeller and Kelly
Bissinger and substantive contributions were made by David Barsky, Charles
Bissinger, Mary Joe George, Antoinette Jackson, Roger Hartman, Kristin Neun,
LaFonte Nesbitt, Paul Reno, Brianne Schwanitz, Monica Sussman, John Vihstadt,
and Watt Taylor.

If you have any questions, please do not hesitate to contact George Weidenfeller at
202.721.1133, gweidenfeller@goulstonstorrs.com

Very truly yours,



Practice Committee Chair

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Ellen Dole
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Forrest Milder

October 8-9, 2009 ~ Fall Conference ~ Newport, RI
May 26-28, 2009 ~ 19th Annual Forum on Affordable Housing and Community Development Law Meeting ~ Washington, DC
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Development Law

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AMERICAN BAR ASSOCIATION
FORUM ON AFFORDABLE HOUSING AND COMMUNITY DEVELOPMENT

COMMENTS CONCERNING HUD MULTIFAMILY RENTAL PROJECT CLOSING
DOCUMENTS: PROPOSED REVISIONS AND UPDATES AND NOTICE OF INFORMATION
COLLECTION

We appreciate the efforts of the United States Department of Housing and Urban Development (“HUD”) to revise and modernize the form closing documents for use in the Federal Housing Administration (“FHA”) multifamily rental housing mortgage insurance programs (the “Loan Documents”) and HUD’s willingness to meet with members of the public to receive comments on the Loan Documents, twice in Washington, DC and once in Los Angeles, California. We strongly support the efforts by HUD to modernize the Loan Documents, but continue to be concerned that some of the changes to the Loan Documents include substantial policy changes that may not be appropriate in the context of this rulemaking process. This comment letter will specifically address several matters on which HUD requested input at the above referenced public meetings related to the following: (i) certain of the Loan Documents; (ii) a training program; and (iii) the transition from the current Loan Documents to the new Loan Documents. Given the large number of documents to review, and the limited amount of time to review and comment on the documents, this comment letter only addresses those documents listed under Section I. However, we generally endorse and support the comments that have been submitted by the Mortgage Bankers Association (“MBA”) and the National Leased Housing Association (“NLHA”). To the extent not specifically identified below, we also provide herewith comments previously made available to HUD in advance of the public meetings. We would be pleased to meet with you to discuss any comments or suggestions.

I. Comments with respect to Loan Documents

Select comments with respect to each of the Loan Documents listed immediately below are attached hereto and incorporated herein at the referenced Exhibit. We have also included below a summary of the questions raised by HUD at the Multifamily Closing Documents Discussions referenced above and addressed these questions in specific comments and responses in the Exhibits.

A. Exhibit A - Note

B. Exhibit B - Security Instrument (Mortgage)

HUD requested comments on each of the following issues: (i) state specific foreclosure provisions (Exhibit B, Section 1); (ii) escalation of debt (Exhibit B, Section 25); (iii) waste versus decent, safe and sanitary housing (Exhibit B, Sections 2(g) and (26)); and (iv) class A and class B events of default (Exhibit B, Section 14). Comments regarding each of these issues are set forth at Exhibit B.

C. Exhibit C - Lender's Certificate

HUD requested comments on each of the following issues: (i) program obligations (Exhibit C, Section 1); (ii) borrower's input for reliance issues (Exhibit C, Section 2); (iii) changes in risk allocation (Exhibit C, Section 3); (iv) TPA review (Exhibit C, Section 4); and (v) DACA (Exhibit C, Section 5). Comments regarding each of these issues are set forth at Exhibit C.

D. Exhibit D - Regulatory Agreement

HUD requested comments on each of the following issues: (i) program obligations (Exhibit D, Section 2); (ii) definition of rent (Exhibit D, Section 4); (iii) Section 8 references (Exhibit D, Section 21); (iv) surplus cash (Exhibit D, Section 13); and (v) ability to amend (Exhibit D, Section 19). Comments regarding each of these issues are set forth at Exhibit D.

