

SUBSTANTIVE ISSUES OF DUE DILIGENCE FOR LEGAL OPINIONS

By Edward J. Levin
Piper Marbury Rudnick & Wolfe LLP
Baltimore, Maryland

The due diligence that counsel must perform in rendering a legal opinion letter is directly dependent on the contents of that opinion letter. Every statement and every opinion in the letter must be supported in some manner, and the substance of the opinion letter therefore dictates the extent of the due diligence required.

As an initial step, to determine the necessary due diligence, it is important to have a basis for each statement in an opinion letter and to know all of the components of the opinions contained in an opinion letter. In some cases counsel will be able to assume certain facts (such as, in some opinions, that a certain corporation is in good standing in a given state), in some cases because other counsel is rendering an opinion concerning such points. Often, a number of facts on which the opinion giver relies are statements and representations of the borrower. An illustrative certificate from a borrower to its counsel to support an Inclusive Opinion, discussed below, is attached as *Exhibit A*. No due diligence will be required to support those assumptions or to rely on such certificates unless the opinion giver has actual knowledge of facts that would make the reliance unreasonable.¹

It is essential to recognize all of the opinions implicitly given in an opinion letter. Consider an opinion based on the Accord, which opinion is extremely short. Because such an opinion incorporates the Accord by reference, it does not state the assumptions, exceptions, explanations and other matters frequently contained in opinion letters. More importantly for determining the due diligence required to render such an opinion, an Accord-based opinion does not explicitly state a number of opinions that are usually set forth in opinion letters. Implicit in an Accord-based opinion are the unstated opinions that the borrower is validly existing and in good standing under the laws of its state of organization, and that the transaction does not violate the applicable usury laws. The reason that an Accord-based opinion does not state these opinions is that the enforceability opinion subsumes them, and a lawyer rendering an Accord-based opinion must be aware of this and must perform the due diligence required to support each of the implicit opinions.

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¹ See Section 5 of the Accord, which is part of the Section of Business Law of the American Bar Association, *Third-Party Legal Opinion Report*, including the Legal Opinion Accord (the “**Accord**”), 47 BUS. LAW. 167 (1991) and 29 REAL PROP. PROB. & TR. J. 487 (1994).

The Accord was not designed for real estate secured transactions and must be modified to be used with such transactions. To make the Accord usable in real estate secured transactions, in 1993 the Section of Real Property, Probate and Trust Law of the ABA and the American College of Real Estate Lawyers prepared an adaptation to the Accord (the “**Real Property Adaptation**”).² The Real Property Adaptation adds defined terms to the glossary of the Accord, and it supplements and amends certain sections of the Accord and portions of the commentary to the Accord.

To make the Accord as modified by the Real Property Adaptation user-friendly for real estate lawyers and their clients, the ABA Section of Real Property, Probate and Trust Law and ACREL prepared the Inclusive Real Estate Secured Transaction Opinion Project Report (the “**Inclusive Opinion Report**”), which was completed in 1998. An opinion letter based on the Inclusive Opinion Report is called an “**Inclusive Opinion**.”³

I. Due Diligence under Opinions Given in the Inclusive Opinion

Set forth below are the opinions contained in an Inclusive Opinion and a discussion of the general guidelines of the due diligence that must be performed to render these opinions. The actual due diligence will vary from state to state and will also depend on the actual opinions that are contained in the opinion letter.

A. Validly Existing and in Good Standing Opinion

1. The Inclusive Opinion Formulation

Paragraph 2.1 of the Inclusive Opinion provides:

Status. The Client is a [corporation], validly existing in good standing in its jurisdiction of organization.

The opinion in Paragraph 2.1 pertains to the “status” of the opining lawyer’s client. The good standing of an entity as of a particular date may typically be determined by obtaining a certificate from the Secretary of State or equivalent. In most instances, general partnerships, joint ventures, and proprietorships do not have to make filings with the Secretary of State, and therefore good standing is not a relevant concept for such entities. In some states, it may be

² Section of Real Property, Probate and Trust Law of the American Bar Association and the American College of Real Estate Lawyers, *Report on Adaptation of the Legal Opinion Accord of the Section of Business Law of the American Bar Association for Real Estate Secured Transactions*, 29 REAL PROP. PROB. & TR. J. 569 (1994).

³ The Inclusive Opinion Report is posted on the internet at the following three addresses: www.acrel.org, www.abanet.org/rppt/inclusive-art.html; and http://ctr.umkc.edu/dept/dirt/files/incl_rep.htm.

necessary to obtain a tax clearance certificate from the office of the state taxing authority to determine the good standing of that entity.⁴

Good standing certificates should be dated close to the date of the opinion, generally within 30 days. It is important to determine what action or inaction by an entity could cause it to lose its good standing status. If an entity must pay a fee, file a personal property tax report, and/or pay specified taxes by a certain date each year, and if failure to do each of the required items will cause the entity to lose its good standing status, the attorney should use particular care in reading an opinion dated after that date if the status certificate is dated before such date. The attorney may be able to determine that the borrower has complied with all of the applicable annual or periodic requirements. In some states, the relevant date when an entity may be deemed to be not in good standing is when the state taxing authority reports to the Secretary of State the names of those entities that did not timely file reports or pay taxes. Until such date, counsel may not be concerned that the borrower has lost its good standing status. If there is a concern that the entity may have lost its good standing status between the date of the good standing certificate and the date of the opinion letter, counsel may be more comfortable changing the opinion to provide: “The Client is a [corporation], and as of {the date of the status certificate} was validly existing in good standing in its jurisdiction of organization.”

