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**FANNIE MAE MULTIFAMILY FINANCING:  
A ROADMAP FOR BORROWERS AND THEIR COUNSEL**

INDEX:

1.	Introduction.....	2
2.	Fannie Mae: a brief background. ....	2
3.	Loan Securitization. ....	3
4.	DUS Lending; Underwriting and Legal Due Diligence. ....	3
5.	Identification of Borrower and Key Principal(s). ....	4
6.	Organizational Document Review.....	7
7.	Opinion Letter Review.....	8
8.	Loan Documents. ....	10
9.	Title and Survey.....	12
10.	Rate Lock and Closing.....	12
11.	Delivery of the loan to Fannie Mae. ....	133
12.	Assumptions of Existing Fannie Mae Loans .....	13
APPENDIX A:	CLOSING CHECKLIST AND DISTRIBUTION LIST	
APPENDIX B:	BORROWER ORGANIZATIONAL DOCUMENTS CHECKLIST	
APPENDIX C	FORM OF BORROWER’S COUNSEL OPINION	
APPENDIX D	TITLE INSURANCE INSTRUCTIONS	
APPENDIX E	SURVEY CHECKLIST AND FORM OF SURVEYOR’S CERTIFICATE	

## **1. Introduction**

Borrowers often find the loan closing process to be unpleasant because it carries the threat of unknown risks and last minute surprises. Lenders do their best to educate their borrowers and manage borrower expectations about the process yet gaps in knowledge often remain. This article aims to take some of the mystery out of the process by shedding light on the due diligence standards and closing procedures employed by Fannie Mae DUS (Delegated Underwriting and Servicing) lenders. Hopefully it will give borrowers and their counsel a clearer sense of their role in facilitating a smooth and timely closing. One disclaimer: this article is not intended to identify all issues or criteria relevant to a lender's decision to make a Fannie Mae DUS loan, only to give a general overview and address some of the ordinary and extraordinary issues that can arise during the closing process.

## **2. Fannie Mae: a brief background.**

Fannie Mae purchases, sells and otherwise deals with mortgages in the secondary market rather than as a primary lender. To address the credit liquidity crisis resulting from the bank failures occurring after the stock market crash of 1929, Congress chartered Fannie Mae (then known as the Federal National Mortgage Association) specifically to create a secondary market for home mortgages. In 1968, it was split in two: the Government National Mortgage Association (Ginnie Mae) was placed under the jurisdiction of the U.S. Housing and Urban Development and remained wholly owned by the government; FNMA was placed under the supervision of the Office of Federal Housing Enterprises Oversight, an independent office within HUD, and became privately held, although the President of the United States continues to exercise some influence, having the right to appoint five of its eighteen directors. Since 1997 the Federal National Mortgage Association has legally been referred to as Fannie Mae.

Due to their unique federal charters, Fannie Mae, along with its smaller cousins Freddie Mac and the Federal Home Loan Bank System, are often referred to as GSEs or government-sponsored enterprises. They have come to dominate residential mortgage financing in the United States. Fannie Mae itself is the nation's largest source of multifamily financing, having purchased a record \$36B of multifamily loans in 2003.

Fannie Mae brings several advantages to its business. Although Fannie Mae debt is not explicitly backed by the faith and credit of the United States government, its line of credit at the U.S. Treasury provides implicit federal backing. It is subject to lower capital requirements than commercial banks and its enormous size (business volume of \$1.4 trillion dollars in 2003) provides additional leverage. Its securities are exempt from S.E.C. registration requirements and its income is exempt from state and local taxes. Fannie Mae partially passes these benefits through to the ultimate borrowers by acquiring multifamily loans at a lower interest rate than often available from life insurers, commercial banks, conduits or other sources.

Fannie Mae participates in multifamily lending primarily through a fairly exclusive club: its DUS lenders. Each of the twenty-five (as of April 2004) lenders participating in the DUS program qualified by meeting Fannie Mae's capitalization requirements and satisfying other criteria and then entering into an agreement with Fannie Mae governing the terms of the lender's underwriting and servicing authority. This Agreement affords DUS lenders

the privilege of underwriting and delivering individual multifamily loans to Fannie Mae while retaining the servicing rights, but also requires the lender to accept liability for a portion of any losses incurred if a loan is not repaid. The loan delivery process is discussed in Section 11 below.

### **3. Loan Securitization.**

Once a DUS lender makes a multifamily loan and delivers it to Fannie Mae, the securitization process commences. Although alternative executions are also offered, Fannie Mae most often issues a mortgage-backed security (“MBS”) in exchange for a mortgage loan (or a pool of mortgage loans) originated and delivered by a lender. The monthly principal and interest paid by the borrower is collected by the lender and paid over to Fannie Mae for distribution to the MBS holder(s). However, a portion of the interest payment is retained by the lender as a servicing fee and a portion is collected by Fannie Mae for its guarantee of timely payment of principal of and interest on MBS certificates. These fees typically make the interest rate paid by a borrower on a DUS loan at least 80 basis points higher than the interest rate received by the ultimate holders of the MBS certificates.

The addition of Fannie Mae’s credit enhancement earns these MBS certificates triple-A status from the rating agencies, creating an investment vehicle for which there appears to be an almost unlimited appetite. Fannie Mae’s net portfolio of loans (single family and multifamily) exceeds \$750 billion.

### **4. DUS Lending; Underwriting and Legal Due Diligence.**

#### **a. Overview of Closing Process.**

A DUS lender’s legal due diligence process consists of review of title, survey, borrower organizational documents and borrower’s counsel opinion. The lender will also order a UCC search and review the property management agreement (if any), certificates of occupancy and obtain a comfort letter from the local zoning authority. Lenders typically involve outside counsel in this work. A sample Closing Checklist and Distribution List is attached as Appendix A.

Legal due diligence proceeds concurrently with the lender’s underwriting process although circumstances sometimes require one track to outpace the other. The process typically takes 30-45 days but if urgency prevails, review can often be completed more quickly. Recent widespread adoption of new technologies by DUS lenders has unquestionably allowed for the compression of closing timelines.

When the underwriting and legal due diligence have reached a point where the lender is comfortable that loan would comply with Fannie Mae standards (or that the remaining issues can be adequately addressed by waiver), the lender will then issue a loan commitment. The loan commitment states the general terms of the loan and identifies any remaining conditions to “rate lock” and closing. These events will be discussed in Section 10 below.

b. Fannie Mae Requirements; Waivers.

A DUS lender must make loans that comply with the “DUS Guide,” Fannie Mae’s sixteen part lending manual for DUS lenders and their counsel. Lenders may deliver a loan to Fannie Mae only if (a) it complies with the underwriting, legal and other requirements set forth in the DUS Guide or (b) to the extent any aspect of the proposed loan is noncompliant, the lender has either (i) requested a waiver from Fannie Mae of the relevant Guide provision(s) and the waiver request has been approved by Fannie Mae (with or without conditions) or (ii) the Guide has delegated the waiver process to the lender and the lender has determined that the criteria for granting the waiver have been met. Whenever the word “waiver” is used in this article it refers to a waiver of a DUS Guide provision.

Fannie Mae frequently issues “Lender Memos” to its DUS lenders introducing new products, updating underwriting standards or revising legal guidelines. These Memos are ultimately incorporated as revisions to the DUS Guide.

**5. Identification of Borrower and Key Principal(s).**

Nearly all Fannie Mae DUS loans involve both a borrower and one or more “Key Principals.” The lender’s underwriting identifies as Key Principals the persons whose management experience and/or financial resources are important to the creditworthiness of the loan. Key Principals are subject to two primary obligations:

a. Exceptions to Non-Recourse Guaranty.

Unless a loan is very small or presents an unusual risk to the lender, Fannie Mae multifamily loans are non-recourse to the borrower save for the non-recourse carve-outs (sometimes referred to as “bad-boy” provisions) stated in the Note. By executing the “Acknowledgment and Agreement of Key Principal to Personal Liability for Exceptions to Non-Recourse Liability” affixed to the Note, the Key Principal guarantees the borrower’s performance of the carve-outs, making the borrower and Key Principal both personally liable to the lender for repayment of a portion of the indebtedness equal to any loss or damage suffered by the lender as a result of:

i. failure of the borrower to pay to lender upon demand after an Event of Default, all rents to which the lender is entitled under the Security Instrument and the amount of all security deposits collected by the borrower from tenants then in residence;

ii. failure of the borrower to apply all insurance proceeds and condemnation proceeds as required by the Security Instrument;

iii. failure of the borrower to comply with the provisions of the Security Instrument relating to the delivery of books and records, statements, schedules and reports;

iv. fraud or written material misrepresentation by the borrower, Key Principal or any officer, director, partner, member or employee of the borrower in

connection with the application for or creation of the indebtedness or any request for any action or consent by the lender; or

v. failure to apply rents, first, to the payment of reasonable operating expenses (other than Property management fees that are not currently payable pursuant to the terms of an Assignment of Management Agreement or any other agreement with Lender executed in connection with the Loan) and then to amounts payable under this Note, the Security Instrument or any other Loan Document (except that the borrower will not be personally liable (1) to the extent that the borrower lacks the legal right to direct the disbursement of such sums because of a bankruptcy, receivership or similar judicial proceeding, or (2) with respect to rents that are distributed in any calendar year if the borrower has paid all operating expenses and Debt Service Amounts for that calendar year).