E. Exhibit E - Opinion

HUD requested comments on each of the following issues: (i) the opinion should not be considered a form (Exhibit E, Section 1(A)); (ii) side agreements (Exhibit E, Section 1(I)); (iii) individual signature versus name of the issuing law firm (Exhibit E, Section 1(K)); (iv) acceptability of title company (Exhibit E, Section 1(B)); and (v) false statement language (Exhibit E, Section 1(G)). Comments regarding each of these issues are set forth at Exhibit E.

F. Exhibit F - Building Loan Agreement

G. Exhibit G - Construction Contract

HUD requested comments on each of the following issues: (i) use of current AIA General Conditions reference (Exhibit G, Section 1(a)); (ii) clarification of specific contract documents, including omitting any side agreements (Exhibit G, Section 1(f)); (iii) clarification as to final completion (Exhibit G, Section 2); (iv) removal or required incentive payment language (Exhibit G, Section 3); (v) clarification of survey requirement (Exhibit G, Section 5); and (vi) clarifications of rights of HUD and lender in the event of contractor default (Exhibit G, Section 6). Comments regarding each of these issues are set forth at Exhibit G.

H. Exhibit H - Lease Addendum

HUD requested comments on each of the following issues: (i) elimination or modification of HUD's option to purchase fee title (Exhibit H, Section 1); and (ii) clarification of financial obligations of tenant in line with standard triple net lease (Exhibit H, Section 2). Comments regarding each of these issues are set forth at Exhibit H.

I. Exhibit I - Agreement and Certification

J. Exhibit J - Completion Assurance Agreement

K. Exhibit K - AIA Document B181

L. Exhibit L - Surveyor's report

Exhibit E

Opinion

1. General Comments
 - A. First and foremost, a legal opinion is an opinion and should not merely filling in the blanks in a form. As we have commented previously, many local offices will not permit changes, and thus, what is as format starting point becomes a form.
 - B. R. provides for title insurance from an acceptable company under HUDs regulations. To our knowledge, no such regulations as to when HUD deems a title company acceptable exist.
 - C. JJ. calls for ALL documents executed by Borrower and any State or local government entity pertaining to the development of the Property. This needs to be narrowed as it could include various applications for funding, permits, work orders, etc., which are not typically examined by counsel. Such "all" language creates an impractical standard and HUD must specify what documents it requires to be reviewed.
 - D. Opinion 1. If the law firm rendering the opinion has not formed the entity it should not have to opine as to due formation, rather the opinion should only be as to validly existing and in good standing.
 - E. Opinion 2. Delete from Borrower's authority "and to comply with applicable federal statutes and regulations of HUD in effect on the date of the FHA commitment". One does not need authorization to comply with legal requirements.
 - F. Opinion 4. Delete payment "under the security instrument" and "HUD's regulations" as the payment obligations are under the Note.
 - G. Confirmation (c) requires that the lawyer to have no interest in the project, property or loan, yet HUD is now adding a certification below the signature that it is an instrument presented and delivered for the purpose of influencing an official action of HUD. The opinion also includes the false statement warning language. This is an opinion, not an instrument. The statements contained are not declarations of fact but opinions based on the information before the attorney. The attempt to make it an instrument in essence creates the interest in the loan that HUD requires the lawyer to not have. It is likely that most reputable law firms will not be willing to give an opinion with this language and thus it must be deleted.
 - H. Confirmation (d) should delete the provisions about any bridge lender. Often times LIHTC equity comes in as a bridge loan initially.
 - I. Confirmation (g) requires Borrower's Counsel to certify there are no side-deals between the Borrower and any party to the transaction, which is a new requirement. This places an undue burden on counsel to first determine what is meant by the term "side agreement".

For example, is an oral commitment to work cooperatively together a "side agreement" or merely basic good faith and fair dealing?