2. Qualification to Do Business.

If the client is not formed in the state in which it owns property and is conducting business in the state that is the subject of the opinion letter (the “Opining Jurisdiction,” as defined in the Inclusive Opinion), the Inclusive Opinion provides that it would be appropriate to add to the end of the opinion in Paragraph 2.1 that the client also is “qualified to do business in the State.” Qualification to do business in a given state may be determined by obtaining a good standing certificate from the Secretary of State (or the subject state’s counterpart). Consideration should be given to updating the status certificate or search as of the date of the opinion, or obtaining a tax clearance certificate from the applicable taxing authority, particularly in the period after the annual due date for tax and report filings.

Because foreign general partnerships, joint ventures, and proprietorships do not have to qualify to do business in many states, this opinion is not applicable for such entities in those states.

If an entity, once qualified to do business in a particular state, may lose the right to do business in that state for failure to make filings or to pay taxes, the good standing certificate

⁴ See, e.g., the discussion in Section 5.05 of the October 15, 1997 edition of the *Interpretative Standards Applicable to Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions*, adopted by the Legal Opinion Committee of the Real Property Law Section of the State Bar of Georgia and approved by the Executive Committee of the Real Property Law Section of the State Bar of Georgia.

should be dated close in time to the opinion letter (generally within 30 days). Depending on the time of year in relation to when reports and taxes are due, it may be appropriate to obtain a tax clearance certificate from the state taxing authority. It is important to review the statute that applies to the particular entity in the state in question to determine the actions that must be taken, and when they may be taken, before the qualification to do business of a foreign entity in that state may be forfeited.⁵

3. Validly Existing

To determine that the entity is “validly existing,” the attorney should check all of the entity’s filings with the Secretary of State to determine that the entity has not dissolved, consolidated, or merged with or into another entity. In some states, an entity may be involuntarily dissolved by court action at the initiation of the state Attorney General or some other party. Counsel should also carefully read the organic documents of the entity to determine whether the entity has only a limited life or, if a partnership, whether it may be dissolved by an action of one or more of its partners. The entity should provide a certificate to its counsel stating that it has not, and its partners have not, taken any action to dissolve, and that it is not the subject of an action of involuntary dissolution.

A general partnership, limited partnership, or limited liability company generally does not terminate on dissolution, but it continues to exist until the winding up of the entity’s affairs is complete.⁶ Therefore, dissolution, by itself, of such entity, does not affect the entity’s valid existence so long as its affairs have not been wound up. Dissolution limits the authority of a partner of a partnership or member of a limited liability company to act, however, since the partner or member may only take action to wind up the affairs of the entity.⁷

⁵ See, e.g., the following statutes that provide for forfeitures of the right of foreign entities to do business in Maryland after 15 days’ notice of forfeiture, which notice may be given if the foreign entity does not timely file reports or pay late filing fees and the failure is not cured within 30 days after notice: foreign limited liability companies, Md. Corps. and Ass’ns Code Ann. (“CA”) §4A-1013 (1993 Repl. Vol., 1999 Supp.); foreign corporations, CA §7-304 (1993 Repl. Vol.); foreign limited liability partnerships, CA §9-912 (1993 Repl. Vol., 1999 Supp.) (terminated effective December 31, 2002) and CA §9A-1111 (1993 Repl. Vol., 1999 Supp.); and foreign limited partnerships, CA §10-913 (1993 Repl. Vol., 1999 Supp.).

⁶ See, e.g., as to limited liability companies, CA §4A-904 and §4A-907 (1993 Repl. Vol., 1999 Supp.); as to general partnerships, CA §9-601 (1993 Repl. Vol., 1999 Supp.) (terminated effective December 31, 2002) and CA §9A-802 (1993 Repl. Vol., 1999 Supp.); and as to limited partnerships, CA §10-803 (1993 Repl. Vol.).

⁷ See Partnerships and Limited Liability Companies Committee of the Business Law Section of the State Bar of California, *Report on Legal Opinions Concerning California Partnerships – February 1998*, Business Law News published by State Bar Education Foundation, Business Law Section of the State Bar of California (Winter 1999) (the “**California Partnership Report**”) at 7.

4. Duly Organized

An opinion as to the valid existence of a corporation does not necessarily include the opinion that the corporation was duly organized. Determining that a corporation was duly organized may be necessary to be able to render the remedies or enforceability opinion. For example, under Maryland law, the directors of a corporation must hold an organizational meeting of the board of directors to adopt bylaws and elect officers.⁸ In *Bostettler v. Freestate Land Corp.*, 48 Md. App. 142, 150-51, 426 A.2d 404, 409 (1981), *modified*, 292 Md. 570, 440 A.2d 380 (1982), Maryland's intermediate appellate court stated that if an organizational meeting is never held, all actions taken by or on behalf of the entity may be void as lacking corporate authority. However, when the Maryland Court of Appeals (Maryland's highest court) reviewed the *Bostettler* case, it held that courts will presume that a proper organizational meeting was held in the absence of any evidence as to whether there was an organizational meeting. *Freestate Land Corp. v. Bostettler*, 292 Md. 570, 578-81, 440 A.2d 380, 385-86 (1982).⁹ Counsel may determine that there was an organizational meeting by reviewing the minute books of the corporation. If there exists no record of such a meeting, the shareholders of the corporation should elect or confirm the election of a board of directors, and the board of directors should confirm the election of officers and the adoption of bylaws.