The borrower also becomes personally liable to the lender for the repayment of all of the Indebtedness if it acquires any property or operation of any business not permitted by the “single asset borrower” provisions of the Security Instrument; or a Transfer that is an Event of Default under the provisions of the Security Instrument stated in part b. below occurs. Unlike most conduit loans, a voluntary bankruptcy filing by the borrower does not in and of itself cause the loan to become recourse to the Key Principal.

b. Transfer Restrictions in Security Instrument.

Section 21 of the Security Instrument limits the borrower’s right to transfer its interest in the Property and the Key Principal’s right to transfer its interest in the borrower. Any of the following constitute an Event of Default under the Security Instrument:

- i. a Transfer (as defined below) of all or any part of the Property or any interest in the Property;
- ii. a Transfer of a Controlling Interest (as defined below) in the borrower;
- iii. a Transfer of a Controlling Interest in any entity which owns, directly or indirectly through one or more intermediate entities, a Controlling Interest in the borrower;
- iv. a Transfer of all or any part of Key Principal's ownership interests (other than limited partnership interests) in the borrower, or in any other entity which owns, directly or indirectly through one or more intermediate entities, an ownership interest in the borrower;
- v. if Key Principal is an entity, (A) a Transfer of a Controlling Interest in Key Principal, or (B) a Transfer of a Controlling Interest in any entity which owns, directly or indirectly through one or more intermediate entities, a Controlling Interest in Key Principal;

vi. if the borrower or Key Principal is a trust, the termination or revocation of such trust; and

vii. a conversion of the borrower from one type of legal entity into another type of legal entity, whether or not there is a Transfer.

**"Transfer"** means:

i. a sale, assignment, transfer or other disposition (whether voluntary, involuntary or by operation of law);

ii. the granting, creating or attachment of a lien, encumbrance or security interest (whether voluntary, involuntary or by operation of law);

iii. the issuance or other creation of an ownership interest in a legal entity, including a partnership interest, interest in a limited liability company or corporate stock;

iv. the withdrawal, retirement, removal or involuntary resignation of a partner in a partnership or a member or manager in a limited liability company; or

v. the merger, dissolution, liquidation, or consolidation of a legal entity.

"Transfer" does not include (i) a conveyance of the Mortgaged Property at a judicial or non-judicial foreclosure sale under this Instrument or (ii) the Mortgaged Property becoming part of a bankruptcy estate by operation of law under the United States Bankruptcy Code. For purposes of defining the term "Transfer," the term "partnership" shall mean a general partnership, a limited partnership, a joint venture and a limited liability partnership, and the term "partner" shall mean a general partner, a limited partner and a joint venturer.

A Transfer of a **"Controlling Interest"** means, with respect to any entity, the following:

i. if such entity is a general partnership or a joint venture, a Transfer of any general partnership interest or joint venture interest which would cause the Initial Owners to own less than 51% of all general partnership or joint venture interests in such entity;

ii. if such entity is a limited partnership, a Transfer of any general partnership interest;

iii. if such entity is a limited liability company or a limited liability partnership, a Transfer of any membership or other ownership interest which would cause the Initial Owners to own less than 51% of all membership or other ownership interests in such entity;

iv. if such entity is a corporation (other than a Publicly-Held Corporation) with only one class of voting stock, a Transfer of any voting stock which would cause the Initial Owners to own less than 51% of voting stock in such corporation;

v. if such entity is a corporation (other than a Publicly-Held Corporation) with more than one class of voting stock, a Transfer of any voting stock which would cause the Initial Owners to own less than a sufficient number of shares of voting stock having the power to elect the majority of directors of such corporation; and

vi. if such entity is a trust, the removal, appointment or substitution of a trustee of such trust other than (A) in the case of a land trust, or (B) if the trustee of such trust after such removal, appointment or substitution is a trustee identified in the trust agreement approved by Lender.

The Transfer restrictions in Fannie Mae's form loan documents are generally less restrictive than transfer restrictions found in conduit loan documents. For example, the right to transfer is not conditioned upon satisfying a debt service coverage or loan to value ratio. Many transfers can be structured to comply with the restrictions on Transfer or can gain lender approval although generally a 1% transfer fee will apply in proportion to the percentage interest being transferred. Fannie Mae also delegates to lenders the right to modify the Security Instrument to expand the rights of Key Principals to transfer interests in the borrower amongst themselves.

## **6. Organizational Document Review.**

### **a. Selection of Borrowing Entity.**

A borrower generally must be a limited liability company, limited partnership, general partnership or corporation to qualify for Fannie Mae financing. Individual owners, trusts and co-tenancies consisting of two or more of any of the foregoing types of entities require more extensive lender analysis and often require a waiver.

### **b. Single Asset Requirement.**

During the term of a loan, a borrower may not acquire any real or personal property other than the Property and personal property related to its operation and maintenance, may not operate any business other than the management and operation of the Property; and may not maintain its assets so as to make them difficult to segregate and identify. This provision is intended to facilitate the lender's exercise of its remedies upon an Event of Default. With only a single real estate asset, a borrower will be less likely to succeed in using voluntary bankruptcy to significantly delay its day of reckoning on a project that no longer supports repayment of the loan. Fannie Mae does not require the extensive list of "separateness covenants" promulgated by the rating agencies for conduit-type financings to be incorporated in the borrower's organizational documents; only a simple statement that the borrower's sole purpose is the ownership and operation of the project. For 3MaxExpress loans (a Fannie Mae product for loans up to \$3M), Fannie Mae does not require the borrower to be a single asset entity.

c. Two U.S. Tiers of Ownership.

A borrower may be ultimately owned by foreign persons or entities but only if ownership is held through at least two tiers of domestic (U.S.) entities. The Key Principal(s) of a foreign-owned or controlled Borrower may be foreign citizens provided they own their interest in the borrower through a domestic entity.

d. Borrower organizational document checklist.

Attached as Appendix B is the borrower organizational documents checklist we use to streamline the review process. Fundamental considerations include: (i) does the entity have the power to own and operate the property; (ii) what approval is necessary to authorize the loan; (iii) who may sign the loan documents on behalf of the entity; (iv) whether the purpose of the entity is limited to ownership and operation of the property and related functions and (v) is the entity required to continue its existence until a date that is at least several years after the scheduled maturity date of the loan.

e. Execution of Loan Documents by Power of Attorney

A Key Principal or individual borrower sometimes inquires whether he or she may sign a loan document by granting a power of attorney to another party. Generally DUS lenders will not allow this.

**7. Opinion Letter Review.**

a. Form of Opinion.

Fannie Mae requires a different form of opinion letter from the borrower's counsel for different loan "products". The standard form of opinion, required for loans on ordinary apartment projects, is attached as Appendix C. This form does not require borrower's counsel to opine on the enforceability of the loan documents unless the borrower and lender have agreed to a non-standard modification to the loan documents. The form contains customary assumptions and qualifications. If an enforceability opinion is required, borrower's counsel may add additional qualifications if consistent with opinion practice in the jurisdiction as recognized by the published report of an opinion letter committee of the state bar. However, the limited scope of Fannie Mae's enforceability opinion makes most qualifications unnecessary: Counsel must only opine that (subject to certain qualifications) the unenforceability of any particular provision(s) in the loan documents will not preclude (a) the enforcement of the obligation of the borrower to pay the principal, interest, late charges, if any and prepayment premium, if any, as provided in the Note, and (b) the foreclosure of the Security Instrument upon the event of a material breach. See Paragraph 4 of Appendix C.

On loans secured by more heavily regulated types of multifamily projects, such as senior housing and manufactured housing communities, not only is an enforceability opinion required, but so are numerous opinions concerning licensure, zoning and other matters. Lenders encourage borrowers to engage counsel as early as possible in the process so that counsel has enough time to complete the due diligence required to give the opinion.

b. Opinion due diligence.

At a minimum, the lender expects borrower's counsel to conduct the following due diligence to give the opinion:

i. Obtain good standing certificate(s) from the state of organization and state of property location and determine whether the borrower (and any general partner of borrower) are duly organized and validly existing;

ii. Review the borrower's organizational documents and any amendments thereto, as well as the organizational documents of any general partner(s) or manager(s) of the borrower, to determine whether the borrower has the authority to own and operate the Project and determine who will be authorized to execute the loan commitment and the loan documents;

iii. Prior to closing, determine whether the borrower has duly executed the loan documents;

iv. Review the Certificate of Borrower attached to the opinion letter form as Exhibit A (not to be confused – as it often is – with the loan document of the same name discussed in Section 7.f below) with a representative of the borrower, making reasonable inquiry regarding the certifications, and obtain the signature of the borrower and each Key Principal on the Certificate (counsel may include additional representations in the Certificate and occasionally we see a Certificate that has been doubled in length with additional representations to borrower's counsel); and

v. Review the loan documents to determine that borrower's performance of their terms will not conflict with its organizational documents.

c. Date of Opinion.

