

Multifamily Seller/Servicer Guide

Chapter 6

Legal Services for Mortgage Origination and Servicing

6.1 Freddie Mac reliance on Seller/Servicer's legal counsel (09/08/04)

Although many decisions in connection with the structuring of a Mortgage or a Transfer of Ownership or other Special Servicing Request may require Freddie Mac's approval, Freddie Mac, in making such decisions, may rely on the expertise of the Seller/Servicer and its legal counsel regarding legal matters.

6.2 Qualifications of Seller/Servicer's legal counsel (02/28/13)

An attorney who represents the Seller/Servicer in connection with the structuring, origination or delivery of a Mortgage or in connection with a Transfer of Ownership or other Special Servicing Request must have a minimum of two years' experience closing commercial or multifamily housing mortgage loans on behalf of lenders.

If the attorney retained by the Seller/Servicer in connection with a proposed transaction is not licensed to practice law in the State in which the Property is located or lacks experience with the laws of that State, the Seller/Servicer or the attorney must have available local counsel who is both licensed and experienced in that State. The Seller/Servicer or its legal counsel must consult with that local counsel as necessary to

- In accordance with Section 6.4 or 6.5, identify for Freddie Mac any legal issues affecting the proposed Mortgage that arise under the laws of that State
- Respond in accordance with Section 6.6 to any questions Freddie Mac might have about those issues

The Seller/Servicer and its legal counsel need not seek confirmation from local counsel that the Multifamily Loan Documents (as they appear on FreddieMac.com) are enforceable under the laws of that State, but must consult local counsel to

- In accordance with Section 6.7, determine whether enforceability will be affected adversely by any negotiated changes to the Multifamily Loan Documents or by the structure of the Borrower or the transaction
- Identify whether, since the issue date of each Multifamily Loan Document, the law of that State has changed in a way that would adversely affect enforceability of that document

If the Seller/Servicer's legal counsel lacks expertise regarding special features of the transaction, such as government housing subsidies, the Seller/Servicer must have available special counsel who has the necessary expertise. The Seller/Servicer or its legal counsel must consult that special counsel as necessary to

- Identify for Freddie Mac (in accordance with Section 6.4 or Section 6.5) any legal issues affecting the proposed Mortgage that arise from those features of the transaction
- Respond in accordance with Section 6.6 to any questions Freddie Mac may have about those issues

The Seller/Servicer may use paralegals to perform appropriate tasks if the paralegals are supervised by an experienced attorney and their written work product is reviewed by that attorney before being submitted to Freddie Mac. An attorney, rather than a paralegal, must conduct the legal aspects of any negotiations with a Borrower regarding transaction structure or the content of documents.

6.3 Availability of Seller/Servicer's legal counsel (09/08/04)

For each Mortgage that it sells to Freddie Mac and for each Transfer of Ownership and other Special Servicing Requests submitted to Freddie Mac for approval, the Seller/Servicer must have its legal counsel available at all times. This availability must continue from and after the commencement of consideration of the proposed transaction (including before the submission of an early rate-lock application to Freddie Mac, Freddie Mac's issuance of a Letter of Commitment or Freddie Mac's issuance of a letter approving a proposed Transfer of Ownership). Freddie Mac may need the Seller/Servicer's legal counsel to assist Freddie Mac with the structuring and negotiation of the proposed transaction. Among other things, the Seller/Servicer's legal counsel must be available to

- Participate in discussions about the proposed structure of the Borrower or transferee and of the transaction
- Identify legal issues presented by nonstandard features of the proposed transaction (see Sections 6.4 and 6.5)
- Respond to Freddie Mac's questions concerning legal issues (see Section 6.6)
- Provide analysis of certain legal documents affecting the Property (see Section 6.7)
- Participate in and assist Freddie Mac with any negotiations with the Borrower or transferee (see Section 6.8)

6.4 Preliminary legal issues memorandum

a. When a preliminary legal issues memorandum is required (10/12/17)

The Seller/Servicer or its legal counsel must submit to Freddie Mac a memorandum ("preliminary legal issues memorandum" or "PLIM"), prepared by the Seller/Servicer's legal counsel, that meets each requirement set forth in Section 6.4(b) when the Seller/Servicer submits each of the following:

- An underwriting package
- An application for approval of a Transfer of Ownership

- Certain other Special Servicing Requests, as specified in the applicable provisions of this Guide

b. Requirements for the PLIM (02/28/20)

Each PLIM must do each of the following, based on the information then available to the Seller/Servicer and its counsel:

1. List legal risks or issues (if any) presented by characteristics of the proposed transaction ("nonstandard features") that are not contemplated by the Guide, or, for a transfer or other Special Servicing Request, were not contemplated by the original Loan Documents, and that, unless addressed in the transaction structure or in the legal documents could
 - Materially limit document enforceability
 - Materially impede foreclosure
 - Following foreclosure, result in title to the Property being subject to encumbrances or interests that would materially impede the sale of the Property or would materially reduce the sale price, or
 - Materially increase the risks that would result from the Borrower or a guarantor becoming the subject of a bankruptcy or insolvency proceeding
2. State the proposed principal balance of the Mortgage
3. State whether the Borrower has already been formed and if newly formed, how long it has been in existence.
4. Describe any nonstandard feature or provision that
 - Does not satisfy the requirements of Freddie Mac, is not generally accepted by Ratings Agencies or would be likely to negatively impact the ratings of any certificates, notes or other securities to be issued in connection with securitization, and/or
 - Could result in an Exception to the Seller/Servicer Representations and Warranties
5. For a Transfer of Ownership or other Special Servicing Request, identify any nonstandard feature or provision that materially changes management or control of the Borrower
6. Briefly (in one or two sentences) describe the potential impact of each listed risk or issue of the proposed transaction

Any such risk or issue is referred to below as a "transaction legal issue." Transaction legal issues include issues that arise under the laws of the State in which the Property is located.

The PLIM prepared at the origination of the loan must be prepared using the most current version of the Legal Issues Analysis form (LIA), which is available on FreddieMac.com.

For a Transfer of Ownership or other Special Servicing Request, the PLIM must be prepared using the most current applicable version of the Preliminary Legal Issues Memorandum Form – Servicing available on FreddieMac.com.

c. Disclosure of information by Seller/Servicer (02/28/13)

The Seller/Servicer must provide its legal counsel with all pertinent information about the proposed transaction then in the possession of the Seller/Servicer in order to enable its legal counsel to prepare the PLIM.

d. Delivery of the PLIM to Freddie Mac (03/03/14)

In addition to delivering the PLIM electronically, the Seller/Servicer or its legal counsel must send the PLIM to the applicable Freddie Mac Multifamily Attorney, and the Seller/Servicer must include a copy of the PLIM in the underwriting package or application for approval of a Transfer of Ownership or other Special Servicing Request, and in the Final Delivery Package.

If, at the time of submission of the underwriting package or application for approval of a Transfer of Ownership or other Special Servicing Request, the transaction does not include any nonstandard features or any such features present no transaction legal issues, the Seller/Servicer must nevertheless submit a PLIM, but it may be limited to a statement that the Seller/Servicer's legal counsel is not aware of any transaction legal issues.

e. PLIM for Servicing requests (02/28/13)

If the application is for the approval of a Transfer of Ownership or other Special Servicing Request, the PLIM must include the counsel's

- analysis of whether the existing loan documents contain any modifications that must be deleted and/or whether the existing loan documents must be modified to add items in order to properly document the transaction
- description and analysis of any additional modifications requested by the proposed transferee (However, Servicer's counsel must convey to the transferee's counsel that Freddie Mac's policy is not to permit additional modifications)

f. Freddie Mac request for additional analysis or information (02/28/13)

After reviewing the PLIM, Freddie Mac may request that the Seller/Servicer's legal counsel provide further written information or analysis with regard to any of the transaction legal issues.

g. PLIM not a legal opinion (02/28/13)

Freddie Mac does not consider the PLIM to be a legal opinion. The Seller/Servicer's legal counsel may prepare the PLIM on the assumption that the individuals reading and relying upon it will be Freddie Mac's attorneys; and, therefore, the PLIM need not be written in a manner that would be understandable by non-attorneys.