If the general partners or managing members of the client are entities (or if partners or members of such entities are also entities), similar due diligence should be done for each of such entities.

5. Checklists

The following checklists, which are based on the Maryland Opinion Report,¹⁰ may be useful to assist lawyers preparing opinions as to the existence, due organization, and good standing of an entity under Maryland law. The due diligence requirements in most other states are comparable, but vary somewhat.

⁸ See Md. Corps. and Ass'ns Code Ann. §2-109 (1993 Repl. Vol.).

⁹ See also *Cardellino v. Comptroller of the Treasury*, 68 Md. App. 332, 511 A.2d 573 (1986), in which Maryland's intermediate appellate court held that a corporate officer, barred by the doctrine of estoppel, could not raise the corporation's failure to hold an organizational meeting to deny her liability for unpaid retail sales taxes.

¹⁰ *Report of the Special Joint Committee of Lawyers' Opinions in Commercial Transactions of the Maryland State Bar Association, Inc. and The Bar Association of Baltimore City*, 45 BUS. LAW. 705, 731 (1990). The Maryland Opinion Report was dated January 18, 1989.

- For a corporation --
 1. Order a long form status/good standing certificate from the Maryland State Department of Assessments and Taxation (“SDAT”) (Maryland’s counterpart to the Secretary of State in other states) and certified copies of the corporation’s articles of incorporation and all other documents listed in the certificate.
 2. Confirm that an organizational meeting of the board of directors was held.
 3. Review all filed corporate documents for (a) a time limit on the corporation’s existence, and (b) articles of dissolution, merger, or transfer.
 4. At the time of closing, be sure to have a status/good standing certificate not more than 30 days old. In the weeks following April 15, consider requesting a Tax Clearance Certificate from the Comptroller of the Treasury or evidence from the corporation’s officers that the corporation has filed its annual personal property report and paid any State taxes owed.

- For a general partnership --
 1. Determine the existence and terms of the partnership, preferably by obtaining (a) a copy of a written partnership agreement and (b) a certificate signed by all partners confirming the formation and continued existence of the partnership as a Maryland general partnership.
 2. Make a reasonable factual inquiry and/or obtain a certificate of all partners to confirm that no event of dissolution has occurred under the terms of the partnership agreement or under the Maryland Uniform Partnership Act. This certificate should confirm that neither the partnership nor any partner is involved in a bankruptcy proceeding and that no judicial proceeding is pending for the dissolution of the partnership.
 3. Determine whether a statement of partnership authority or a statement of denial, which authorizes certain partners, or limits the authority of certain partners to execute documents on behalf of the partnership, has been filed at the SDAT.¹¹

¹¹ See Section I.C below.

- For a limited partnership --
 1. Obtain a current long form status/good standing certificate and a certified copy of the limited partnership certificate (with all amendments or other filings) from the SDAT. Check to see if the filed certificate of limited partnership conforms to the limited partnership agreement, if the agreement and certificate are separate documents.
 2. Make a reasonable factual inquiry (perhaps obtain a certificate of one of the general partners similar to the one described above for general partnerships) to determine whether any circumstances exist that would trigger a dissolution (a) under the certificate of agreement of limited partnership or (b) under the Maryland Revised Uniform Limited Partnership Act. Review SDAT filings for a certificate of dissolution or cancellation.
 3. Confirm that SDAT filings include a designation and address of a resident agent, and, if the limited partnership was formed before July 1, 1982, a listing of the name and address of each general partner and the latest date for the limited partnership to dissolve (if there is such a date in the partnership agreement).
 4. Determine whether a statement of partnership authority or a statement of denial has been filed at the SDAT that authorizes certain partners, or limits the authority of certain partners, to execute documents on behalf of the partnership.
- For a limited liability company
 1. Obtain a current long form status/good standing certificate and a certified copy of the articles of organization (with all amendments or other filings) from the SDAT.
 2. Review the operating agreement. If there is no written operating agreement, obtain a certificate to that effect from the members as well as a statement outlining the provisions of the oral operating agreement.

B. Authorization Opinion

Paragraph 2.2 of the Inclusive Opinion provides:

Authorization. All actions or approvals by the Client, and its [shareholders], necessary to bind the Client under the Transaction Documents have been taken or obtained.

Paragraph 2.2 of the Inclusive Opinion pertains to authorization of the transaction by the client. The footnote appended to this opinion states in part: “In a partnership or other entity, ‘partners’ or other owners of the ownership interests in the Client would replace ‘shareholders’ and due diligence should be expanded to cover any requisite actions and status of the partners or other owners.”