Both the opinion letter and the Certificate must be dated the actual date of closing, despite that the loan documents may be dated as of some other date. Lenders generally ask borrower's counsel to deliver the opinion and Certificate undated so that they can be dated correctly by the escrow agent upon closing.

d. Counsel with Financial Interest in Project.

Every Fannie Mae opinion letter form requires counsel to affirm that it has no interest in the borrower, the lender or the Project, other than the payment of its fee. Occasionally counsel owns an interest in the borrower and cannot make this affirmation without some qualification. In most cases, counsel will still be allowed to give the opinion provided that counsel timely and accurately discloses its interest. Borrower's counsel should inform the lender's counsel so that a waiver can be requested. In deciding whether to approve the waiver request (allowing counsel to qualify its affirmation of non-ownership), Fannie Mae will consider the percentage of ownership, the experience and reputation of counsel and any other factors it deems relevant in light of the lender's underwriting of the loan.

e. Multiple Opinions Required.

If the “borrower organization” state and the “property location” state are not one and the same, counsel licensed to practice in each state must be engaged to give the opinion, which is bifurcated so that opinions relating to the organization of the borrower are given by the borrower organization state counsel, opinions relating to the property jurisdiction are given by the property location state counsel and hybrid opinions are given by both counsels. If counsel is happens to be licensed to practice in both jurisdictions, a single opinion may be rendered. Occasionally the borrower and the Key Principal (or two co-tenant borrowers) must be represented by separate counsel in which case each must render an opinion on matters concerning that counsel’s client.

f. No Opinion Required.

For 3MaxExpress loans, Fannie Mae does not require an opinion of borrower’s counsel provided the form loan documents are not modified by a non-standard modification.

g. Delivery of the opinion.

Prior to closing, counsel must deliver an original signed opinion letter with a signed copy of the Certificate of Borrower and a redlined draft showing all changes and insertions made to the Fannie Mae form.

**8. Loan Documents.**

a. Generally.

Fannie Mae transitioned from pre-printed, fill-in-the-blank loan document forms to computer data files (Word or WordPerfect) in 1998 and simultaneously substantially revised many of its forms. The lender generally provides the applicable loan document forms to the borrower at the same time it sends out its warm-up package.

Borrowers often identify the comparatively limited list of non-recourse carveouts as one of the competitive advantages of Fannie Mae’s multifamily loan products, as compared to the other GSE’s, conduits and life insurers. Fannie Mae’s approach has been to try to make the loan covenants fair and borrower-friendly, to the extent these goals can be reconciled with appropriate prudence for an institutional lender and acceptance of the product by MBS investors. Fannie Mae rarely grants requests for non-standard modifications to loan documents and if it does so it usually requires an enforceability opinion from borrower’s counsel. If a borrower desires a limited number of reasonable modifications and makes the request early in the process a lender will generally give fair consideration to the request.

b. Note and Security Instrument.

Fannie Mae has state-specific forms of Note and Security Instrument which it updates from time to time. The Note was updated most recently in 2003 to simplify and clarify the prepayment premium calculations, among other revisions. Loans may have either a fixed or

adjustable interest rate and most typically have a 10 year term, although projects may qualify for terms of up to 30 years. Interest-only terms and adjustable rate financings are also available.

A borrower may defease its property from the lien of the Security Instrument prior to the maturity date, but a borrower must select from two different means of doing so at the inception of the loan: payment of a prepayment premium or defeasance of the loan by substitution of new collateral. Most borrowers select the prepayment premium option both because it tends to be easier for borrowers to understand and because the pricing of this option has lately been more attractive.

c. UCC-1 Financing Statements.

The borrower's real property constitutes the primary security for the loan. However, Fannie Mae also requires that the lender perfect its security interest (created by the security agreement provision in the Security Instrument) in fixtures and other personalty pursuant to the Uniform Commercial Code in effect in the jurisdiction where the property is located. Although in most states the Security Instrument in itself constitutes a financing statement, Fannie Mae requires the lender to record a UCC-1 fixture filing in the official records of the property jurisdiction as well as file a separate UCC-1 with the state filing office (generally the Secretary of State) of the borrower organization state.

d. Replacement Reserve and Completion Reserve Agreements.

These agreements create lender-controlled escrow accounts for future replacements and immediate repairs and establish the terms and conditions for borrower's withdrawal of funds from the accounts. All loans include a Replacement Reserve Agreement (although deposits are waived if certain underwriting conditions are satisfied). A Completion/Repair Agreement is executed only if the property requires immediate repairs. The lender charges a small fee for maintaining the accounts.

e. Assignment of Management Agreement.

The borrower must assign its interest in any property management agreement to the lender. If the property manager is affiliated with the borrower, the lender may require that the manager subordinate its fee to payments of principal and interest on the loan.

f. Certificate of Borrower.

When delivering a loan to Fannie Mae, a DUS lender must make certain representations and warranties concerning the property and the borrower. The primary purpose of the Certificate of Borrower is to "pass-through" those representations and warranties to the borrower. This document also incorporates many provisions typically found in a customary loan closing or "bring-down" certificate.

g. Agreement to Amend or Comply.

Although most lenders have excellent quality control procedures for creating loan documents, lenders and their counsel neither claim nor achieve perfection; hence the need for

this agreement. In the event any further documentation or information is required in order to enable the lender to deliver the loan to Fannie Mae or deemed necessary or appropriate by the lender in the exercise of its rights under the commitment letter or to correct patent mistakes in the loan documents, materials relating to the lender's title insurance or the funding of the Loan, the borrower must provide the necessary documentation or information. The borrower must also execute and deliver to the lender and/or Fannie Mae such documentation, including but not limited to any amendments, corrections, deletions or additions to the Note, the Security Instrument and the other loan documents as is required by the lender or Fannie Mae; provided, however, that the borrower need not do anything that has the effect of (a) changing the essential economic terms of the loan set forth in the commitment letter, or (b) imposing greater personal liability under the loan documents than that set forth in the commitment letter.

h. Other Documents.

Fannie Mae maintains a library of loan document forms to address unusual conditions and terms and to document various specialty loan products. Fannie Mae also often adds new forms and products in response to opportunities or market trends. Often these forms are generated in cooperation with DUS lenders and their counsel.

**9. Title and Survey.**

Generally a DUS lender or its counsel reviews the title report and survey without significant involvement of borrower's counsel. We have developed title and survey checklists to make as explicit as possible Fannie Mae's requirements. These checklists are attached as Appendices D and E respectively and are fairly self-explanatory. These title and survey requirements do not substantially differ from those of other commercial real estate lenders.

For loans on projects located in California, Oregon, Washington, Nevada or Arizona (other than new construction), Fannie Mae does not require a survey if the title insurer agrees to delete the general survey exception.

**10. Rate Lock and Closing.**

Upon the completion of the legal due diligence, execution of the loan commitment and deposit of the commitment and rate lock fees, the borrower may lock the interest rate on the loan. Once rate lock occurs, the lender is then obligated to close the loan and deliver it to Fannie Mae; a breakage fee will accrue if this does not occur. Lenders require borrowers to pay a substantial deposit prior to rate lock to assure payment of this fee if the loan fails to fund due to a borrower default.

Fannie Mae has recently instituted an "early rate lock" option to give borrowers the right to lock the interest rate prior to completion of all due diligence if certain conditions are met. Payment of an additional fee is required to extend the rate lock. Borrowers may now rate lock up to one year in advance of closing in certain circumstances.

## **11. Delivery of the loan to Fannie Mae.**

Once the loan documents are signed and the closing occurs, the lender has a fairly narrow window of time in which to “deliver” the loan to Fannie Mae. Delivery consists, in part, of packaging the original loan documents, waivers, title policy, insurance certificates, opinion letter and management agreement into indexed, tabbed folders and shipping the folders to Fannie Mae’s “DDF” (document delivery facility) in Virginia. An electronic submission, referred to as MCODES, comprises another part of the delivery process. There paralegals scrutinize the submission to determine whether the documents comply with the applicable provisions of the DUS Guide. Once the delivery is approved by DDF, the transaction is “closed” and an MBS is issued to the account of the lender.

## **12. Assuming an Existing Fannie Mae Loan**

Given the substantial premium assessed upon early repayment of a Fannie Mae multifamily loan, a borrower desiring to sell its project typically seeks to have the buyer assume the existing financing. In such case, the lender underwrites the new buyer according to the then-current underwriting standards. If the new buyer is approved, the parties enter into an Assumption and Release Agreement whereby the buyer and one or more “New Key Principals” assume the obligations of the existing borrower and Key Principal(s), who are generally released except for the original borrower’s obligations under the environmental warranties and covenants which survive the transfer, much as a borrower’s environmental indemnification obligations survive repayment of the loan. If the lender approves the loan assumption, a fee of one percent of the outstanding balance of the loan will be charged at closing; otherwise the transaction costs are fairly minimal.