h. Title and UCC matters (05/05/17)

A title search and Uniform Commercial Code (UCC) search are not required to be completed before the PLIM is prepared, but the PLIM must identify any transaction legal issues arising from title or UCC matters of which the Seller/Servicer or its counsel have actual knowledge at that time. A transaction legal issue arising from title matters must be listed in the PLIM, but the Seller/Servicer or its legal counsel must provide the full analysis of such matters in a Title Exception and Survey Analysis (TESA) meeting the requirements of Chapter 29.

i. Cross-collateralized and cross-defaulted Mortgages (02/28/13)

If the Mortgage is to be cross-collateralized and/or cross-defaulted with other Mortgages, the PLIM must include the additional analysis set forth in Section 6.12.

j. Investment funds (05/05/17)

If any Borrower Principal or guarantor is an investment fund, the PLIM must include the additional analysis set forth in Section 9.10.

k. Regulatory Agreements (12/10/13)

If the Property is subject to any agreement that restricts the occupancy of all or a portion of the units at the Property (e.g. to seniors or low-income or disabled tenants) or limits the amount of rent that may be charged, Seller's counsel must complete the Regulatory Agreement Analysis form found on the Multifamily Loan Documents page on FreddieMac.com. Seller's counsel must update the Regulatory Agreement Analysis if more information becomes available after the PLIM is completed.

l. Notices to third parties of origination of Mortgage and assignment to Freddie Mac (05/01/14)

The PLIM must include Seller/Servicer's legal counsel's analysis of whether, upon the origination of the Mortgage by Seller and/or the subsequent assignment of the Mortgage to Freddie Mac, written notice to a third party under any document, instrument or agreement, recorded or unrecorded, affecting the Property would be required and/or generally advisable, including for the purpose of entitling the Seller and/or Freddie Mac, each in its capacity as a mortgagee of the Property, to any legal rights under such documents, instruments or agreements. Examples of such documents that Seller/Servicer's legal counsel must review to make this determination include ground leases, commercial leases, condominium declarations, Regulatory Agreements, reciprocal easement agreements, shared use agreements, homeowners' association documents, subordinate loan documents, and HAP contracts.

m. LIHTC Properties electing the Income Averaging Set-Aside (02/28/20)

For LIHTC Properties electing the Income Averaging Set-Aside, the PLIM and/or the regulatory agreement analysis for the LIHTC Regulatory Agreement must include each of the following:

- Evidence that the tax credit investor limited partner has consented to the Income Averaging Set-Aside for the Property

- Analysis of the regulations and/or Qualified Allocation Plan (QAP) implementing the Income Averaging Set-Aside by the tax credit allocating agency of the State in which the Property is located (for example, whether unit mixes are fixed at designation or can change over time), and whether the Property will be in compliance with such regulations and/or QAP, as well as any guidance published by the Internal Revenue Service regarding the same.

6.5 Identification of legal issues as they arise (02/28/13)

If, during work on a proposed Mortgage or Transfer of Ownership or other Special Servicing Request, the Seller/Servicer's legal counsel becomes aware of any transaction legal issues that have not previously been identified in the PLIM, the Seller/Servicer's legal counsel must identify such issues to the applicable Freddie Mac Multifamily Attorney and briefly describe the possible impact of each such issue on the proposed transaction.

Freddie Mac may request that the Seller/Servicer's legal counsel provide further written information or analysis with regard to any such additional transaction legal issue.

6.6 Freddie Mac legal questions (09/08/04)

The Seller/Servicer's legal counsel must provide any additional information that Freddie Mac may request regarding any transaction legal issue, the substance of the law that applies to the proposed transaction, the practical results of applying that law or alternatives for mitigating risks arising from that law.

6.7 Document analysis by Seller's counsel (03/03/14)

If the Guide, the Letter of Commitment, the early rate-lock application or the Approval Letter for a Transfer of Ownership or other Special Servicing Request requires that Freddie Mac approve a legal document affecting the Property, the Borrower or the Mortgage, or if Freddie Mac requests further written information about or analysis of a document, then the Seller/Servicer or its legal counsel must submit such a document, accompanied by an analysis of the document prepared by the Seller/Servicer's legal counsel, to the applicable Freddie Mac Multifamily Attorney.