- J. Confirmation (h) refers to when the Borrower is not a sole asset borrower, please advise when this is a possibility for an FHA loan.
- K. The existing instructions to the form Opinion state that the attorney "may" sign individually. However, some HUD counsel requires an individual's signature. Recommended practice with certain firms, location and insurance providers require a signature of the firm name reflecting that the opinion is from the firm, and not just an individual lawyer. HUD should clarify that it is in its own interest to have a fully authorized opinion signature.
- L. There is a critical need for legal counsel opinions to be updated periodically and conform to the standard set forth in the well known *Silverado Accord* (See Section of Business Law, American Bar Association, Third Party Legal Opinion Report, 47 Bus. Law 167 (1991)), also known as the "Report." The standard of opinion letters set forth in the *Silverado Accord*, originating from the formation of the Committee on Legal Opinions of the Section of Business Law of the American Bar Association at the 1989 ABA Conference in Silverado, California, is consistent with current opinion letter standards and policies. We urge HUD to adopt the standard of opinion letters set forth in this 1991 Report. HUD cannot continue to move towards morphing counsel opinion letters into form opinions which may not be acceptable in all jurisdictions. Attorneys and law firms have ethical standards and duties of conduct and liability that need to be in sync with one another.

2. Specific Comments on Proposed Form of Opinion Letter

- A. As a general matter, we appreciate HUD's consideration of prior comments and the removal of certain opinion paragraphs that have been a source of controversy and contentiousness for years. In particular, the removal of paragraphs 2, 4 and 7 were particularly appreciated. In response to a comment that the opinion letter is out of step with trends at Freddie Mac and Fannie Mae to reduce the scope of the opinion letter provided by Borrower's counsel, HUD stated in the Federal Register that the scope of transactions under the HUD loan programs are broader than that of Freddie Mac and Fannie Mae, noting that HUD provides construction financing. It certainly is true that HUD does provide construction financing while Freddie Mac and Fannie Mae do not, most of the remaining comments to the opinion letter relate to matters that have little to do with construction matters, such as opinions or confirmations regarding side deals, identity of interests and lien priority.

In addition, many of the requested changes are non-sustentative in nature and are efforts to clean up inconsistencies in the opinion letter. For example, the reference to the UCC financing statements, as noted below, indicates that they are executed by the Borrower even though, to our knowledge, this no longer is the case.

Lastly, while we again appreciate removal of certain opinions from the opinion letter, we understand that they have been moved to the Lender's Certificate, which may not always

be appropriate. For example, requiring the Lender to certify that all permits for a construction project are in place seems unreasonable. Also, requiring the Lender to certify that a loan is not usurious strikes us as requiring the Lender to provide a legal opinion.

- B. In Paragraph "G", the words "to be filed by Lender" should be deleted. Oftentimes, the financing statements are filed by parties other than Lender, such as the title company. In addition, the words "executed by Borrower as Debtor" should be deleted or, at a minimum, put in brackets, as we are unaware of any state where the Borrower is still required to execute the UCC financing statements.
- C. In Paragraph "N", please remove the word "properly" as the other similar paragraphs omit this word in the opinion letter.
- D. In Paragraph "Q", Borrower's counsel is asked to review a receipt from the insurance company providing flood insurance. It is usual commercial practice for Lender to review all of the Borrower's insurance and to make sure that it complies with the loan program requirements. In addition, federal law already imposes on Lender an obligation to make certain flood insurance is in place for all structures located within a designated special flood hazard area and a Lender is subject to special fines in the event it fails to fulfill its obligations under the statute.
- E. With regard to the surveyor's report listed in Paragraph "W" in the opinion letter, the reference should be deleted as the document itself is unnecessary. All of the information contained in the surveyor's report is redundant to the actual information contained on the survey. Therefore, we would request that the surveyor's report be removed as a loan document and removed from the opinion letter accordingly.
- F. With regard to the paragraph defining documents as either "Loan Documents", "Supporting Documents" or "Documents", we believe that all of the documents listed up through, and not including, the Borrower's Opinion Certification, should be included in Loan Documents for which an enforceability opinion is given. The only exception to this is the Lender's Certificate, which should be moved lower in the list of documents so that the Borrower's counsel is not providing an enforceability opinion as to that document.
- G. In Paragraph "i" of the assumptions, we would suggest deleting the reference to "Personalty" and using instead "UCC Collateral," which term is defined in the Regulatory Agreement and Security Instrument.
- H. With regard to the paragraph providing assumptions regarding Fixtures, we would delete the assumption that Fixtures are located at the Property and the accompanying list of Fixtures not located at the Property. A Fixture, as defined in the Security Instrument, is personal property that is affixed to the Property, so their location is not in question. However, we would include an assumption that tangible personal property is located at the Property, because the location of personalty is an issue for perfecting a security interest in such property for Borrowers that are individuals and unregistered entities.