### **LIST OF APPENDICES:**

APPENDIX A:	CLOSING CHECKLIST AND DISTRIBUTION LIST
APPENDIX B:	BORROWER ORGANIZATIONAL DOCUMENTS CHECKLIST
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**CLOSING CHECKLIST AND DISTRIBUTION LIST**

**[NAME OF LENDER]**

**Name and Location of Project**

<i><b>LEGEND</b></i>	
<b>B</b>	Borrower
<b>BC</b>	Borrower's Counsel
<b>LC</b>	Lender's Counsel
<b>TC</b>	Title Company

<b>ITEM DESCRIPTION</b>	<b>RESPONSIBLE PARTY</b>	<b>STATUS</b>
<b>Financial Statements for Borrower(s) and Key Principal(s)</b>	B	
<b>Organizational documents of Borrower and Borrower-related parties</b>		
Borrower		
Certified copy of Articles of Incorporation/Articles of Organization/Certificate of Limited Partnership	B/BC	
Bylaws/Operating Agreement/Partnership Agreement	B/BC	
Any amendments or restatements of the foregoing	B/BC	
Authorizing Resolution/Incumbency Certificate	B/BC	
Borrower information sheet (Tax ID#, signature block, correct legal name, address, etc.)	B/BC	
Good Standing Certificate from state of formation (unless general partnership)	B/BC	
Certificate of Qualification to do Business in State where Property is Located (if Borrower not formed in that state)	B/BC	
General Partner(s)/Managing Member(s) of Borrower		
Certified copy of Articles of Incorporation/Articles of Organization/Certificate of Limited Partnership	B/BC	
Bylaws/Operating Agreement/Partnership Agreement	B/BC	
Any amendments or restatements of the foregoing	B/BC	
Authorizing Resolution/Incumbency Certificate	B/BC	
Good Standing Certificate (unless general partnership)	B/BC	
Certificate of Qualification to do Business in State where Property is Located (if General Partner/Managing Member not formed in that state)	B/BC	

APPENDIX A  
(continued)

ITEM DESCRIPTION	RESPONSIBLE PARTY	STATUS
<b>Property-related documents</b>		
Commercial Leases	B	
Property Management Agreement	B	
Certificate(s) of Occupancy	B	
Business License	B	
Rent Roll	B	
<b>Title</b>		
Preliminary title report/title commitment	BC/TC	
UCC/Judgment/Tax Lien search	BC/TC	
Title exception documents	BC/TC	
Proforma title policy	BC/TC	
Final title policy (at closing)	BC/TC	
<b>ALTA Survey</b>	B	
<b>Property and Liability Insurance (Lender's insurance requirements sent under separate cover)</b>	B	
<b>Loan Documents</b>		
Note	LC	
Deed of Trust	LC	
Replacement Reserve and Security Agreement	LC	
Completion/Repair and Security Agreement (if required)	LC	
Assignment of Management Agreement	LC	
Certificate of Borrower	LC	
Agreement to Amend or Comply	LC	
Subordination, Non-Disturbance and Attornment Agreement (if required)	LC	
UCC-1 and exhibits thereto	LC	
Other loan documents	LC	
<b>Borrower's Counsel opinion (State law of (i) situs of Property and (ii) Borrower entity formation)</b>	BC	
<b>Payoff letter(s) and release documents for existing financing</b>	BC/TC	
<b>Closing Instructions and Settlement Statement</b>	LC/TC/B	

APPENDIX B

**BORROWER ORGANIZATIONAL DOCUMENTS CHECKLIST**

Date Received: \_\_\_\_\_ Reviewed by: \_\_\_\_\_ Date: \_\_\_\_\_

NAME OF LOAN: \_\_\_\_\_ F&L Matter #: \_\_\_\_\_

BORROWER: \_\_\_\_\_ LENDER: \_\_\_\_\_

BORROWER COUNSEL: \_\_\_\_\_ PHONE# \_\_\_\_\_

ENTITY TYPE (circle one): LLC (member mngd), LLC (manager mngd) LP GP Trust Ind. Corp.

IF LLC, LP or GP, NAME OF MANAGER(S)/GEN. PARTNER(S): \_\_\_\_\_

State of Formation: _____	Tax ID #: _____	Org. ID #: _____
---------------------------	-----------------	------------------

IDENTIFY AUTHORITY FOR THE INFORMATION BELOW:

Purpose Clause Sufficient?: Y /N \_\_\_\_\_ Single Purpose Entity? Y /N \_\_\_\_\_ (If no, inform Lender).

What Approval Is Required? \_\_\_\_\_

Who Is Authorized to Sign?: \_\_\_\_\_

Does Entity terminate on specific date? If yes, \_\_\_\_\_ (must be => 5 yrs after loan matures)

Does Borrower's Name Exactly Match the Proforma/Title Report? Y / N \_\_\_\_\_

Other Issues of Concern? \_\_\_\_\_

Is the Property located in a state other than where the borrowing entity is organized? \_\_\_\_\_ If yes, is a separate opinion required? \_\_\_\_\_ Where will the UCCs be filed? \_\_\_\_\_

Document	Draft	Final	Document	Draft	Final
Articles or Certificate			Borrowing Resolution		
Operating Partnership Agreement			Amendment (if any)		
Certificate of Status			Other:		

**Proposed Signature Block:**

Comments Sent \_\_\_\_\_: Copies of final executed docs approved: \_\_\_\_\_

APPENDIX C

[Opinion of Borrower's Counsel on Origination of Mortgage Loan  
Without Enforceability Opinion]

[insert loan closing date], \_\_\_\_\_

Fannie Mae  
c/o DDF  
13150 Worldgate Drive  
Herndon, VA 20170

[DUS Lender]  
[Address]

Re: Lender: \_\_\_\_\_  
Borrower: \_\_\_\_\_  
Project: \_\_\_\_\_  
Location: \_\_\_\_\_  
Loan Amount: \$ \_\_\_\_\_

Ladies and Gentlemen:

We have acted as [special/general] counsel to [name], a [type of entity] (the "Borrower"), [\_\_\_\_\_, the general partner of the Borrower] [and] [\_\_\_\_\_] (the "Key Principal[s]") in connection with a mortgage loan (the "Loan") in the original principal amount of \$ \_\_\_\_\_ from [Lender] (the "Lender") to the Borrower. [We have also acted as [special/general] counsel to Borrower in connection with a subordinate mortgage loan (the "Subordinate Loan") in the original principal amount of \$ \_\_\_\_\_ from [name] (the "Subordinate Lender"), a [type of entity] to the Borrower.] We have been advised by the Borrower that the proceeds of the Loan are to be used to [insert refinance a loan secured by, rehabilitate and/or purchase] a multifamily residential property known generally as [name of project] (the "Project") located at [address] in [state and local jurisdictions].

We have been advised by the Lender that it expects to sell the Loan to Fannie Mae, pursuant to the terms of Fannie Mae's Delegated Underwriting and Servicing product line. The Borrower has requested that we deliver this opinion to you, has consented to reliance by Lender's counsel in rendering its opinion to the Lender and Fannie Mae and to reliance by the Lender and Fannie Mae on this opinion in making and purchasing, respectively, the Loan, and has waived any privity between the Borrower and us in order to permit you to so rely on this opinion. We understand and, with the consent of the Borrower, consent to your so relying on this opinion.

In our capacity as counsel to the Borrower, we have examined the following:

- A. Multifamily Note, dated as of \_\_\_\_\_, \_\_\_\_\_, in the original principal amount of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) executed by the Borrower in favor of the Lender (the "Note");
- B. Multifamily [Deed of Trust] [Mortgage] [Deed to Secure Debt,] Assignment of Rents and Security Agreement, dated as of \_\_\_\_\_, executed by the Borrower for the benefit of

APPENDIX C  
(continued)

the Lender (the "Security Instrument"), granting a security interest in the Project as more specifically described in the Security Instrument (the "Property");

C. Two (2) Uniform Commercial Code Financing Statements signed by the Borrower as debtor and naming the Lender as secured party (the "Financing Statements");

D. Replacement Reserve and Security Agreement, dated as of \_\_\_\_\_, \_\_\_\_\_, executed by the Borrower and the Lender;

E. Certificate of Borrower, dated as of \_\_\_\_\_, \_\_\_\_\_;

F. Assignment of Management Agreement, executed by the Borrower, Lender and Managing Agent, dated as of \_\_\_\_\_, \_\_\_\_\_;

G. [Subordination, Non-disturbance and Attornment Agreement dated as of \_\_\_\_\_, \_\_\_\_\_, executed by the Borrower, Lender and [name of tenant of Project;] [if applicable]

H. [Completion/Repair and Security Agreement, dated as of \_\_\_\_\_, \_\_\_\_\_, executed by the Borrower and the Lender;] [if applicable]

I. Agreement to Amend or Comply, dated as of \_\_\_\_\_, \_\_\_\_\_, executed by the Borrower.

J. Acknowledgement and Agreement of Key Principal to Personal Liability executed by the Key Principal and annexed to the Note ("Acknowledgment");

K. [List all other documents executed in connection with the Loan;]

L. Loan Commitment between the Borrower and the Lender, dated \_\_\_\_\_, \_\_\_\_\_;

M. Certified copies of the [describe organizational documents] of the Borrower, and of the [describe organizational documents] of each general partner of the Borrower (collectively, the "Organizational Documents");

N. Certified copies of the borrowing resolutions of the Borrower and each general partner, if any;

O. [With respect to the Borrower (i) certificates of [good standing/identify proper name of certificate] issued by the State of \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_ and by the State of \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_ and (ii) [identify proper name of the certificate(s) of authority to transact business if Borrower's state of organization is other than the Property jurisdiction] issued by the State of \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_.]