Delivery of a document to Freddie Mac does not relieve the Seller/Servicer of its obligation to provide a document analysis or of its responsibility for the accuracy of any such analysis.

The document analysis must

- State the proposed principal balance of the Mortgage
- Identify and explain whether the document contains any provisions that do not satisfy the general requirements of Freddie Mac, are not generally accepted by Rating Agencies, or would be likely to negatively impact the ratings of any certificates, notes or other securities to be issued in connection with a securitization
- Identify any provision that would result in an Exception to the Seller/Servicer Representations and Warranties and provide a proposed Exception to be set forth in the Letter of Commitment
- Identify the parties to the document (and their relationship to the Borrower, where applicable)

- Summarize the document in enough detail that Freddie Mac's attorneys need not read the document itself
- Indicate where the document departs from local law, generally accepted local practice or any applicable standards in the Guide
- Identify the advantages and disadvantages of approving the document
- Identify options for mitigating any such disadvantages

Each document analysis must include the degree of detail that a prudent mortgage lender originating the Mortgage for its own portfolio would need in order to make an informed decision about the document. If a document contains provisions that are either so important or so difficult to analyze that the Seller/Servicer's counsel believes Freddie Mac's attorneys should read those provisions themselves, rather than rely solely on the analysis, the analysis should identify such provisions and their significance.

The Seller/Servicer's legal counsel may prepare each document analysis on the assumption that the individuals reading and relying upon it will be Freddie Mac's attorneys; and, therefore, the document analysis need not be written in a manner that would be understandable by non-attorneys. A document analysis may omit analysis of sections that have no relevance to the Property or the proposed transaction if the document analysis identifies the applicable sections and notes why they have no application. For example, an analysis of restrictive covenants for a planned unit development in which a property is located might note that specified sections of the document contain architectural restrictions applicable only to single family homes and omit any analysis of those inapplicable restrictions.

Documents for which Freddie Mac requires document analysis include

- Ground leases (See Chapter 30 for the required format of ground lease documentation.)
- Restrictive covenants not falling within the safe harbor stated in Section 29.2(e)
- Regulatory Agreements requiring that occupancy or tenant income standards be met for purposes of local, State or federal housing programs
- Any other document affecting title that does not fall within one of the safe harbors stated in Section 29.2
- Subordinate Financing documents
- Preferred equity structures
- Merger agreements
- Master leases or operating leases
- Condominium documents (if the Borrower owns less than 100% of the condominium)

- Any other document for which Freddie Mac requests an analysis

No document analysis is required for

- A Multifamily Loan Document (including an Assumption Agreement)
- A title insurance commitment or policy
- A document affecting title that falls within one of the safe harbors stated in Section 29.2, unless Freddie Mac specifically requests such an analysis
- Tax-exempt bond documents

Each document analysis required pursuant to this section must be updated to include all information conveyed to Freddie Mac after the date of the PLIM and must be included in the Final Delivery Package along with copies of the documents that are analyzed.

6.8 Negotiation of legal documents (03/03/14)

For any Mortgage, if the Borrower requests permission to make one or more changes in a Multifamily Loan Document (including an Assumption Agreement) or any Freddie Mac standard form document for a Bond Credit Enhancement transaction, the Seller/Servicer and its legal counsel must

- Identify the advantages and disadvantages of granting each request
- Identify options for mitigating any such disadvantages
- Explain any feature of local law from which the need for a change arises or that has a material impact on a requested change

In addition, if the Borrower requests permission to make one or more changes in a Multifamily Loan Document (including an Assumption Agreement), the Seller/Servicer and its legal counsel must

- State the proposed principal balance of the Mortgage
- Identify and explain whether such change generally satisfies the requirements of Freddie Mac, is generally accepted by the Ratings Agencies or would be likely to negatively impact the ratings of any certificates, notes or other securities to be issued in connection with a securitization
- Identify any change that would result in an Exception to the Seller/Servicer Representations and Warranties and provide the wording of the proposed Exception to be set forth in the Letter of Commitment