To accomplish the due diligence required to render this opinion, the attorney should review the organic documents of the client. These generally include the charter and bylaws of a corporation, the partnership agreement for any partnership, the certificate for a limited partnership, and the articles of organization and the operating agreement for a limited liability company. The lawyer should obtain certified copies of the documents that are in effect during the relevant periods. The purpose of this review will be to determine what action is necessary under the constituent documents for the entity to authorize the execution, delivery, and performance of the loan documents and also to verify that the type of transaction is within the scope of the purpose of the entity.¹²

The opining lawyer must carefully review the applicable loan documents and the transactions contemplated thereby to determine whether any special approvals or authorizations are required. Counsel must also consider the law governing the entity, whether it be general corporate law, general partnership law, limited liability company law, trust law, or specific statutory provisions governing special purpose entities such as investment companies, banking institutions, insurance companies, or professional corporations.

Once counsel has determined what action is required under the constituent documents and applicable law to authorize the execution, delivery, and performance of the loan documents, counsel will need to obtain evidence that such action has been taken and has not been rescinded or revoked in any way. This could involve review of the client's minute books or other records. In most cases, however, it will be sufficient to rely on a certified copy of the applicable resolutions authorizing the particular transaction, together with a certification that such resolutions have not been modified or rescinded and that there are no other resolutions relating to the transaction in question. Typically, the resolutions will be certified by the secretary of a corporation or a partner of a partnership.

If a partnership or limited liability company has dissolved, the partners or members may only act to wind up the affairs of the entity. Therefore, if the entity has dissolved, the opining lawyer must determine that the transaction on which the opinion is rendered is in furtherance of the winding up of the entity's affairs to render an authority opinion. Alternatively, counsel may

¹² See California Partnership Report at 15.

note in the opinion letter that the entity has dissolved and state that no opinion is given that the transaction is consistent with the winding up of the affairs of the entity.¹³

If the loan documents for a partnership borrower contain a confession of judgment clause, the attorney giving the opinion must determine whether the partners have unanimously consented to the confession of judgment or, if not, whether unanimous consent is required. Under Section 9(3) of the Uniform Partnership Act (“UPA”), five specific actions (including confessing a judgment) require the consent of all partners. The Revised Uniform Partnership Act (“RUPA”) does not contain a comparable requirement. The official comment to RUPA states in part that:

Most of the acts listed in UPA Section 9(3) probably remain outside the apparent authority of a partner under RUPA, such as disposing of the goodwill of the business, but elimination of a statutory rule will afford more flexibility in some situations specified in UPA Section 9(3). In particular, it seems archaic that the submission of a partnership claim to arbitration always requires unanimous consent.

However, this leaves open the question of whether all partners must consent to a confession of judgment clause in loan documents. Each state may have a different answer to this question.

C. Execution Opinion

Paragraph 2.3 of the Inclusive Opinion provides:

Execution. The Client has duly executed and delivered the Transaction Documents and the Financing Statements for valid consideration.

To be satisfied that the loan documents have been duly executed and delivered by the borrower, it will be necessary to receive some evidence that the documents have been signed by a person authorized under the applicable authorizing documents. Typically, an incumbency certificate including sample signatures should be provided for this purpose. In some instances, counsel may have sufficient personal knowledge of the corporation or partnership, as well as of the individual officer or partner who signs the loan documents, and of that person’s signature, to eliminate the need for an incumbency certificate. The opining counsel should observe the signing of the loan documents by the authorized signatory on behalf of the client, or otherwise be satisfied that the documents have been properly executed and delivered.

If the client is a partnership in a state that has enacted RUPA, it may file a statement of partnership authority or a statement of denial.¹⁴ Such a statement may authorize certain partners,

¹³ See California Partnership Report at 19.

or limit the authority of certain partners, to execute documents on behalf of the partnership, and third parties are deemed to know of the limitations.

The footnote to Paragraph 2.3 of the Inclusive Opinion points out that Accord Commentary §10.4(i) states that the Opinion Giver must have established that all of the conditions necessary under contract law for formation of a contract have occurred. The due diligence to satisfy this requirement will vary from state to state. One matter that must be determined is whether each party has given and received sufficient consideration to form a contract under the laws of the applicable state.

D. Remedies or Enforceability Opinion

Paragraph 2.4 of the Inclusive Opinion provides:

Remedies Opinion. The Transaction Documents are legal, valid, binding and enforceable against the Client in accordance with their terms.

This is the remedies or enforceability opinion of the Inclusive Opinion. The formulation of the remedies opinion, and whether it includes a generic exception, a laundry list of exceptions, or a practical realization approach, has been the topic of extended discussion.¹⁵

As to the due diligence required to support the remedies opinion, it is necessary for the lawyer to consider carefully the loan documents to determine all actions that may be required to be performed by the borrower thereunder and all remedies that the lender may have, and also to consider applicable law to determine whether such opinion can be given or whether additional exceptions are necessary. It is not possible to set forth specific procedures for what due diligence may be necessary in this area, and the degree of review and research required by the opining lawyer will depend on that lawyer's knowledge of the various areas of law that could affect the validity and enforceability of the loan documents, or a portion of them. If the lawyer asked to render an opinion does not feel competent to provide the opinion because of lack of expertise for a particular area of law, that lawyer should not provide the opinion except in reliance on a supporting opinion of other counsel whom the primary lawyer believes to be competent in such

(Footnote continued from previous page)

¹⁴ See Sections 303 and 304 of the Uniform Partnership Act (1996).