With respect to each general partner of the Borrower (i) certificates of [good standing/identify proper name of certificate] issued by the State of \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_ and by the State of \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_ and (ii) [identify proper name of the certificate(s) of authority to transact business if Borrower's state of organization is other than the Property jurisdiction] issued by the State of \_\_\_\_\_ on \_\_\_\_\_, \_\_\_\_\_ (collectively, the "Good Standing Certificates");]

APPENDIX C  
(continued)

P. A Certificate of the Borrower attached to this opinion as Exhibit A (the “Borrower’s Certificate”);

Q. Title insurance policy number \_\_\_\_\_ issued by \_\_\_\_\_ to the Lender, dated \_\_\_\_\_, \_\_\_\_\_, together with all endorsements (the “Title Policy”);

- OR -

Proforma title insurance policy number \_\_\_\_\_, issued by \_\_\_\_\_ to the Lender, dated \_\_\_\_\_, \_\_\_\_\_, together with all endorsements (the “Title Policy”);

- OR -

Title insurance commitment number \_\_\_\_, issued by \_\_\_\_\_ to the Lender, dated \_\_\_\_\_, \_\_\_\_\_, together with all endorsements[, as modified,] to such commitment as of the date of this opinion (the “Title Commitment”);

R. [Subordination Agreement dated \_\_\_\_\_, \_\_\_\_\_ by and among Borrower, Lender and the Subordinate Lender (the “Subordination Agreement”). In addition, list all other documents executed in connection with any other loan secured by all or part of the Property (the “Subordinate Loan”)]; and

S. Such other documents, matters, statutes, ordinances, published rules and regulations, published judicial and governmental decisions interpreting or applying the same, and other official interpretations as we deem applicable in connection with this opinion.

The documents listed in A through L above are referred to collectively as the “Loan Documents”. The documents listed in M through S above are referred to collectively as the “Ancillary Documents”. The documents listed in A through S above are referred to collectively as the “Documents”.

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

In reaching the opinions set forth below, we have assumed the due authorization, execution and delivery of all Documents by all parties to the Loan other than the Borrower and Key Principal[s]. In addition, we have also assumed that the Loan Documents accurately reflect the complete understanding of the parties with respect to the transactions contemplated thereby and the rights and obligations of the parties thereunder. We have also assumed that the terms and conditions of the Loan as reflected in the Loan 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 Loan Documents. We have made reasonable inquiry of the Borrower with respect thereto and, based on such inquiries, our review of the Loan Commitment and the Ancillary Documents, and our knowledge, nothing has come to our attention that leads us to believe that we are not justified in so assuming.

APPENDIX C  
(continued)

In rendering this opinion we have, with your approval, relied as to certain matters of fact on the Ancillary Documents, as set forth herein. We have made reasonable inquiry of the Borrower as to the accuracy and completeness of the Ancillary Documents and based on such inquiries and our knowledge, nothing has come to our attention that leads us to believe that we are not justified in so relying thereon.

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

1. [Based solely on the Good Standing Certificate(s), copies of which are attached hereto as Exhibit [B]], the Borrower is a [name of entity], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_ [, and is qualified to transact business as a foreign [name of entity] in [Property jurisdiction].]

OR, IF THE BORROWER IS A TRUST:

[The Borrower is [name of the type of trust] validly existing under the laws of [jurisdiction] [, and is qualified to transact business as a foreign entity in [Property jurisdiction].]

AND, IF THE GENERAL PARTNER OF ANY TYPE OF BORROWER IS AN ENTITY:

[Based solely on the Good Standing Certificates, copies of which are attached hereto as Exhibit [C],] the general partner of the Borrower is a [name of entity], duly organized, validly existing and in good standing under the laws of \_\_\_\_\_ [and is qualified to transact business as a foreign \_\_\_\_\_ in [Property jurisdiction].]

2. The Borrower has the [corporate/partnership/trust] authority to execute, deliver and perform its obligations under the Loan Documents.

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

4. [Each of the Loan Documents has been duly executed and delivered by the Borrower, and the individual(s) executing the Loan Documents on behalf of the Borrower have the authority and legal capacity to do so.]

- OR IF THE LOAN DOCUMENTS HAVE BEEN MODIFIED OTHER THAN BY A STANDARD SCHEDULE OR EXHIBIT AND AN ENFORCEABILITY OPINION IS REQUIRED -

[Each of the Loan Documents has been duly executed and delivered by the Borrower, and the individual(s) executing the Loan Documents on behalf of the Borrower have the authority and legal capacity to do so. Each of the Loan Documents constitutes the valid and legally binding obligation of the Borrower, enforceable against the Borrower 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

APPENDIX C  
(continued)

(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 the foregoing subparagraphs (i) and (ii), such unenforceability will not preclude (a) the enforcement of the obligation of the Borrower to pay the principal, interest[, late charges, if any] and prepayment premium, if any, as provided in the Note, and (b) the foreclosure of the Security Instrument upon the event of a material breach.]

5. [The Acknowledgement and Agreement of Key Principal to Personal Liability for Exceptions to Non-Recourse Liability has been duly executed and delivered by [name] and [name] in [his/her/their] individual capacity as Key Principal[s].]

- OR -

[The Exceptions to Non-Recourse Guaranty has been duly executed and delivered by [name] and [name] in [his/her/their] individual capacity as the Key Principal[s].]

6. The execution and delivery of, and the performance of the obligations under, the Loan Documents, will not violate the Organizational Documents of the Borrower.

7. Based solely upon (a) our knowledge and (b) the Borrower's Certificate, the execution and delivery of the Loan Documents will not (i) cause the Borrower to be in violation of, or constitute a material default under the provisions of any agreement to which the Borrower is a party or by which the 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 Borrower is subject, and (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever upon any of the property or assets of the Borrower, except as specifically contemplated by the Loan Documents.

8. Based solely upon (a) our knowledge and (b) the Borrower's Certificate, there is no litigation or other claim pending before any court or administrative or other governmental body or threatened against the Borrower, the Key Principal, the Property, or any other properties of the Borrower or the Key Principal [, except as identified on Exhibit [D]].

9. Based solely on (a) our knowledge and (b) the Borrower's Certificate, no authorization, consent, approval, or other action by, or filing with, any [organizational and property jurisdictions] or federal court or governmental authority is required in connection with the execution and delivery by the Borrower of the Loan Documents.

10. [The Subordination Agreement has been duly executed and delivered by the Borrower.]

11. [The Borrower can sue and be sued in [Property jurisdiction] without the necessity of joining any of the beneficiaries of the Borrower, including without limitation, a suit on the Note or a foreclosure proceeding arising under the Security Instrument. Venue for any foreclosure proceeding under the Security Instrument may be had in [Property jurisdiction]. The laws of [Property jurisdiction] govern the interpretation and enforcement of the Loan Documents notwithstanding that the Borrower may be formed in a jurisdiction other than [Property jurisdiction]. The Borrower is an irrevocable trust that has a term longer than the term of the Loan and the term of the irrevocable trust is not affected by the terms of any of the beneficiaries' interests.]

APPENDIX C  
(continued)

We express no opinion as to the laws of any jurisdiction other than the laws of [the Property jurisdiction and the state of Borrower's organization if it is not the same as the Property jurisdiction] 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 state of Borrower's organization if it is not the same as the Property jurisdiction] 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 we become aware of any facts that might change the opinions expressed above after the date of this opinion.

We confirm that we do not have any financial interest in the Project, the Property, or the Loan, and that other than as counsel for the Borrower, we have no interest in the Borrower or the Lender and do not serve as [a director, officer or] [an] employee of the Borrower or the Lender. We have no undisclosed interest in the subject matters of this opinion.

The foregoing opinions are for the exclusive reliance of the Lender, Fannie Mae and by any subsequent holder of the Note.