If the Borrower requests more than five such changes that are not essential to the implementation of the proposed transaction structure and have not been incorporated in prior transactions with the same Borrower, the Seller must submit to the applicable Freddie Mac *Multifamily Attorney*

- A letter from the Borrower or its legal counsel, addressed to the Seller or its legal counsel, that includes the language that the Borrower is requesting for each change and an explanation of why the Borrower is making the request
- The following information from the Seller/Servicer's legal counsel (in the form of a letter, an email, or clear and legible notations on the letter from the Borrower or its legal counsel)
 - The advantages and disadvantages of granting each request
 - Options for mitigating any such disadvantages
 - An explanation of any feature of local law from which the need for a change arises or that has a material impact on a requested change

In a case where such requests for changes are numerous, Freddie Mac may charge a fee to the Seller/Servicer for any legal work its attorneys must perform in responding to such requests. The Seller/Servicer may require that the Borrower reimburse it for any such fee.

6.9 Legal work performed by Freddie Mac's attorneys (09/08/04)

Freddie Mac may charge a fee to the Seller/Servicer for any legal work that in-house or outside attorneys representing Freddie Mac must perform as a result of the failure of the Seller/Servicer or the Seller/Servicer's legal counsel to perform any task or provide any assistance required by this chapter or by any other provision of the Guide, the Letter of Commitment or early rate-lock application or the Freddie Mac letter approving a Transfer of Ownership or a Special Servicing Request. Freddie Mac reserves the right to charge the Seller/Servicer a fee for any legal work that in-house or outside attorneys representing Freddie Mac perform as a result of other legal issues that arise during a transaction.

6.10 Mortgages purchased by Freddie Mac

a. Attorney review requirements (07/30/10)

In connection with each Mortgage submitted to Freddie Mac for purchase, an attorney who represents the Seller and who has the qualifications required by Section 6.2 must

- Perform the tasks and provide the assistance described in this chapter, and
- Prepare and/or review all legal documents

b. Documents to be reviewed (03/03/14)

The documents that the Seller's counsel must review or prepare include the following items, as applicable, together with all applicable exhibits, attachments and amendments:

1. Note
2. Security Instrument
3. Guaranty

4. Loan Agreement
5. Financing statements
6. Repair and Escrow Agreement, Repair Escrow Agreement, or Repair Agreement
7. Replacement Reserve Agreement
8. Assignment of Management Agreement and Subordination of Management Fees
9. Any other legal document required by the Letter of Commitment or the fully accepted early rate-lock application or executed in connection with the loan
10. Title insurance commitment and/or policy
11. Documents cited as exceptions in Schedule B of the title insurance commitment and/or policy
12. Analysis of title exceptions required under Section 29.2(b)
13. Organizational documents of each entity identified in Section 9.7
14. Opinion of the Borrower's and guarantor's legal counsel and, if applicable, any opinion of the SPE Equity Owner's legal counsel

6.11 Transfers of Ownership

a. Attorney review requirements (07/30/10)

In connection with any Transfer of Ownership or other Special Servicing Request, an attorney having the qualifications required by Section 6.2 must

- Perform the tasks and provide the assistance described in Sections 6.3 through 6.8
- Prepare and/or review all legal documents in connection with the proposed Transfer of Ownership or other Special Servicing Request in accordance with the approval letter

b. Documents to be reviewed (03/03/14)

The documents that the Servicer's counsel must review or prepare include the following items, as applicable, together with all applicable exhibits, attachments and amendments:

1. Freddie Mac's standard Assumption Agreement (for a Transfer of Ownership involving a change in ownership of the Property)
2. Guaranty
3. Replacement Reserve Agreement
4. Repair and Escrow Agreement, Repair Escrow Agreement or Repair Agreement