¹⁵ See, e.g., the exposition in Section 11A in the Real Property Adaptation regarding the different types of exceptions to a remedies or enforceability opinion, 29 REAL PROP. PROB. & TR. J. at 583-600.

area of law. If another lawyer issues a supporting opinion in any particular area, the primary counsel should make reference to the supporting opinion in the primary lawyer's opinion letter.¹⁶

E. Form of Security Documents Opinion

Paragraph 2.5 of the Inclusive Opinion provides:

Form of Security Documents. The Security Documents are in a form sufficient to create a lien on or security interest in all right, title and interest of the Client in the Collateral, except to the extent the Collateral includes items or types of **Personal Property** (as defined in the attached Glossary) in which a security interest cannot be created under Article 9 of the Uniform Commercial Code.

The form of documents opinion was added to the Accord by the Real Property Adaptation. It does not require any specific due diligence, but instead requires that counsel be familiar with the state law requirements as to the form of security documents necessary to create a lien or security interest in the collateral. Note that this opinion covers only the form of the security documents. It does not cover the financing statements or other issues such as perfection of the liens created.

F. Usury Opinion

Paragraph 2.6 of the Inclusive Opinion provides:

Usury Opinion. Assuming that no fees, charges, benefits, or other compensation will be paid, directly or indirectly to Lender or for Lender's benefit, except as specified in the Transaction Documents, and assuming that no amounts to be paid as specified in the Transaction Documents constitute a penalty, the Transaction, as evidenced by the Transaction Documents, does not violate the usury laws of the State.

In some states, commercial loans above a certain amount or loans to certain types of entities, such as corporations, are exempt from usury limitations, but in other states a more sophisticated analysis is required to render a "no usury" opinion. Whether a loan transaction is usurious may depend on the purposes for which the borrower uses the loan proceeds. If so, the due diligence necessary to give a usury opinion may include obtaining a certificate from the borrower as to the use of the loan proceeds.

¹⁶ Section 8 of the Accord lists six different ways in which the primary attorney may refer to an opinion from "Other Counsel."

A usury opinion is implied by the Accord if a remedies opinion is given, but regardless of whether a usury opinion is stated, the same due diligence will be required.

G. No Breach or Default Opinion

Paragraph 2.7 of the Inclusive Opinion provides:

No Breach or Default Opinion. Execution and delivery by the Client of, and performance of its agreements in, the Transaction Documents do not (i) violate the [articles or certificate of incorporation or bylaws; partnership agreement or certificate] of the Client, (ii) [to the best of our **Actual Knowledge** (as defined in the attached Glossary)], breach, or result in a default under, any existing obligation of the Client under the Other Agreements specified in Attachment [_] hereto (the “**Specified Other Agreements**”), or (iii) [to the best of our Actual Knowledge] breach or otherwise violate any existing obligation of the Client under any Court Order which is identified in Attachment [_] hereto (the “**Specified Court Orders**”), which the Client has certified to us are the only Court Orders. Our Opinion in this Paragraph does not extend to any action or conduct of the Client that a Transaction Document may permit but does not require, except to the extent that (a) such action or conduct takes place simultaneously with, and (b) we had Actual Knowledge that it constituted part of, the consummation of the Transaction.

The formulation of the Inclusive Opinion’s “no breach or default” opinion defines the scope of the due diligence required. The opining lawyer must first become familiar with the loan documents that are the focus of the subject transaction and then must make the determinations required by the three parts of this opinion.

For part (i), the opining lawyer must review the organic documents of the client. These would include filed documents as well as off-record documents, such as corporate bylaws or a general partnership agreement and amendments. The lawyer should obtain a certificate from an officer, partner, or member of the client that states the substance of the current entity documents that are not of record.

For part (ii), the lawyer and the client must compile a list of contracts binding on the client, which are referred to as “Specified Other Agreements,” and the language of the Inclusive Opinion suggests that the Specified Other Agreements are to be listed in an attachment to the opinion letter. A footnote to the Inclusive Opinion suggests that the contracts to be considered for the “Specified Other Agreements” might include contracts dealing with money borrowed by the Client; contracts filed by the Client with the SEC; or other written contracts (other than the Transaction Documents) to which the Client is a party or by which it or its property is bound. Then the lawyer must review the Specified Other Agreements to determine that the loan documents of the subject transaction will not cause the client to breach or default under the Specified Other Agreements. If the opining lawyer is general counsel to the client or the client has not entered into many other agreements, the recipient of the opinion letter may insist that the

“no breach or default” opinion extend to all of the obligations of the borrower. In such a situation, the opining lawyer must be sure to identify and review all of such contracts.

For part (iii), the opining lawyer needs to obtain a certification from the client of all of the court and administrative orders, writs, judgments, and decrees that name the Client and are specifically directed to it or its property, since that is how “Court Orders” are defined in the Inclusive Opinion. Then the lawyer must review such Court Orders to determine that the loan documents do not breach or otherwise violate any existing obligation of the Client under any of them.