Very truly yours,  
[FIRM NAME}

\_\_\_\_\_  
[Authorized Signature]

APPENDIX C  
(continued)

**LIST OF EXHIBITS**

- EXHIBIT A - CERTIFICATE OF BORROWER
- EXHIBIT B - CERTIFICATES OF GOOD STANDING OF BORROWER
- EXHIBIT C - CERTIFICATES OF GOOD STANDING OF GENERAL PARTNER OF  
BORROWER
- EXHIBIT D - LIST OF LITIGATION

APPENDIX C  
(continued)

EXHIBIT A  
TO OPINION OF BORROWER'S COUNSEL

CERTIFICATE OF BORROWER

This Certificate of Borrower is made the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_, (the "Borrower") and \_\_\_\_\_ (the "Key Principal") for reliance upon by \_\_\_\_\_ (the "Borrower's Counsel") in connection with the issuance of an opinion letter dated of even date herewith (the "Opinion Letter") by ("Borrower's Counsel") as a condition of settlement of the \$\_\_\_\_\_ loan (the "Loan") from [Lender] to Borrower. In connection with the Opinion Letter, the Borrower and Key Principal hereby certify to Borrower's Counsel for its reliance, the truth, accuracy and completeness of the following matters:

1. The Organizational Documents (as defined in the Opinion Letter) are the only documents creating or governing the internal affairs of the Borrower or authorizing the Loan, and the Organizational Documents have not been amended or modified except as stated in the Opinion Letter.

2. The terms and conditions of the Loan as reflected in the Loan Documents (as defined in the Opinion Letter) 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 Loan Documents.

3. All tangible personal property of the Borrower in which a security interest is granted under the Loan Documents (other than accounts or goods of a type normally used in more than one jurisdiction) is located at the Property (as defined in the Opinion Letter) and the Borrower's [Chief Executive Office] [only place of business] [residence] is located in \_\_\_\_\_.

4. No authorization, consent, approval, or other action by, or filing with, any [organizational and property state(s)] or federal court or governmental authority is required in connection with the execution and delivery by the Borrower of the Loan Documents.

5. The execution and delivery of the Loan Documents will not (i) cause the Borrower to be in violation of, or constitute a material default under the provisions of any agreement to which the Borrower is a party or by which the 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 Borrower is subject, and (iii) result in the creation or imposition of any lien, charge, or encumbrance of any nature whatsoever upon any of the property or assets of the Borrower, except as specifically contemplated by the Loan Documents.

6. There is no litigation or other claim pending before any court or administrative or other governmental body or threatened against the Borrower, the Key Principal, the Property, or any other properties of the Borrower or the Key Principal [except as identified on Exhibit [D], List of Litigation, in the Opinion Letter.]

APPENDIX C  
(continued)

IN WITNESS WHEREOF, the Borrower and Key Principal have executed this Certificate of Borrower effective as of the date set forth above.

BORROWER:

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

KEY PRINCIPAL:

\_\_\_\_\_

## APPENDIX D

### **TITLE INSURANCE INSTRUCTIONS FOR FANNIE MAE DUS LOANS**

DUS Lender has been requested to make a mortgage loan for the acquisition or refinancing of a multifamily housing project. Immediately following the closing, DUS Lender intends to sell and deliver the mortgage loan to Fannie Mae. To assist you in providing title services for this transaction and to assure a smooth and timely closing, we are providing these instructions and information regarding the preparation of the title commitment, the specimen or pro forma policy, and the lender's title insurance policy.

The commitment, specimen policy, endorsements and title exceptions will be reviewed by DUS Lender and its counsel. Please send copies of these documents to our closing officer and counsel at the addresses set forth in the list of members of the team assembled to close this transaction. Our counsel will be your principal contact should you have any questions to be answered.

### **ACCEPTABLE TITLE INSURANCE COMPANY**

The maximum single risk assumed by any single title insurer may not exceed 25% of that company's capital, surplus, and statutory reserves. Excess amounts may be covered by acceptable reinsurance arrangements with other acceptable title insurance companies.

The title insurance policy must be written by an insurer that has an acceptable rating from at least one of the following independent rating agencies: Demotech, Inc., Duff and Phelps Credit Rating Company; LACE Financial Corporation; Moody's Investors Service; or Standard and Poor's Inc. Acceptable ratings include the following: a "Financial Stability Rating" of "S" (Substantial) or better or a "Statutory Accounting Rating" of "C" (Average) or better from Demotech, Inc.; a "BBB" or better rating from Duff and Phelps Credit Rating Company; a "C" or better rating from LACE Financial Corporation; a "BAA" or better rating from Moody's Investor Service; or a "BBB" or better rating from Standard and Poor's Inc.

The title insurance company must remove (by endorsement or written waiver) any creditors' rights exception or exclusion from the title insurance policy. If a title insurance company will not (or cannot, because of state regulatory requirements) remove a creditors' rights exception or exclusion, kindly contact lender's counsel immediately.

### **COMMITMENT TO INSURE TITLE**

We request that you provide an executed counterpart of your commitment to insure title (the "Commitment") well in advance of closing, together with a "Specimen" or "Pro Forma" Policy (more particularly described below). The Commitment shall:

Show the named insured as: "Fannie Mae and/or DUS Lender, a New York limited liability company, their successors and/or assigns, as their interests may appear";

Provide coverage in the full amount of the loan;

Include as attachments copies of the Required Endorsements and Policy Provisions listed in Part III, Item 8 below;

APPENDIX D  
(continued)

Provide assurance that the Required Endorsements will be issued with the Lender's Title Policy;

Include as attachments legible copies of all recorded instruments which will be listed as exceptions to the coverage of the Commitment.

**SPECIMEN POLICY**

The Specimen or Pro Forma Policy shall be in the form of a Standard 1992 American Land Title Association ("ALTA") form of lender's title insurance policy or 1990, 1987 or 1970 Policy (amended 10/17/70 and 10/17/84) ALTA loan form policies. This policy shall meet the requirements listed below. This document should not be signed but should have the word(s) "Specimen" or "Pro Forma" (or words of similar import indicating that it is not legally effective) handwritten or stamped thereon. We will review and provide comments on the Specimen Policy. After approval by us of the Specimen Policy, including the Required Endorsements and Policy provisions discussed below, the information will be transferred onto a new policy form which shall become the Lender's Title Policy to be issued at closing.

If your company is unable to issue the Lender's Title Policy in this form and in this edition, please communicate with us immediately.

The basic requirements for the Specimen Policy (and Lender's Title Policy) are as follows:

Name of Insured: The Insured in Schedule A, Paragraph 1, shall be "Fannie Mae and/or DUS Lender, a [state of formation and type of entity], their successors and/or assigns, as their interests may appear".

Description of Mortgage: The description of the mortgage appearing in Schedule A, Paragraph 3, shall include the precise name of the mortgage instrument (usually, "Multifamily [Deed of Trust] [Mortgage], Assignment of Rents and Security Agreement"); the names of the parties; the date of the mortgage, the principal amount of the loan; the name of the trustee (if applicable) and spaces for recording data to be filled in at closing, i.e., the recorder's office, the date of recordation and for book and page numbers and/or instrument number. If the recorder does not give book and page numbers and/or instrument numbers at closing, spaces should be provided for the exact date and time of recordation; in such case, a later endorsement will be required reciting the book and page numbers and/or instrument numbers. The following is an example which should be followed:

"The Mortgagee's Title Policy will insure the following [Deed of Trust] [Mortgage]: Multifamily [Deed of Trust] [Mortgage] Assignment of Rents, and Security Agreement dated as of \_\_\_\_\_, 200\_\_, recorded on \_\_\_\_\_, 200\_\_, under Document No. \_\_\_\_\_ of the \_\_\_\_\_, executed by [Name of Borrowing Entity], a [Type of Borrowing Entity], naming [Name of Trustee] as Trustee and securing the payment of one Note in the principal amount of \$ \_\_\_\_\_ and any other amounts payable under the terms of the said Multifamily

APPENDIX D  
(continued)

[Deed of Trust] [Mortgage], Assignment of Rents and Security Agreement, payable as therein provided to the order of DUS Lender.

Assignment of [Deed of Trust] [Mortgage] executed by DUS Lender, to Fannie Mae, dated \_\_\_\_\_, 200\_\_, filed \_\_\_\_\_, 200\_\_ recorded under File No. \_\_\_\_\_, Official Records, \_\_\_\_\_ County, \_\_\_\_\_.

Additionally secured by financing statement recorded on \_\_\_\_\_, 200\_\_ under \_\_\_\_\_ County Clerk's file no. \_\_\_\_\_ naming [Borrower] as Debtor and Fannie Mae c/o DUS Lender as Secured Party.

Legal Description: The legal description of the Property in the title insurance policy must conform to that shown on the survey of the property and in the Security Instrument. The APN number must appear as an informational note immediately below the legal description. No part of the Property is permitted to be included or assessed under or as part of another tax lot or parcel, and no part of any other property is permitted to be included or assessed under or as part of the tax lot or parcels for the Property. Please contact us immediately if either of these conditions exist.