- I. With regard to Opinion 1, we do not believe it is necessary to provide for all the differing types of entities and distinguish between whether or not the entities were formed by Borrower's counsel. At the end of the day, Lender and HUD should be interested only that the entity validly exists under the laws of the Organizational Jurisdiction, whether it be a trust, a limited liability company, partnership or other entity. A similar opinion should be provided for each entity executing loan documents on behalf of Borrower.

This change would be consistent with Freddie Mac opinion letter format. HUD, in its comments published in the Federal Register, justified the more comprehensive nature of its form opinion on the premise that the scope of transactions under the HUD loan programs are broader than that of Freddie Mac and Fannie Mae. However, we are unable to discern any differences between the HUD programs and that of Freddie Mac or Fannie Mae that would require a broader opinion regarding the Borrower's organizational existence and authority to operate.

- J. With regard to Opinion 4, not all collateral can be foreclosed upon under the Security Instrument. Therefore, we suggest adding the words "of the real property interests granted under the terms and provisions" after the word "foreclosure." This language appears to be a carryover from prior forms and does not consider that the new Security Instrument includes a security interest in personal property.
- K. With regard to Opinion 5, this opinion seems duplicative of other opinions already contained in the opinion letter. The statement that execution of the Loan Documents and performance of the obligations thereunder will not violate the Organizational Documents seems largely duplicative of Opinions 2 and 3. The statement that execution of loan documents will not violate any applicable provisions of state or local law appears to be duplicative of the enforceability opinion set forth in Opinion 4, with the exception that Opinion 5 does not contain the caveats contained in Opinion 4 with regard to creditor's rights and equitable remedies. Because it is duplicative and because it lacks some of the safeguards set forth in Opinion 4, we believe that Opinion 5 should be deleted in its entirety.
- L. With regard to Opinion 6, please delete the words "appears on the zoning maps of [Property Jurisdiction] as being..." Oftentimes, the Zoning Certificate will state the Property is located in a particular zoning district without referencing the maps. In addition, the additional verbiage is unnecessary.
- M. With regard to Opinion 9, please provide a definition of "Program Obligations." We suggest that the words "as defined in the Regulatory Agreement" be added after this term.
- N. With regard to Opinion 10, given that HUD requires that all of the bond documents executed by Borrower contain a provision that the HUD loan documents control over any conflicting provisions in the bond documents, it is unnecessary for Borrower's counsel to obtain and rely upon an opinion letter from bond counsel on this topic.
- O. With regard to Confirmation (d), we would request that the reference to "any investing lender or investor in the Loan transaction, any bridge lender involved in the Loan transaction, any lender with a commitment to purchase the Loan or any interest therein or

any other party involved in the Project or the Loan transaction” be deleted. Lenders are often reluctant to provide information to Borrower's counsel regarding the names of the investors, investing lenders, purchasing lenders or any other parties with interest in the loan. Without an obligation of the Lender to provide such information, it is difficult for the Borrower's counsel to provide this assurance.

- P. With regard to Confirmation (e), we believe this should be deleted as noted above in our discussion regarding flood insurance. Whether or not flood insurance is required and review of either a survey or flood hazard determination letter to determine whether or not the Property is in a special flood hazard area is a responsibility of the Lender under usual commercial practice and pursuant to federal law.
- Q. We believe that Confirmation (f) should be deleted. The guidelines promulgated by the American College of Real Estate Attorneys for opinion letters specifically state that opinions regarding liens and encumbrances against the property (“title opinions”) are inappropriate for Borrower's counsel in most cases. In addition, this opinion is redundant to the title insurance that is provided to the Lender and HUD at closing.

Although HUD stated in its Federal Register comments that the National Housing Act requires that HUD insure a first lien (i) this requirement is no different than the requirements of most lenders and (ii) ignores the fact that HUD in fact insures second mortgages under the National Housing Act pursuant to the Section 223(d) and Section 241 programs.

