

**Instructions to Guide for
Opinion of Borrower's
and Operator's Counsel**
Section 232

**U.S. Department of Housing
and Urban Development**
Office of Residential
Care Facilities

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Public reporting burden for this collection of information is estimated to average 0.0 hours. This includes the time for collecting, reviewing, and reporting the data. The information is being collected to obtain the supportive documentation which must be submitted to HUD for approval, and is necessary to ensure that viable projects are developed and maintained. The Department will use this information to determine if properties meet HUD requirements with respect to development, operation and/or asset management, as well as ensuring the continued marketability of the properties.

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Purposes; Guide Must Be Followed; Applicability to Operator's Counsel; Definitions

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

Please note that these Instructions apply to both the Opinion of Borrower's Counsel and the Opinion of Operator's Counsel, as applicable, but the references to specific documents use the designations found in the Opinion of Borrower's Counsel, references to counsel refer only to "Borrower's Counsel," and these instructions refer simply to the "Opinion" in the singular form.

HUD regards the Borrower's Counsel as essential to the process of preparing and executing the legal and administrative documents necessary to achieve a closing in those healthcare mortgage insurance programs where a Note is endorsed for mortgage insurance by HUD. The definition of any capitalized term or word used herein can be found in these Instructions to Guide for Opinion of Borrower's Counsel, the Guide for Opinion of Borrower's Counsel, the Regulatory Agreement between Borrower and HUD, the Note, and/or the Security Instrument, except that the term "**Program Obligations**" means (1) all applicable statutes and any regulations issued by the Secretary pursuant thereto that apply to the Project, including all amendments to such statutes and regulations, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, and mortgagee letters that apply to the Project, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking

shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Project only to the extent that they interpret, clarify and implement terms in these Instructions to Guide for Opinion of Borrower's Counsel or the Opinion rather than add or delete provisions from such documents. Handbooks, guides, notices, and mortgagee letters are available on HUD's official website: (http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips or a successor location to that site). "Mortgagor" is now referred to as "Borrower," and "Mortgagee" is now referred to as "Lender;" but, those new uses are defined to include "Mortgagor" and "Mortgagee" as those terms are used in Program Obligations. Pursuant to Program Obligations, attorneys or others in a business relationship with the Borrower are defined as "Principals." Borrower's Counsel has significant obligations to its client (Borrower) and to Lender and HUD. In part, these responsibilities entail the exercise of due diligence to help to ensure the accurate and timely preparation, completion and submission of the forms required by HUD in connection with the transaction. Further, the Borrower's Counsel and any other attorneys involved in the transaction must be thoroughly familiar with Program Obligations pertaining to each mortgage insurance transaction in which they each participate. HUD takes seriously the preparation and completion of the various documents involved in the mortgage insurance process (most of which are HUD form documents).

It is essential that the Opinion be followed in both style and substance in order to ensure a timely closing. The Borrower's Counsel is expected to complete a draft Opinion for submission to HUD field counsel along with the other closing documents early enough for HUD to complete its review prior to the date of the closing. The guide forms of opinion require any attorney submitting an opinion to HUD for review to attach a comparison copy that has been "redlined" against the HUD form, so that any deviations are specifically identified. Any deviations must be discussed with HUD field counsel at that time so that they can be resolved prior to the closing. Any material deviation not required by State or local law or otherwise authorized by these instructions must be brought to the attention of the Assistant General Counsel, Multifamily Mortgage Division, by HUD field counsel along with an explanation by Borrower's Counsel as to the necessity for the deviation.

The Opinion can be utilized in connection with all types of insured closings: insured advances or insurance upon completion (for new construction or substantial rehabilitation); initial/final closings (for refinancing, etc.). Furthermore, the Opinion format can be adapted and used in Transfers of Physical Assets (TPAs), Section 241 supplemental loans, and the various refinancing transactions under Section 223. It is important that the correct options be selected in instances where choices are provided and that appropriate deletions or modifications are made to accommodate unique circumstances or programs.

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

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

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

Page 1 and Introduction

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

List of Documents

If there are no brackets around a particular document, the document is one which is commonly used for initial endorsements in cases involving insured advances; however, it is impossible to list every document for every loan. Further, no attempt has been made to list all documents utilized in all types of refinancing. Conversely, some documents may not be utilized in a particular transaction and must be deleted from the list in the actual Opinion. Brackets around the name of the document indicate that the document may or may not be used for every loan. If bracketed documents are not used in a particular loan transaction, then delete such documents from the list in the actual Opinion, but retain the item's letter designation and insert "Intentionally omitted" in place of the name of the document, to speed the review of the opinion and ease comparison with other opinions. Each document executed in connection with the Loan

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

A. Organizational Documents: All of the documents relating to the organization, status, and authorization of Borrower (and the Principal) must be reviewed for compliance with Program Obligations.

A.5. Permits required for the operation of the Project. In all cases, including refinancing, HUD requires that any permits needed for the continued operation of the Project be in place. In existing Projects, HUD must be assured that no new requirements have been imposed that would prevent continued operation of the Project.