Effective Date: The effective date of the title insurance policy must be no earlier than the date (and time, if the effective date includes time) of recording of the assignment of Security Instrument to Fannie Mae. If the assignment to Fannie Mae is insured by an endorsement, the date of the policy must be extended to the date of this assignment.

A separate Collateral Assignment of Leases will rarely be required. If a separate Collateral Assignment of Leases is necessary in this case, it should be included in Schedule A, in the same paragraph as the mortgage and described as above with spaces for recordation provided as above.

Schedule B Exceptions: The Specimen Policy should divide the list of exceptions in Schedule B into:

Part I (Exceptions which could acquire priority over the lien of the mortgage or a statement that there are no such exceptions)

If Schedule B, Part I indicates the presence of any easements that are not located on the survey or otherwise not exactly locatable, the title insurance policy must provide affirmative insurance against any loss resulting from the exercise by the holder of any easement of its right to use or maintain that easement. CLTA 103.1 or an equivalent endorsement is required for this purpose. If the applicable state insurance board or commission does not permit such coverage to be given, notify DUS Lender and we will contact Fannie Mae to determine whether an alternative proposed by the title insurance company will be acceptable.

APPENDIX D  
(continued)

Part II (Exceptions which you determine to be subordinate to the lien of the mortgage)

Schedule B, Part II should include the following:

A description of the UCC Financing Statement(s) which you will record in the land records and, if appropriate, in the financing records at the local level, with spaces (for completion at closing) for liber and folio numbers or other applicable identifying information, along with the date and place of recording. The following example is acceptable:

“A Financing Statement given as additional security for payment of the indebtedness secured by the Deed of Trust shown in Paragraph 3 of Schedule A, was executed by [Name of Borrowing Entity], a [Type of Borrowing Entity], as Debtor, in favor of Fannie Mae c/o DUS Lender, a [State of Formation and Type of Entity], as Secured Party, recorded on \_\_\_\_\_, 200\_\_, as Entry No. 0000000 in Book 0000 at Page 0000 of \_\_\_\_\_ County Recorder’s Office.

UCC, Tax Lien, Lis Pendens and Judgment Lien Searches: [Please consult with the borrower before taking this step as the borrower may be obtaining this from another source.] Please conduct searches, at both the state and local levels, of the UCC filing records, Tax Lien records, Lis Pendens Records, and Judgment Lien Records for any filings in the name of the owner(s), proposed Borrower (including any known trade names), and any prior owner of the property in the last five years. If the owner is a corporation, the searches shall be in the name of the corporation; if the owner is a partnership, in the name of the partnership and each general partner thereof; and if the project is owned by one or more individuals, then the searches shall be in the names of such individual(s) and any trade name employed by them. Note: These searches must be dated no more than 30 days prior to the date of closing. Please notify us immediately if you are unable to provide any of these services.

Unacceptable Exceptions: The following Exceptions are not permitted by DUS Lender and Fannie Mae:

Exception for Taxes (unless not presently due and payable). Any taxes which are due and payable must be paid at or prior to closing. The policy must expressly insure that any such noted taxes, assessments or other lienable items are not yet due and payable.

Survey Exception. The standard survey exception, if any, to the Policy must be deleted. Unless noted in the cover letter hereto, a survey has been requested and is expected to be forwarded to you by the Borrower or the surveyor as soon as it is available. To expedite the preparation of a complete and accurate survey, please forward to the Surveyor a copy of your Commitment, together with any documents listed as exceptions to the Commitment and describing easements located on or affecting the project.

Mechanics’ and Materialmen’s Lien Exception. Exceptions for mechanics’ and materialmen’s liens are not permitted. If there are any special requirements (e.g., stipulations

APPENDIX D  
(continued)

against liens, owner's affidavits, etc.) which must be met, please notify us and the Borrower immediately.

Standard Exceptions. Standard exceptions (such as for matters not shown on public records) must be deleted. However, the title insurance policy may contain an exception for tenants in possession under residential leases.

Miscellaneous. DUS Lender reserves the right to require insurance over certain exceptions which may be taken, such as urban renewal plans.

Required Endorsements and Policy Provisions: The following are Required Endorsements and Policy Provisions which must be set forth in both the Commitment and the Specimen Policy (to the extent available under applicable State law):

ALTA Form 9 Comprehensive Endorsement.

Property Location Endorsement (CLTA 116).

Environmental Lien Endorsement (ALTA 8.1). [If your state is a "Superlien" state or has similar legislation that would permit a lien to be filed against the property for costs incurred in connection with environmental compliance, please provide us with your version of this endorsement. We will require that the ALTA Endorsement #8.1 indicate that a complete search of the records has been made through the date of Closing and that no claim or action is pending.]

Contiguity Endorsement, if necessary, assuring that all parcels included within the land covered by the policy are contiguous to each other and do not form any overlaps or gaps between said parcels (CLTA 116.4).

Endorsement that the property is contiguous to and has direct access to public streets (CLTA 103.7).

Unlocated Easement Endorsement. If Schedule B, Part I indicates the presence of any easements that are not specifically locatable, then the title insurance policy must provide affirmative insurance against any loss resulting from the exercise by the holder of an easement of its right to use or maintain that easement. CLTA 103.1 or an equivalent endorsement is required for this purpose.

If a survey is required, an endorsement assuring that the land is the same as is delineated on the Survey and that the Survey accurately describes the location and dimension of the exterior boundaries of the land, shows the relationship of the land to public rights-of-way and correctly reflects the absence of any encroachments or easements not otherwise expressly set forth in Schedule B-Part I (CLTA 116.1).

If the policy contains a creditors' rights exclusion (generally set forth in paragraph 5 or 7 of the Conditions and Stipulations of the Policy), an endorsement must be provided to delete this provision. Fannie Mae will not accept any ALTA Mortgagee Policy of Title Insurance unless this provision has been canceled.

APPENDIX D  
(continued)

“Usury,” “doing business,” and “separate tax parcel” endorsements will also generally be required.

The title insurance policy must affirmatively insure that the improvements do not encroach upon the listed easements or insure against all loss or damage due to such encroachment.

Appurtenant Easements Insured. Any appurtenant easements (such as access or utility easements) determined by the Lender (consistent with Fannie Mae requirements and prudent Lender practice) to be necessary to the operation of the Property as underwritten must be set forth as part of the legal description and affirmatively insured as a separate insured interest in land in the title insurance policy.

**LENDER’S TITLE POLICY CLOSING FUNCTIONS AND PROCEDURES**

Lender’s Title Policy. We require that the Lender’s Title Insurance Policy be issued and effective prior to the funding of the loan. The Lender’s Title Policy shall contain all of the provisions of the Specimen Policy (including all Required Provisions and endorsements) as finally approved by us and must bear the “wet ink” signature of an authorized officer or agent of the title company. An agent or representative of the title company should attend the closing. Such individual must be authorized to execute the policy, and all endorsements thereto.

We will need one (1) original and one (1) duplicate original copy of the policy and any endorsements - each with a “wet ink” signature.

It is essential that recordation take place on the same day as the loan closing. Therefore, the representative at the closing should plan to travel to the recorder’s office, or have someone with him or her who will travel to the recorder’s office. If the distance between the site of closing and the courthouse is prohibitive, or for any other reason recordation is not anticipated on the day of closing, please let us know so that we can make alternate arrangements.

We must have one (1) recorder-certified copy of each recorded document no later than twenty-four (24) hours following the closing. In the event that the recorder’s office cannot provide us with recorder-certified copies within twenty-four (24) hours, please notify us immediately. Recorder-certified copies of documents are required as a prerequisite for delivery to and acceptance of the loan by Fannie Mae. A delay in Fannie Mae’s acceptance of the loan will result in significant additional charges to the Borrower.

The bill for your services and all title premiums, recording fees, taxes and other charges is the responsibility of the Borrower.

Disbursement and Insured Closing Letter. DUS Lender expects the title insurer to act as disbursement agent of loan proceeds. If you are an agent of a title insurance company, it will be necessary to have the title insurance company provide us with an insured closing protection letter on your behalf prior to the closing. The original letter should be addressed to DUS Lender and

APPENDIX D  
(continued)

sent to the attention of the DUS Lender's counsel. The insured closing protection letter must authorize you to close the loan and to distribute the loan proceeds in accordance with a closing instruction letter to be provided to you prior to closing (a prototype copy of which is attached hereto). DUS Lender will wire to your account the funds specified in the closing instruction letter. Please provide us with the name of the bank where funds should be wired, the account name and number, and the name of a person from the bank to notify upon receipt of the funds.

Closing Documents. Copies of the Note, Mortgage, Survey and other closing documentation will be delivered to you by us or our counsel for your review prior to closing.