- R. With regard to Confirmation (g), the reference to side deals between Borrower and any party to the transaction is not sufficiently precise for the purposes of an opinion letter. “Any party to the transaction” could conceivably include brokerage agreements on property sales, firm delivery agreements with investors and Lenders, contracts with third party vendors for property services (trash disposal, cable, maintenance) and/or leases with tenants. We believe that this confirmation should be deleted as it is not required by Freddie Mac or any other lenders or mortgage insurers that we are aware of. If it is not deleted, we would suggest that HUD limit the provision to construction loans and apply it only to contractors, subcontractors and material and equipment for suppliers for construction loans).
- S. With regard to Confirmation (h), the references to litigation involving any Principal should be deleted. The reference to searches involving "Principals" is very problematic. The HUD regulations are not clear on what is defined as a "Principal" and, for some purposes, the term is defined very broadly to include architects, contractors, consultants, operators, managing agent, packager and others. Whether the definition of Principal set forth in the Previous Participation Certification (2530), the list of Principals could be extensive, placing an unreasonable burden in terms of docket searches on Borrower's counsel. It also is unclear whether the Borrower's counsel must expand the docket search beyond the requirements of Paragraph “MM” if a Principal is located in another jurisdiction. The benefit of such searches is dubious given the fact that the HUD loan programs generally are non-recourse. Litigation involving the principals of the Borrower to which the Borrower is not a party would have no impact on the Borrower's operations.

Given the uncertain definition of the term Principal, the potential for numerous Principals in the transaction, the cost involved with pulling docket searches for all such Principals and the limited benefit provided by such docket searches, we request that the reference to Principals be deleted.

- T. With regard to Confirmation (i), we would ask that the Borrower's counsel be permitted, if desired, to attach a redline of the opinion letter from the form so that it is clear what changes counsel has made from the opinion format. In addition, instead of referring to "format approved by OMB and obtained from HUD on _____", we would suggest that the Borrower's counsel refer to the opinion letter form number and its date. Borrower's counsel would have little ability to confirm whether or not OMB has approved a particular form, but can readily pull the current form off of the HUDCLIPS website.
 - U. We would suggest that HUD delete all of the new language located below the signature block. Instead, we would suggest that HUD return to the language in the existing form of opinion letter regarding civil liability for knowingly making false statements. Lastly, it seems inappropriate and somewhat insulting to require Borrower's counsel to execute the opinion letter a second time with regard to the certification regarding the opinion letter influencing HUD action. The certification itself is redundant to the fact that the opinion is addressed to HUD and the first and last sentences of the opinion letter explicitly permit reliance by HUD.
3. With regard to the Certificate of Borrower, we have the following comments:
- A. The Borrower's counsel should receive some certification from the Borrower regarding side deals upon which to support its statement in the opinion letter.
 - B. Paragraph 3 of the Certificate of Borrower should be revised to (i) delete the reference to "Fixtures", which by definition are affixed to the Property, and replace it with "tangible UCC Collateral" and (ii) delete the reference to personal property not located at the Property. Borrowers would not have the ability to make the legal determination as to what types of personal property are, for the purposes of the Uniform Commercial Code, not located at the Property. In addition, the potential list could be exhaustive, including goodwill, bank accounts, receivables and any other intangible personal property.

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Memorandum

Date: April 1, 2010

From: La Fonte Nesbitt

Re: ABA/RPTE Spring Symposium – HUD Opinion Letter Presentation

HUD current form of borrower's counsel opinion for multifamily loan transactions was issued for effect in April, 2003. Seven years is long time in the world of commercial real estate transactions; think about how much your loan documents have changed in that time. In fact, however, the April 2003 issue date is somewhat misleading as the April 2003 form was essentially the re-issue (with very few changes) of a form opinion originally issued in 1994! Almost since the moment the form opinion was issued in 1994 and again in 2003, there has been resistance by counsel to borrowers of HUD-insured multifamily loans to giving the opinion as drafted.