The alternative language in parts (i) and (ii) permits the opining lawyer to limit the opinions about Specified Other Agreements and Court Orders “to the best of our Actual Knowledge.” This term is defined in the Inclusive Opinion to mean “with respect to the Opinion Giver, the conscious awareness of facts or other information by the Primary Lawyer or Primary Lawyer Group.” Therefore, “file knowledge,” or being deemed to know the contents of all firm files even in the absence of actual current awareness of such matters, is not imputed to the opinion giver. The definition in the Inclusive Opinion of “Primary Lawyer” includes (a) the lawyer in the Opinion Giver’s organization who signs the Opinion Letter; (b) any lawyer in the Opinion Giver’s organization who has active involvement in negotiating the Transaction, preparing the Transaction Documents, or preparing the Opinion Letter; and (c) solely as to information relevant to a particular opinion issue or confirmation regarding a particular factual matter (*e.g.*, pending or threatened legal proceedings), any lawyer in the Opinion Giver’s organization who is primarily responsible for providing the response concerning that particular opinion issue or confirmation. When there is more than one Primary Lawyer for a transaction, all of the Primary Lawyers comprise the Primary Lawyer Group.

Note that the formulation of the “no breach or default” opinion does not refer to “conflicts” with organizational documents, Specified Other Agreements, or Court Orders. The term “conflicts” is broader and perhaps more ambiguous than “breach or result in a default under” or “breach or otherwise violate.” The due diligence required to render a “no conflict” opinion would be more extensive than the due diligence required to render a “no breach or default” opinion in many circumstances.

H. No Violation of Law Opinion

Paragraph 2.8 of the Inclusive Opinion provides:

No Violation of Law Opinion. Execution and delivery by the Client of, and performance by the Client of its payment obligations in, the Transaction Documents neither are prohibited by applicable provisions of statutory law or regulation of the State nor subject the Client to a fine, penalty or other similar sanctions under, any statutory law or regulation of the State. Our opinion in this Paragraph relates only to statutory laws and regulations that we, in the exercise of

customary professional diligence, would reasonably recognize as being directly applicable to the Client, the Transaction, or both.

The scope of the “no violation of law” opinion is specifically limited to those laws and regulations of the opining jurisdiction that the opining lawyer “in the exercise of customary professional diligence, would reasonably recognize as being directly applicable to the Client, the Transaction, or both.” Therefore, the attorney rendering the opinion must perform the same level of due diligence in determining that the payment obligations of the client under the transaction documents are not prohibited by applicable provisions of statutory law or regulation of the state and do not subject the client to a fine, penalty, or other similar sanctions, under any statutory law or regulation of the state as other lawyers in the same state would perform. The required due diligence procedures for all “no violation of law” opinions may not be set forth because the necessary due diligence is so heavily dependent on the activities of the borrowing entity, the terms of the subject transaction, and the effect of applicable state laws.

Note that this opinion focuses only on the payment obligations of the client. Section 15 of the Real Property Adaptation limited the Accord’s broader opinion relating to the obligations of the client under the loan documents generally. In real estate secured transactions, borrowers typically have obligations relating to the ownership, construction, operation, and/or maintenance of real property and improvements thereon, and the due diligence that would be necessary to give the “no violation of law” opinion without restriction to the payment obligations of the borrower would be extremely extensive.

II. Due Diligence under Additional Confirmations in the Inclusive Opinion

Paragraph 4.1 of the Inclusive Opinion provides:

Legal Proceedings. We hereby confirm to Lender, pursuant to the request set forth in Section [_] of the Agreement, but without investigation, analysis, or review of court or other public records or our files, other than our litigation docket and information provided to us by the Client, that there are no actions or proceedings against the Client, pending or overtly threatened in writing, before any court, governmental agency or arbitrator which (i) seek to affect the enforceability of the Agreement, or (ii) except as disclosed in [the Agreement or an exhibit, annex or schedule thereto] [an officer’s certificate], come within [the objective standard established in the Agreement for disclosure of such matters] [other objective threshold].

Paragraph 4.1 of the Inclusive Opinion is not presented as a legal opinion; rather, it is a disclosure about the knowledge of the opinion giver. It states that, based only on the opinion giver’s litigation docket and information provided by the client, there are no pending or threatened actions or proceedings against the client that affect the enforceability of the loan agreement or that meet stated standards. This is derived from Section 17 of the Accord, but Paragraph 4.1 of the Inclusive Opinion states explicitly how the confirmation is limited.

The due diligence necessary to provide this confirmation is apparent from the language of Paragraph 4.1. The opinion giver must check his, her, or its own litigation docket and should obtain a certificate from the borrower about actions or proceedings against the client that are pending or overtly threatened in writing that affect the enforceability of the loan documents or exceed a stated threshold. The opinion giver is not obligated to search court records or other public records or to take any steps other than those outlined in Paragraph 4.1.

III. Due Diligence under Opinions Not Part of in the Inclusive Opinion

Many types of opinions are rendered in real estate secured transactions in addition to those that are contained in the Inclusive Opinion. These include opinions regarding land use, zoning, environmental matters, recordation of documents, choice of law, taxes, election of remedies, foreclosure procedure, and priorities. The due diligence required for any of these types of opinions is heavily dependent on the applicable facts, circumstances, and local laws, and therefore the steps necessary to afford the opinion letter with the background and comfort to render such opinions cannot be summarized here.¹⁷ The due diligence should consist of all of that research, and all of those inquiries and actions, necessary to provide the support for rendering each of such opinions.