Pay-off Estimates. DUS Lender does not obtain estimates of the pay-off figures for existing indebtedness secured by the project unless the existing indebtedness is a DUS Lender loan. It will be your responsibility as escrow agent to obtain and verify the amount(s) required to retire any and all outstanding loans and, in cooperation with the mortgagor (or Seller, if any) to arrange for satisfactory releases of existing mortgages and termination statements of existing financing statements.

**COINSURANCE AND REINSURANCE**

DUS Lender reserves the right to approve the title insurance company. Coinsurance or reinsurance may be required in certain cases. Please advise us immediately if you expect to obtain reinsurance or coinsurance.

APPENDIX E

**SURVEY CHECKLIST FOR FANNIE MAE DUS LOANS**

**LENDER AND ALTA/ACSM REQUIREMENTS**

Property Name: \_\_\_\_\_  
Date Received: \_\_\_\_\_ Loan No. \_\_\_\_\_  
Property Location (City/State): \_\_\_\_\_  
Surveyor: \_\_\_\_\_  
Survey Date: \_\_\_\_\_ Survey Revision Date: \_\_\_\_\_  
Reviewer: \_\_\_\_\_ Review Date: \_\_\_\_\_

**SHOW ON ALTA MAP**

**OK NOT OK NOTES**

**PROPERTY DESCRIPTION**

Title report/commitment data (name of title company, report number & date) upon which description and easements are based [see ¶5 Surveyor's Certificate ("S Cert.")].

\_\_\_\_\_

Property description written on map and identical to title report/commitment.

\_\_\_\_\_

Bearing & distance for each side written on/at boundary lines [if record bearing is different from survey bearing indicate & explain]. Bearings all read in the same direction (clockwise or counterclockwise).

\_\_\_\_\_

Curved sides, if any, shown by length of arc, central angle, radius and chord distance and bearing [arc is always longer than cord].

\_\_\_\_\_

To establish a point of beginning for metes and bounds surveys, a monument (brass cap, iron pipe etc.) from which survey started or a "found" monument at actual corner of property.

\_\_\_\_\_

APPENDIX E  
(continued)

**SHOW ON ALTA MAP**

**OK**

**NOT  
OK**

**NOTES**

Bearings & distances from monument to point of beginning, if not actual corner of property.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Monuments found or set (or a reference monument) at all major corners of property.  
Bearing base referenced to well fixed bearing line [must be statement somewhere on the map explaining bearing basis].

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

If property comprised of more than one parcel, internal parcel boundaries shown.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**EASEMENTS**

List of all easements affecting the property [check against the Title report/commitment]. Reference to exceptions in title report/proforma acceptable as long as date of report/proforma indicated.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Locations of all located easements, cross-referenced to list of easements. If any easements run through buildings etc., indicate and follow-up as to resolution.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

All easements serving the property [see property description, it should list any easement serving the property as a separate parcel].

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Note explaining any “blanket” easements that do not have defined locations [see list of easements or notes].

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Location of all utilities [see legend for reference], including ingress to and egress from the property (within the property, location of underground utilities which serve only the property need not be shown).

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

APPENDIX E  
(continued)

**SHOW ON ALTA MAP**

**OK**

**NOT  
OK**

**NOTES**

Any observed on-site prescriptive, or apparent prescriptive easements [check for listed observations, fence gates, pathways etc.].

\_\_\_\_\_

**IMPROVEMENTS**

All improvements [see ¶2 S Cert.].

\_\_\_\_\_

Number of stories in each building [can be written on buildings, in notes or legend].

\_\_\_\_\_

Current set back lines on all sides and any other building restrictions, including recording information for any recorded restrictions. Distances from buildings to boundary lines, perpendicular to boundary line. Make sure all buildings meet the setback requirements above. If they do not, indicate and follow-up for resolution.

\_\_\_\_\_

\_\_\_\_\_

Curb cuts or driveways for access to property from public street.

\_\_\_\_\_

Distance to nearest intersecting streets, if not adjacent to property [not needed if property is at a street intersection].

\_\_\_\_\_

Note character and location of all walls, buildings or fences within five feet of either side of boundary lines.

\_\_\_\_\_

Total number and location of regular and handicap parking spaces [usually stated in Notes]. Explanation given if no handicap spaces.

\_\_\_\_\_

**ENCROACHMENTS**

APPENDIX E  
(continued)

All encroachments of improvements from property onto abutting parcels, including distance [¶4 S Cert.].

\_\_\_\_\_

All encroachments of improvements onto property, including distance [¶4 S Cert.].

\_\_\_\_\_

**ADJACENT PROPERTY**

Recording data, lot and block, tax I.D. no., plat or some survey reference for each adjacent property, or names of adjacent owners [single entity names are sufficient, i.e., X Condominiums or Y apartments, or Z Subdivision]

\_\_\_\_\_

For streets that abut the property, width of street and right of way measured and shown with boundary lines.

\_\_\_\_\_

Label abutting streets as “public” or “private.”

\_\_\_\_\_

Observable evidence of access (or lack thereof) to each abutting street, public or private.

\_\_\_\_\_

**CERTIFICATE**

Wording matches form of Surveyor’s Certificate attached hereto, adapted to specific facts (using bracketed language therein).

\_\_\_\_\_

Indicates any special hazard areas - if “as shown on map,” it must be shown with boundaries of area.

\_\_\_\_\_

Certified to Fannie Mae, DUS Lender, and title company (by name) - [see opening ¶ of S Cert.].

\_\_\_\_\_

**MISCELLANEOUS MAP DETAILS**

”Label” or “Title Block” showing city, county, state & name of project and the caption “ALTA/ASCM Land Title Survey.”

\_\_\_\_\_

APPENDIX E  
(continued)

Name, address, telephone number and signature of  
licensed surveyor.

\_\_\_\_\_

Surveyor's seal.

\_\_\_\_\_

Date of ground survey (must be 90 days or less  
before loan closing) [see ¶2 S Cert.].

\_\_\_\_\_

Date(s) of revision(s), if any.

\_\_\_\_\_

North direction arrow.

\_\_\_\_\_

Legend for all symbols and abbreviations.

\_\_\_\_\_

Scale must be 1" = 50' or less, and this must be  
written out.

\_\_\_\_\_

Graphically illustrated scale, in feet or meters.

\_\_\_\_\_

Area of land in square feet.

\_\_\_\_\_

Vicinity map.

\_\_\_\_\_

APPENDIX E  
(continued)

**SURVEYOR'S CERTIFICATE**

The undersigned, being a registered surveyor of the State of [insert state where Mortgaged Property is located] certifies to (i) [insert name of DUS Lender] (ii) Fannie Mae, its successors and assigns, and (iii) [insert name of title insurance company if title insurance company so requires] as follows:

1. This map or plat and the survey on which it is based were made in accordance with the "Minimum Standard Detail requirements for ALTA/ACSM Land Title Surveys," jointly established and adopted by the American Land Title Association, the American Congress on Surveying and Mapping and the National Society of Professional Surveyors in 1999, includes Items of Table A thereof and this Survey meets the requirements for an Urban Survey as defined therein.

2. The survey was made on the ground between [insert dates survey was made] and correctly shows the area of the subject property, the location and type of all buildings, structures and other improvements situated on the subject property, and any other matters situated on the subject property.

3. [Except as shown on the survey], there are no visible easements or rights of way of which the undersigned has been advised.

4. [Except as shown on the survey], there are no observable, above ground encroachments (a) by the improvements on the subject property upon adjoining properties, streets or alleys, or (b) by the improvements on adjoining properties, streets or alleys upon the subject property.

5. The location of each easement, right of way, servitude and other matter affecting the subject property and listed in the title insurance commitment dated \_\_\_\_\_, 200\_\_, issued by [insert name of title insurance company issuing commitment] with respect to the subject property, has been shown on the survey, together with appropriate recording references, to the extent that such matters can be located. The property shown on the survey is the property described in that title commitment. The location of all improvements on the subject property is in accord with minimum setback provisions and restrictions of records referenced in such title commitment.

6. The subject property has access to and from a duly dedicated and accepted public street or highway. [If not, so state].

7. [Except as shown on the survey], the subject property does not serve any adjoining property for drainage, utilities or ingress or egress.

8. The record description of the subject property forms a mathematically closed figure. [If not, so state].

9. [Except as shown on the survey,] no portion of the property shown on the survey lies within a Special Hazard Area, as described on the Flood Insurance Rate Map

APPENDIX E  
(continued)

for the community in which the subject property is located. [The survey correctly indicates the zone designation of any area shown as being within a Special Hazard Area.]

[If the certificate is attached to rather than typed or otherwise reproduced on the face of the survey, as a paragraph specifically identifying the survey (such as by date, property description and survey number) to which the certificate relates.]

The parties listed above are entitled to rely on the survey and this certificate as being true and accurate.

[NAME OF SURVEYOR'S FIRM]

By: \_\_\_\_\_

Name:

Title:

[Surveyor's Seal]

Registration No.: \_\_\_\_\_

Dated: \_\_\_\_\_