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5. Assignment of Management Agreement and Subordination of Management Fees, if required
6. Easement Agreement
7. Partial Release Agreement
8. Any other legal document required by the Letter of Commitment or the fully accepted early rate-lock application or executed in connection with the loan
9. Title insurance commitment and/or policy
10. Organizational documents of each entity specified in Section 9.7
11. Opinion of the new Borrower's, new guarantor's, and if applicable, new SPE Equity Owner's legal counsel
12. Subordination Agreement
13. Purchase Contract
14. Deed
15. Affirmation by Borrower or guarantor
16. Borrower's Certificate of Representations and Warranties

c. Scope of Servicer and attorney review (07/30/10)

The Servicer and its counsel must ensure that

1. They have reviewed the documents in detail
2. The documents fully reflect all terms of Freddie Mac's approval and do not otherwise change any of the terms of the Mortgage
3. All statements set forth in the documents are accurate
4. The documents comply with all applicable federal, State and local laws

d. Payment of Servicer's counsel fees (05/01/14)

To the extent that the Loan Documents obligate the Borrower to reimburse the lender for legal fees or expenses in connection with the servicing or enforcement of the Mortgage, the Servicer may require that the Borrower reimburse it for the fees and expenses of its legal counsel.

6.12 Cross-collateralization analysis (11/30/11)

If a Mortgage is to be cross-collateralized and/or cross-defaulted with other Mortgages, Seller/Servicer's legal counsel must submit to the applicable Freddie Mac Multifamily Attorney a

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written analysis of and recommendation of how to best accomplish the cross-collateralization and/or cross-default of the Mortgage with the other Mortgages (“Cross Analysis”). The Cross Analysis is to be prepared in connection with the PLIM required in Section 6.4 and submitted to Freddie Mac in the applicable underwriting package. The Cross Analysis must include the following:

- Whether any issues or concerns have been identified in the applicable jurisdiction for the Mortgage or any of the other Mortgages, by the title company or by another reliable source (source must be identified to Freddie Mac’s satisfaction), that would prohibit or restrict the cross-collateralization or cross-default of the Mortgage with the other Mortgages. Such issues or concerns may include limitations on using a Master Cross-Collateralization and Amendment to Security Agreement or recordation and/or mortgage tax restrictions.
- Whether any restrictions or prohibitions have been identified in the applicable jurisdiction for the Mortgage or any of the other Mortgages, by the title company or by another reliable source (source must be identified to Freddie Mac’s satisfaction), that would limit the availability of the endorsements to the title policy that are then required by Freddie Mac for cross-collateralized and cross-defaulted loans, and if so, the recommendation(s) for best addressing lack of the endorsement(s).
- A recommendation of how to best structure the cross-collateralization and cross-default of the Mortgage and the other Mortgages.
- A recommendation as to what documents, if any, must be recorded in the applicable jurisdiction for the Mortgage or any of the other Mortgages to effectively cross-collateralize and cross-default the Mortgages.

If Seller/Servicer’s legal counsel has not identified any issues or concerns regarding the cross-collateralization and/or cross-default of the Mortgage with the other Mortgages, Seller/Servicer’s legal counsel must nevertheless submit a Cross Analysis, but the Cross Analysis may be limited to a statement that the Seller/Servicer’s legal counsel is not aware, after due diligence, of any issues or concerns regarding the cross-collateralization and/or cross-default of the Mortgages with the other Mortgages, including the title policy or any endorsements to be issued in connection with the title policy.

After reviewing the Cross Analysis, Freddie Mac may request that the Seller/Servicer’s legal counsel provide further written information or analysis.

If Seller/Servicer’s legal counsel becomes aware of any issues or concerns regarding the cross-collateralization and/or cross-default of the Mortgage with any of the other Mortgages that have not previously been identified in the Cross Analysis, Seller/Servicer’s legal counsel must inform the applicable Freddie Mac Multifamily Attorney of these issues and briefly describe the possible impact of each such issue on the proposed transaction. Freddie Mac may request that the Seller/Servicer’s legal counsel provide further written information or analysis with regard to any cross collateralization and/or cross-default issue.

Seller/Servicer’s legal counsel must obtain Freddie Mac’s approval of any recommendations in the Cross Analysis prior to origination of the Mortgage.