¹⁷ See, e.g., Buck, *Land Use and Environmental Due Diligence Checklist for Permitting Review*, ACREL Papers (Spring 1999).

**Illustrative Certificate of Corporate, General Partnership, Limited Partnership,
or Limited Liability Company Borrower
(Accompanies Inclusive Opinion Letter)**

Re: \$_____ Loan from Lender to [Corporate, *General Partnership*, Limited Partnership, or *Limited Liability Company* Borrower] Secured by [Real Property] and [Personal Property]

The undersigned, [being (the officer/partner/member) of the borrower,] [XYZ Corporation, a {state} corporation] (*XYZ General Partnership, a {state} general partnership*) [XYZ Limited Partnership, a {state} limited partnership] [*XYZ Limited Liability Company, a {state} limited liability company*] ("**XYZ**"), does hereby certify that, to the best of [his/her/its/their] knowledge, information, and belief:

1. The representations made by or on behalf of XYZ in the following documents (collectively called the "**Loan Documents**") are accurate and complete:

- a. the Loan Agreement dated _____, 20__ between XYZ and _____ (the "**Lender**");
- b. the Deed of Trust dated _____, 20__ from XYZ to _____ and _____, as trustees;
- c. the Promissory Note dated _____, 20__ in the principal amount of \$_____ from XYZ to the order of the Lender;
- d. the Assignment of Rents dated _____, 20__ from XYZ to the Lender; and
- e. [other Loan Documents] dated _____, 20__.

2. Except as set forth on **Attachment 1**, there are no actions or proceedings against XYZ, pending or overtly threatened in writing, before any court, governmental agency or arbitrator {that (i) seek to affect the enforceability of the Agreement, or (ii) except as disclosed in **Attachment 1**, come within [the objective standard established in the Loan Agreement for disclosure of such matters] [other objective threshold]}.

3. Attached hereto as **Attachment 2** and made a part hereof is an accurate and complete list of all contracts [dealing with money borrowed or guaranteed by XYZ; contracts filed by XYZ with the SEC; or other written contracts other agreements] of XYZ [to which XYZ

is a party, or which are otherwise binding on XYZ as a guarantor, endorser, assignee, or otherwise, and the violation, breach, or default of which could have a material adverse effect on the business, operations, properties, or assets, or on the condition, financial or otherwise, of XYZ].

4. Except as set forth on *Attachment 3*, XYZ is subject to no federal, state, or local governmental programs [is engaged in an industry that is regulated by only the governmental entities set forth on *Attachment 3* and no others] that require governmental consent before entering into commercial loan transactions.

5. The proceeds of the Loan are to be used solely [to acquire/conduct] the [business(es)/commercial enterprise(s)] of _____.

6. [XYZ intends to construct] [The subject property is presently improved by] {an office building for sole use as business and professional offices} on [the subject property].

[paragraphs 7 through 11 below are for a corporate borrower]

7. Attached hereto as *Exhibits A* and *B* and made a part hereof are current copies of the charter and bylaws, respectively, of XYZ.

8. Attached hereto as *Exhibit C* and made a part hereof is an incumbency certificate regarding the officers of XYZ signed by the secretary of XYZ.

9. Attached hereto as *Exhibit D* and made a part hereof is a certified copy of the corporate resolutions signed by the secretary of XYZ authorizing the execution, delivery, and performance of the Loan Documents (the "**Corporate Resolutions**"). The Corporate Resolutions have not been modified or rescinded, and there are no other corporate resolutions relating to the Loan Documents.

10. As of the date hereof, no judicial proceeding has been instituted by the Attorney General of the State of _____ alleging that XYZ has abused, misused, or failed to use its powers and franchises in a manner that, in the public interest, would make proper the forfeiture of the charter of XYZ or the dissolution of XYZ; no articles of dissolution have been filed with the Secretary of State and no petition has been filed in any court of competent jurisdiction to dissolve XYZ.

11. No proceedings by or against XYZ have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has XYZ made an assignment for the benefit of creditors, admitted in writing its inability to pay debts generally as they become due, or filed or had filed against it any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of XYZ.

[paragraphs 12 through 15 below are for a general partnership borrower]

12. Attached hereto as **Exhibit E** and made a part hereof is a copy of the partnership agreement [and all amendments] of XYZ.

13. All [necessary consents] [required votes] of the partners of XYZ have been obtained to approve the captioned transaction.

14. No proceedings by or against XYZ or any partner of XYZ have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has XYZ or any partner of XYZ made an assignment for the benefit of creditors, admitted in writing his, her, or its inability to pay debts generally as they become due, or filed or had filed against him, her, or it any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of XYZ or any such partner.

15. No judicial proceeding has been filed or is pending for the dissolution of XYZ, and no circumstances have occurred or exist that have triggered or will trigger a dissolution of XYZ under the partnership agreement of XYZ or under the Revised Uniform Partnership Act. {If XYZ has dissolved, the partnership should certify to the facts relating to the activities and properties of XYZ after the dissolution so that counsel may determine whether the winding up of the affairs of the partnership is complete.}

[paragraphs 16 through 21 below are for a limited partnership borrower]

16. Attached hereto as **Exhibit G** and made a part hereof is a copy of the limited partnership agreement [and all amendments] of XYZ.

