**New York Building Loan Agreement Instructions**

1. Background

Recent court decisions in New York have called into question HUD’s use of the Escrow Agreement for Non-critical, Deferred Repairs for projects located in New York.

To mitigate the risk that HUD’s Escrow Agreement for Non-critical, Deferred Repairs could be construed under New York law as a building loan contract, which must be filed in order to ensure the priority of mortgage proceeds used to fund improvements, HUD’s New York offices have created a New York-specific Building Loan Agreement form.

For projects located in New York, the filing of a New York Building Loan Agreement is required if the Borrower will fund repairs to be completed post-closing with escrowed mortgage proceeds.

\*\***NOTE:** These instructions are not exhaustive. It remains the sole responsibility of the FHA Lender and FHA Lender’s counsel to ensure compliance with New York Lien Law and that the FHA-insured loan remains a first lien as commonly given.

1. Applicability
2. When use of the New York Building Loan Agreement is required:

The New York Building Loan Agreement must be used where the project has non-critical or owner-elected repairs funded from mortgage proceeds that will be completed post-closing.

The New York Building Loan Agreement replaces the Escrow Agreement for Non-critical, Deferred Repairs, and therefore the Escrow Agreement for Non-critical, Deferred Repairs should not be submitted in the closing package.

Multifamily, LEAN, and Hospital templates of the New York Building Loan Agreement are attached as an exhibit to these instructions.

Notice under the BLA should be sent to the HUD program office and the counsel’s office. Please select the appropriate HUD counsel’s office in Article 6.6 (Notices).

1. A New York Building Loan Agreement is not required if:
2. The Borrower will complete all repairs prior to the closing date or
3. Subject to approval of the FHA Lender, the Borrower will not use mortgage proceeds to fund the repairs and will not reimburse itself from mortgage proceeds.

If the Borrower fully funds the repairs from the Borrower’s own funds (i.e. cash), then the Escrow Agreement for Non-critical, Deferred Repairs would be used. In this case, two separate certifications must be submitted to HUD.

The first certification is signed by the Borrower and FHA Lender and must state that no mortgage proceeds have been used by the Borrower or will be used to reimburse the Borrower for the cost of the non-critical repairs. The certification must also identify whether the funds will be held by the FHA Lender or a depository institution.

The second certification, to be provided by FHA Lender, must state that a Lien Law Affidavit is not necessary and that in the event that any mechanic’s liens are filed, the FHA-insured mortgage would remain a first lien as commonly given.

1. Lien Law Affidavit

The New York Building Loan Agreement must include the Lien Law Affidavit. Lender’s counsel should complete the Lien Law Affidavit in consultation with the title insurance company and attach it to the New York Building Loan Agreement as Exhibit D.

1. Title Insurance Policy and Filing Requirements

The New York Building Loan Agreement must be listed on Schedule B-II as subordinate to the insured mortgage.

The New York Building Loan Agreement must be filed in the appropriate county office.

HUD requires a final Title Insurance Policy on the date of endorsement in the full amount of the FHA-insured loan. Therefore, HUD will not accept a Title Insurance Policy that contains a Pending Disbursements Clause on Schedule B-I for a refinance transaction under Section 223(f) or 223(a)(7).

1. Opinion of Borrower’s Counsel

Please note that the Opinion of Borrower’s Counsel for refinance transactions involving post-closing repairs will need to reflect the use of the New York Building Loan Agreement rather than the Escrow Agreement for Non-critical, Deferred Repairs. In the Opinion of Borrower’s Counsel, the reference to the Escrow Agreement for Non-critical, Deferred Repairs should be deleted, and the New York Building Loan Agreement should be added to the List of Documents. See the Instructions to Opinion of Borrower’s Counsel for further guidance regarding the List of Documents.