To its credit, in January of this year, HUD issued for comment a revised form of borrower's counsel opinion and took in account a number of the comments that have been provided formally and informally by counsel to borrowers and HUD lenders. For example, HUD proposes to eliminate opinions on (i) financing statements under the UCC, (ii) usury and (iii) several construction related opinions. I have included a comparison of the 2003 and Proposed 2010 form opinions to highlight some of the progress that has been made from the perspective of a potential opinion giver. However, despite some very real improvements, there remain a number of problems and even a few new ones. In that regard, I have also included the comments provided to HUD on the Proposed 2010 opinion by the HUD Programs Practice Committee of ABA's Form on Affordable Housing & Community Development Law on which I participated.

As reflected in the following language in HUD's "Instructions To Guide For Opinion of Mortgagor's Counsel (a copy of which was included by Millicent Potts of HUD in her presentation):

"The principal purpose of this Guide remains to achieve a uniform format which can be utilized throughout the Nation and which will be familiar to HUD counsel in all jurisdictions. Such a standardized format is crucial in an era when less resources are available to the Department; however, it should be emphasized that certain limited changes can be authorized by HUD field counsel as required by local law or by the unique nature of the transaction. An effort has been made in these revised instructions to specify examples in more (but not all) of those areas where such changes can be authorized. Otherwise, the format of the Guide must be followed and is not open to negotiation. In this regard, revisions cannot be justified because of a particular Opinion having been approved by another HUD

field office. The exercise of discretion by one HUD field counsel in unique circumstances cannot become the basis for any modification to the Opinion. Any requested modification must be analyzed on its own merit and in a particular context."

to-date there has been VERY little flexibility on HUD's part in permitting substantive deviation from its form.

So rather than focus on continuing issues with the opinion form, I am going to focus instead on how opinion givers might get comfortable with providing the opinions which HUD is requiring and a few key questions.

- Cold comfort perhaps but to my knowledge (and based on statements by senior lawyers at HUD), HUD has never brought suit on a borrower's counsel opinion.
- While some of the opinions are perhaps broader or different from opinions required by other sources or multifamily financing, HUD's form does include what I think of as fairly standard and comprehensive assumptions, qualifications and limitations.
- A few key issues to be aware of:
 - HUD requires that the opinion be signed by an attorney admitted to practice in the jurisdiction in which the property is located (the "Property Jurisdiction" under the HUD opinion). And that requirement is not proposed for change. The attorney is signing in a representative capacity of their firm, not individually, but that may very well contravene your firm's opinion policy. I have seen some flexibility on this issue in different HUD offices around the country based on local custom or requirements of your malpractice coverage. For example, signing in the firm name, but indicating in the body of the opinion, which lawyers in the firm have had primary responsibility for preparing the opinion.
 - HUD's current form requires opinions that the borrower has all the necessary permits, licenses, etc. to own and operate the property. (There are two somewhat contradictory opinions concerning permits in the current form opinion.) Thankfully that opinion is deleted in the Proposed 2010 Opinion. In order to give the required opinions now, my sense is that as a practical matter, most counsel limit their due diligence to "material" permits and licenses that are required in the applicable jurisdiction. For example, certificates of occupancy, apartment licenses, building permits for construction loans. Perhaps elevator permits if the building is a high-rise apartment. And counsel typically do not concern with other "minor" licenses like separate licenses for property management personnel if those are required. Finally, for what ever it is worth, counsel can obtain back-up certifications from the borrower and property manager on these issues and although is not directly on point, HUD typically requires the delivery of a letter from the local jurisdiction to the effect that there are no outstanding building code or similar violations.

- HUD requires opinions concerning compliance with "HUD regulations." Those opinions might be difficult if counsel is not regularly involved with transactions involving HUD multifamily financing and, therefore, is not familiar with HUD's various regulations and requirements.
- As indicated above, HUD has generally permitted very little negotiation of its opinion form. Based on the language below from the Proposed 2010 Form it is unclear if that will continue or if there will be perhaps more flexibility:

This document [opinion letter] does not deviate from the format approved by OMB and obtained from HUD on _____ except for such changes as have been identified to and specifically approved by HUD counsel.