17. Attached hereto as **Exhibit H** and made a part hereof is a copy of the certificate of limited partnership [and all amendments] of XYZ.

18. There have been no amendments to the limited partnership agreement of XYZ other than those reflected on the long form Status Certificate of XYZ from the Secretary of State dated _____, 20__.

19. All [necessary consents] [required votes] of the partners of XYZ have been obtained to approve the captioned transaction.

20. No proceedings by or against XYZ or any general partner of XYZ have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has XYZ or any general partner of XYZ made an assignment for the benefit of creditors, admitted in writing his, her, or its inability to pay debts generally as they become due, or filed or had filed against him, her, or it any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of XYZ or any such general partner.

21. No judicial proceeding has been filed or is pending for the dissolution of XYZ, and no circumstances have occurred or exist that have triggered or will trigger a dissolution of XYZ under the Certificate of Limited Partnership of XYZ or under the Revised Uniform Limited Partnership Act. {If XYZ has dissolved, the partnership should certify to the facts relating to the activities and properties of XYZ after the dissolution so that counsel may determine whether the winding up of the affairs of the partnership is complete.}

[paragraphs 22 through 27 below are for a limited liability company borrower]

22. Attached hereto as **Exhibit I** and made a part hereof is a copy of the articles of organization [and all amendments] of XYZ.

23. Attached hereto as **Exhibit J** and made a part hereof is a copy of the operating agreement [and all amendments] of XYZ. { or } XYZ does not have a written operating agreement, but under the oral operating agreement of XYZ _____ has the authority to approve transactions such as the captioned transaction and to execute the Loan Documents on behalf of XYZ.

24. There have been no amendments to the articles of organization of XYZ other than those reflected on the long form Status Certificate of XYZ from the Secretary of State dated _____, 20__.

25. All [necessary consents] [required votes] of the members of XYZ have been obtained to approve the captioned transaction.

26. No proceedings by or against XYZ have been commenced in bankruptcy or for reorganization, liquidation, or the readjustment of debts under the Bankruptcy Code or any other law, whether state or federal, nor has XYZ made an assignment for the benefit of creditors, admitted in writing its inability to pay debts generally as they become due, or filed or had filed against it any action seeking an order appointing a trustee or receiver of all or a substantial part of the property of XYZ.

27. No judicial proceeding has been filed or is pending for the dissolution of XYZ, and no circumstances have occurred or exist that have triggered or will trigger a dissolution of XYZ under the articles of organization or the operating agreement of XYZ or under the Limited Liability Company Act (for example, there has been no period of 90 consecutive days during which XYZ has had no members). {If XYZ has dissolved, the partnership should certify to the facts relating to the activities and properties of XYZ after the dissolution so that counsel may determine whether the winding up of the affairs of the partnership is complete.}

This Certificate may be relied on by XYZ's [lawyer/law firm] in [his/her/its] opinions addressed to the Lender in connection with the Loan Documents.

IN WITNESS WHEREOF, the undersigned has executed this Certificate as of _____, 20__.

WITNESS:

[Officer/Partner/Member of XYZ]

or

WITNESS:

XYZ CORPORATION

By _____ (SEAL)

Name:

Title:

or

WITNESS:

XYZ GENERAL PARTNERSHIP

By _____ (SEAL)

Name:

Title: General Partner

or

WITNESS:

XYZ LIMITED PARTNERSHIP

By _____ (SEAL)

Name:

Title: General Partner

or

WITNESS:

XYZ LIMITED LIABILITY COMPANY

By _____ (SEAL)

Name:

Title: Member

ATTACHMENT 1

The following is an accurate and complete list of actions or proceedings against XYZ, pending or overtly threatened in writing, before any court, governmental agency or arbitrator {that (i) seek to affect the enforceability of the Agreement, or (ii) except as disclosed in **Attachment 1**, come within [the objective standard established in the Agreement for disclosure of such matters] [other objective threshold]}.

- 1.
- 2.

or

The following is an accurate and complete list of actions or proceedings against XYZ, pending or overtly threatened in writing, before any court, governmental agency or arbitrator that seek to affect the enforceability of the Agreement or could involve a loss to XYZ of more than \$_____.

- 1.
- 2.

ATTACHMENT 2

The following is an accurate and complete list of all contracts [dealing with money borrowed or guaranteed by XYZ; contracts filed by XYZ with the SEC; or other written contracts other agreements] of XYZ [to which XYZ is a party, or that are otherwise binding on XYZ as a guarantor, endorser, assignee, or otherwise, and the violation, breach, or default of that could have a material adverse effect on the business, operations, properties, or assets, or on the condition, financial or otherwise, of XYZ].

- 1.
- 2.

ATTACHMENT 3

The following is an accurate and complete list of federal, state, or local governmental programs in which XYZ is engaged that require governmental consent before entering into commercial loan transactions:

- 1.
- 2.

The following is an accurate and complete list of federal, state, or local governmental entities that regulate XYZ:

- 1.
- 2.