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

G. Construction Contract. See instructions under F above.

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

M. Owner-Architect Agreement: This document (now bracketed like Documents F and G) must only be used in cases involving new construction or substantial rehabilitation.

O. Lender's Certificate: All fees, escrowed accounts, etc. must be disclosed in the Lender's Certificate, which now contains a certification (in paragraph 28) that the closing documents

conform to the HUD-approved format except for changes approved by HUD field counsel. In this regard, the document is crucial to HUD's endorsement of the Note for insurance. Borrower's Counsel is not responsible for the content of the document and only needs to review the document in its capacity as Borrower's Counsel to be certain that the document conforms to the transaction Borrower is agreeing to and that the document accurately reflects the fees and escrows, etc. that are required of Borrower.

In secondary financing cases (such as under Section 241) where the consent of the first lender is obtained for a second Security Instrument insured by HUD, a separate document evidencing the consent (for which there is no specified format) is utilized, and it should be listed in the Opinion.

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

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

S. Title Insurance Policy: HUD field counsel should be consulted about the appropriate Title Insurance Policy format.

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

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

Y. Survey: The survey must be signed, sealed and dated within 120 days of the closing. In certain refinancing transactions, an updated survey would not normally be required because no new construction would have taken place and, presumably, nothing would have changed with respect to the building(s) and the site. In such situations, if there is other satisfactory evidence that no site changes have occurred, then counsel may include an affidavit to this effect from the owner, along with the existing survey. If Borrower's Counsel were to become aware of any changes, this would have to be addressed in the Opinion, and HUD may require a survey depending upon the circumstances.

Z. Assurance of Completion (bonds or agreement): This documentation (now bracketed) would only be used in cases involving some construction.

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

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

EE. Docket Search: The Docket Search can be conducted by either the title insurance company, a reputable document search firm, the Borrower's Counsel or any other attorney licensed in the jurisdiction. If Borrower is created or located in a jurisdiction other than the location of the Project, then a record search in both jurisdictions shall be necessary. In the case where a sole-asset borrower is being created within thirty (30) days before the date of the Opinion, a search of the public records in the jurisdiction where Borrower is located (assuming a different location from the others iterated) is unnecessary. The Opinion could be amended in those instances to indicate that particular state of facts; however, all of the other searches would have to be performed.

Opinions

1. This paragraph contains several options depending upon whether or not Borrower's organizational documents were prepared by Borrower's Counsel rendering the Opinion and upon the type of borrower entity. Care must be taken to ensure that the correct option is selected and that the requisite information is inserted correctly. It is intended that, where Borrower or general partner of Borrower or other managing entity is established by

Borrower's Counsel, no reliance on other sources is permitted and Borrower's Counsel must opine as to the due organization of Borrower. A Status Certificate issued by the applicable governmental authority must be dated no more than 30 days prior to the date of the Opinion of Borrower's Counsel. If Borrower is a foreign corporation or partnership, the Opinion must recite the review of all government approvals required to do business in the Property Jurisdiction. If a Status Certificate cannot be obtained from the applicable governmental authority (e.g., for general partnerships), then Borrower's Counsel shall be required to do the due diligence necessary to give the opinion or may engage other counsel to render such opinion. If the Property Jurisdiction is not the state of formation for the borrower entity, Borrower's Counsel must also opine that Borrower is qualified to transact business in the Property Jurisdiction. Such opinion may be made solely on the basis of a certificate from the applicable governmental authorities of the Property Jurisdiction, and if Borrower's Counsel is relying on such certificate(s), then the opinion must expressly identify those certificate(s) and they must be attached to the Opinion as an exhibit.

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

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

Acceptability of Counsel

The attorney signing the Opinion is responsible for ensuring that he or she has the necessary experience, expertise and authority to provide the Lender and HUD with the required opinions relating to the laws of the applicable states and local jurisdictions governing the transaction, and to seek additional opinions when necessary. Borrower's Counsel must opine as to the law of the Property Jurisdiction and must also opine as to the law of the state of Borrower's organization, if different from the Property Jurisdiction. If an attorney rendering the Opinion has a concern about whether its issuance may be considered an unauthorized practice of law, that attorney should contact the relevant authorities for clarification and/or retain additional counsel as necessary. HUD attorneys are not responsible for the actions or determinations of Borrower's Counsel on this matter, unless there is a specific state law or requirement to the contrary.

Signatures

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

Certification of Borrower

A form of Certification of Borrower/Operator, as applicable, is attached as an Exhibit to each Opinion form. The form represents the minimum amount of information that must be obtained from Borrower/Operator, as applicable (but additions, revisions and rephrasings are

acceptable so long as Borrower/Operator is certifying as to factual matters and not legal conclusions).

Identity of Interest

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

Liens

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

Litigation

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

Reliance on Other Opinions

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

Warning Language

This language is not intended to apply to matters of professional legal judgment exercised by Borrower's Counsel.